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## Barking Up the Wrong Tree: The Misplaced Furor Over the Feeney Amendment as a Threat to Judicial Independence

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# NOTES

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## INTRODUCTION

On April 30, 2003, President Bush signed into law the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, also known as the PROTECT Act.<sup>1</sup> Generally lauded by many supporters and opponents of the “Feeney Amendment” alike, the PROTECT Act works to nationalize the AMBER Alert system,<sup>2</sup> combat child abduction, and increase penalties for sexual crimes and pornography involving children. One amendment to the bill—the so-called “Feeney Amendment”—however, has created a firestorm of controversy in the wake of the bill’s passage. The Feeney Amendment purports to make major changes in the process of criminal sentencing under the U.S. Sentencing Guidelines. Included as “Section IV: Sentencing Reform” of the PROTECT Act, the Feeney Amendment attempts to reduce substantially the practice of “downward departures” from the Sentencing Guidelines, a practice by which a judge sentences a defendant below the prescribed penalties for various crimes.<sup>3</sup>

Many critics of the Feeney Amendment have labeled it an attack on judicial independence because it limits criminal sentencing discretion of federal Article III judges and requires reports on the departure practices of judges. Vocal criticism has emanated from various quarters: academia, the federal judiciary, the media, and legislators.<sup>4</sup> This Note argues that the general tone of the criticism and the repeated references to it as an “attack on judicial independence” are not warranted.

Most of the critics’ assertions about protection of judicial independence—although cloaked in arguments about the separation

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1. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, 42, and 47 U.S.C.); Statement of President George W. Bush upon Signing S. 151, 39 WEEKLY COMP. PRES. DOC. 502-04 (Apr. 30, 2003).

2. The AMBER Alert system is an early warning system designed to help find abducted children. Code Amber Foundation, *About the AMBER Alert Program*, available at <http://www.codeamberfoundation.org> (last visited June 4, 2004).

3. See Part I.A for a description of the most controversial changes that the Feeney Amendment makes to the guidelines sentencing system. Critics describe these changes as an attack on judicial independence.

4. See *infra* Part I.C.

of powers and usurpation of judicial discretion—are, in fact, policy arguments against the Sentencing Guidelines themselves.<sup>5</sup> Moreover, many critics—including federal judges—use the rubric of judicial independence to criticize the working of the Sentencing Guidelines as too harsh and rigid. These critics decry the removal of district judges' access to downward departures to "remedy" the wrongs of the Sentencing Guidelines system. This Note argues neither that, as a normative issue, current sentencing policy is appropriate, nor that the Feeney Amendment and the diminished discretion of judges to engage in downward departures were, as a matter of policy, correct. Instead, this Note advances the argument that these policy criticisms are not appropriately tied to the concept of judicial independence. Judicial independence is undoubtedly an extremely important tenet of our constitutional system, but it is not a talisman. Rather, it is a limited concept that does not avoid the precept that the federal judiciary is still subject to the will of Congress in various ways—including the making of policy on criminal sentencing.

In Part I, this Note describes the most controversial aspects of the Feeney Amendment, those most often cited in critiques of the amendment, and their implementation up to this point. In addition, this Part outlines some of the main arguments against and in support of the amendment. Part II examines varying definitions of judicial independence and provides a standard by which to measure this amendment as a purported infringement of judicial independ-

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5. This Note does not purport to provide an extensive separation of powers justification for the Sentencing Guidelines system itself but assumes that the U.S. Supreme Court already answered this question in *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (holding by an eight-to-one majority that Congress did not violate the separation of powers doctrine by creating the U.S. Sentencing Guidelines and U.S. Sentencing Commission). Although critics of the Feeney Amendment are often critics of the Sentencing Guidelines system as a whole, this Note attempts to answer only those arguments that criticize the Feeney Amendment as an attack on judicial independence. In response to criticisms of the Feeney Amendment as a separation of powers violation, at least one federal court has held that the PROTECT Act alterations to the guidelines system do not alter the system sanctioned in *Mistretta* to such an extent that it would violate the separation of powers. See *United States v. Schnepfer*, 302 F. Supp. 2d 1170, 1198-1200 (D. Haw. 2004). But see *United States v. Mendoza*, No. 03-CR-730-ALL, 2004 WL 1191118, \*6-7 (C.D. Cal. Jan. 12, 2004) (holding that all portions of the Feeney Amendment were constitutional, with the exception of DOJ reporting on individual judges' sentencing practices, which the court held violated the separation of powers).

ence. Part III analyzes why much of the contemporary criticism of the amendment as an attack on judicial independence is misplaced, as the amendment is properly within Congress's legislative power, does not have the actual effects its critics purport it has, and leaves intact the key safeguards of judicial independence. Finally, this Note concludes that, although there may be other criticisms that could be lodged against the Feeney Amendment as a matter of policy, the most popular critique—that it is an attack on judicial independence—is unsupported by the historical and current understanding of that concept.

## I. OUTLINE OF THE CONTROVERSY

### A. *What Is the Feeney Amendment?*

The Feeney Amendment<sup>6</sup> enacts significant legislative changes to the Sentencing Guidelines system, established by the Sentencing Reform Act of 1984, in the area of departure authority—the ability of sentencing courts to sentence outside of the prescribed guidelines range—and in the appellate review of sentencing court departure decisions.<sup>7</sup> The most controversial reforms to the sentencing system include broad directives to the U.S. Sentencing Commission, the Department of Justice (DOJ), and the federal judiciary related to the use of departures in general.<sup>8</sup> These reforms have the broadest impact on sentencing and are most often cited in critiques of the Feeney Amendment as an encroachment on judicial independence. The substance of these reforms is briefly described below.

The first of these changes is the alteration of the appellate standard of review for district court departure decisions and new requirements imposed on district courts in making departures. The PROTECT Act now requires that the district court provide specific

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6. PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003).

7. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FED. SENTENCING GUIDELINES 7 (2003), available at <http://www.ussc.gov/departtrpt03/departtrpt03.pdf> [hereinafter U.S.S.C. DEPARTURES REPORT].

8. There were also various amendments made directly to the Sentencing Guidelines altering the prescribed guideline punishments and reducing the availability of downward departures in kidnaping and child sex-offense cases. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 8-9 (explaining these changes).

reasons in writing for any departure along with its written order of judgment and commitment, unless the sentencing court "relies upon statements received *in camera*."<sup>9</sup> The Act also requires that the court base all departures on the statutory purposes of the Sentencing Guidelines.<sup>10</sup>

More controversially, the PROTECT Act alters the standard of review that appellate courts must employ for the review of departure decisions. The act requires de novo review of a district court's departure decision in cases where "the district court failed to provide the written statement of reasons" for the departure or where the departure is based upon a factor that "does not advance the objectives" of the guidelines, "is not authorized" under the guidelines, or "is not justified by the facts of the case."<sup>11</sup>

In the event an appellate court finds the departure impermissible, the appellate court is required to set aside the sentence and remand to the district court with instructions to re-sentence.<sup>12</sup> The PROTECT Act goes one step further to ensure that the decision of the appellate court is, in fact, applied at re-sentencing. The Act requires the sentencing court to sentence within the applicable guidelines range and not depart from that range unless the grounds for departure were specifically included in the previous sentencing order and were held by the court of appeals, in remanding the case, to be permissible grounds for departure.<sup>13</sup> This highly significant portion of the amendment alters the previous standard of review under *Koon v. United States*, in which the Supreme Court held that the decisions of a district court in applying the guidelines to the facts should be reviewed under an abuse of discretion standard.<sup>14</sup>

Another major aspect of the amendment was the directive to the U.S. Sentencing Commission, the agency tasked with writing and implementing the guidelines, to "ensure that the incidence of

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9. PROTECT Act § 401(c); U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 9.

10. PROTECT Act § 401(d); U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 9.

11. PROTECT Act § 401(d); U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 9. If the appellate court finds a departure is warranted, the appellate court is then required to give "due deference to the district court's determination" of the extent of departure that is reasonable. U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 9 n.32.

12. PROTECT Act § 401(d).

13. *Id.* § 401(e).

14. 518 U.S. 81, 91 (1996).

downward departures are [sic] substantially reduced.”<sup>15</sup> In an attempt to meet this goal, Congress mandated that prior to May 2005 the Sentencing Commission “shall not promulgate any amendment to the sentencing guidelines ... that adds any new grounds [for] ... departure ....”<sup>16</sup> In addition to limiting the addition of new grounds for departure, Congress required that within 180 days the Sentencing Commission had to “review the grounds of downward departure that are authorized by the sentencing guidelines ... and promulgate, pursuant to [the Sentencing Commission’s statutory authority] appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are [sic] substantially reduced.”<sup>17</sup>

Some of the most controversial aspects of the PROTECT Act are the provisions requiring reporting on departure practices, especially reporting by the DOJ. The first reporting provision requires that “[t]he Chief Judge of each district court ... ensure” that all judges within their district submit a report of their sentencing decisions to the Sentencing Commission “within thirty days [of the] entry of judgment in [a] criminal case ....”<sup>18</sup> This report must include a statement of reasons for the sentence imposed, the identity of the sentencing judge, and various other materials.<sup>19</sup> The Sentencing Commission must analyze this information annually, submit a report to Congress, and make the reports and documentation available, upon request, to the House and Senate Committees on the Judiciary and the DOJ.<sup>20</sup>

Moreover, the PROTECT Act requires the adoption of new policies and procedures by the DOJ to ensure that DOJ attorneys “oppose sentencing adjustments, including downward departures,

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15. PROTECT Act § 401(m).

16. *Id.* § 401(j)(2).

17. *Id.* § 401(m). In conformance with this directive, the Sentencing Commission issued a report to Congress in October 2003. See generally U.S.S.C. DEPARTURES REPORT, *supra* note 7. The Sentencing Commission also made various amendments to the Sentencing Guidelines. See *infra* Part I.B.2.

18. PROTECT Act § 401(h).

19. These materials include the pre-sentence report, any plea agreement, the indictment, and whatever else the Sentencing Commission requests. *Id.*

20. *Id.*



that are not supported by the facts and the law,” “make a sufficient record so as to permit the possibility of an appeal,” and “ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse [sentencing] decisions.”<sup>21</sup> Congress required the DOJ to adopt new policies and procedures to comply with this law within ninety days or, alternatively, to comply with more stringent reporting requirements.<sup>22</sup> Much of the initial criticism surrounding the Feeney Amendment has centered on these more stringent DOJ reporting requirements and on fears that they would lead to the creation of a judicial “blacklist” by the DOJ. These reporting requirements would have required the Attorney General, upon the granting of any non-substantial assistance downward departure, to submit a report to Congress explaining the case, the circumstances surrounding the departure, and the identity of the district judge within fifteen days.<sup>23</sup> Additionally, the Attorney General would be required to inform Congress within five days of the Solicitor General’s decision on appealing the sentence.<sup>24</sup> The DOJ chose to adopt new policies and procedures in accord with the law rather than adhering to these Congressional reporting requirements.<sup>25</sup>

### *B. Implementation of the Feeney Amendment*

In order to discern the impact of the controversial Feeney Amendment provisions on judicial independence, the analysis must be conducted not by looking solely at the statute itself. A proper analysis also considers how the statute has been implemented and whether that implementation is an infringement upon judicial independence. To that end, this Section analyzes the early implementation of the Act by the DOJ, the U.S. Sentencing Commission, and the federal courts of appeals.

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21. *Id.* § 401(l).

22. *Id.*; U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 11.

23. PROTECT Act § 401(l); U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 11 n.36.

24. PROTECT Act § 401(l); U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 11 n.36.

25. The DOJ’s implementation of these policies and procedures is described *infra* Part I.B.1.

### 1. *The Department of Justice*

The DOJ responded to the PROTECT Act by aligning its policies and procedures with the requirements of the Act as described above.<sup>26</sup> On July 28, 2003, Attorney General John Ashcroft sent a memorandum to all federal prosecutors stressing that to ensure that the Sentencing Guidelines will be more “faithfully and consistently enforced”—as Congress directed in passage of the Sentencing Guidelines and the PROTECT Act—all Justice Department attorneys “have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law” and to “take all steps necessary to ensure the district court record is sufficient to permit the possibility of an appeal” of the improper sentence adjustment.<sup>27</sup>

This memorandum describes four key procedural reforms the DOJ made to ensure that the Sentencing Guidelines were upheld. Department attorneys now must notify “Main Justice” within fourteen days of an adverse sentencing decision—such as a departure decision made over the government’s objection—in cases that meet objective criteria set forth in an amendment to the U.S. Attorney’s Manual<sup>28</sup> made effective as of the date of the memorandum.<sup>29</sup> Included are criteria that mirror the PROTECT Act’s concern for unwarranted departures in general<sup>30</sup> and cases where

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26. See *supra* notes 21-25 and accompanying text.

27. See Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors 1-3 (July 28, 2003) (on file with author) [hereinafter Ashcroft Appeals Memo].

28. See *id.* at A-1 to A-2 (amendment to § 9-2.170(B) of the U.S. Attorney’s Manual, effective July 28, 2003).

29. *Id.* at 4.

30. The U.S. Attorney’s Manual amendment provides that attorneys should report departure decisions that, *inter alia*, “reduce the sentencing range from Zone C or D to a lower zone in cases in which no term of imprisonment is imposed,” are two or more criminal history categories based on over representation of the seriousness of the defendant’s criminal history, reflect “departures of three or more offense levels based on a ‘discouraged’ factor, an ‘unmentioned’ factor, ... or an ‘impermissible’ factor” under the Sentencing Guidelines, or would “not otherwise [be] required to be reported that are improperly granted in a manner that has become prevalent in the district or with a particular judge.” See U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 11-12.

the departure is in violation of the PROTECT Act itself.<sup>31</sup> Prosecutors are then required to file a timely notice to preserve the right of appeal while the government determines whether it will exercise that right.<sup>32</sup> At this point, "Main Justice" reviews the case to determine if an appeal would be appropriate.<sup>33</sup> If "Main Justice" or a U.S. Attorney determine that an appeal is appropriate and the Solicitor General approves, DOJ attorneys must "vigorously and professionally pursue the appeal."<sup>34</sup>

The DOJ issued a second memorandum regarding PROTECT Act implementation on September 22, 2003. This memorandum related to charging and plea bargaining policies of the DOJ and was intended to make uniform and "rare" the instances in which the government will accede to downward departures, and then only when such departures are "supported by the facts and the law."<sup>35</sup> Consistent with the memorandum's purpose of ensuring uniformity in charging practices, the new policy requires that prosecutors charge and try "the most serious, readily provable offense or offenses that are supported by the facts of the case" and that produce the most substantial sentence possible under the Sentencing Guidelines.<sup>36</sup> The new policy forbids "fact bargaining" and "charge bargaining," often referred to as allowing for "hidden departures."<sup>37</sup> The Attorney General explained that the DOJ would require that its attorneys adhere to this uniformity in charging practices in the spirit of upholding uniformity in the application of the Sentencing Guidelines, just as the PROTECT Act intends. As the memorandum stated, "[j]ust as the sentence a defendant

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31. DOJ Attorneys must also provide notification of an adverse sentencing decision where the departure either 1) takes place in a case involving sexual abuse or a child victim as covered by the PROTECT Act, or 2) takes place on remand and does not comply with the revised requirements for these types of procedures set forth in the PROTECT Act. *See id.* at 12.

32. *See* Ashcroft Appeals Memo, *supra* note 27, at 4.

33. *Id.*

34. *Id.*

35. Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors 6 (Sept. 22, 2003) [hereinafter Ashcroft Charging Policy Memo] (regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing).

36. *Id.* at 2.

37. *See* U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 12-13.

receives should not depend upon which particular judge presides over the case, so too the charges ... should not depend upon the particular prosecutor ....<sup>38</sup> There are limited exceptions to this policy, including an exception for not pursuing charges under Department-authorized “fast track” programs,” outlined in a memorandum sent on the same day.<sup>39</sup> In this same vein, any plea agreement reached “must be fully consistent with the Guidelines ... and with the readily provable facts” about the defendant, including his “history and conduct.”<sup>40</sup> Prosecutors are also limited in making sentencing recommendations outside of the Guidelines range.<sup>41</sup> Finally, prosecutors must disclose all relevant facts to the court that may factor into the Sentencing Guidelines calculation.<sup>42</sup>

These policies implemented by the DOJ were some of the first direct effects of the PROTECT Act and created a plethora of news and public criticism, which is discussed below.<sup>43</sup>

## *2. The U.S. Sentencing Commission*

The U.S. Sentencing Commission has already responded in numerous ways to the PROTECT Act mandate that the Commission reduce the incidences of downward departures.<sup>44</sup> As a result of the PROTECT Act, the Sentencing Commission observed improved reporting of sentencing data by district courts. Reporting by judges to the Sentencing Commission is nothing new, but the Sentencing Commission noted that previous submissions were often incomplete and often did not provide specific substantive descriptions of the

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38. Ashcroft Charging Policy Memo, *supra* note 35, at 2.

39. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 14-15, 14 n.46.

40. Ashcroft Charging Policy Memo, *supra* note 35, at 5.

41. *Id.*

42. *Id.*

43. See *infra* Part I.C.

44. The Commission had been “concerned about the increasing incidence of downward departures” prior to the PROTECT Act and had already taken some actions to amend the guidelines in order to reduce certain types of downward departures. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 16-17. The Commission had taken action in 1999 and 2001 to amend the Sentencing Guidelines to reduce departures based on post-sentencing rehabilitative efforts, aberrant behavior, and illegal re-entry into the United States—all areas of concern to the Commission in terms of the number of departures. *Id.* In addition, the Commission had already begun to study comprehensively how departures affect the whole guidelines system. *Id.* at 17.

reasons for departure.<sup>45</sup> The Sentencing Commission explained that there is a need for "greater specificity and standardization in departure documentation" to facilitate the monitoring of decisions and refining the guidelines as necessary.<sup>46</sup> There has been an increase in the number of sentencing documents received by the Sentencing Commission and anecdotal evidence has shown that "courts understand the concerns expressed in the PROTECT Act and are reacting accordingly."<sup>47</sup> As part of its October 2003 emergency amendment pursuant to the PROTECT Act, the Sentencing Commission also emphasized the need for specific written reasons for departure decisions to "facilitate appellate review, and improve the Commission's ability to monitor departure decisions and refine the guidelines as necessary."<sup>48</sup>

The Sentencing Commission took major action to comply with the specific mandates of the PROTECT Act addressed to them. First, the Sentencing Commission implemented the "direct congressional amendments to the sentencing guidelines to restrict the availability of departures for certain child crimes and sex offenses."<sup>49</sup> In addition, the Sentencing Commission issued a Report to Congress evaluating departure practices and explaining actions they are taking to address the issue.<sup>50</sup>

Finally, the Sentencing Commission adopted an emergency amendment to the Sentencing Guidelines to implement the PROTECT Act directive that the incidences of downward departures be "substantially reduced."<sup>51</sup> The amendment eliminated grounds that had previously been permissible for departures<sup>52</sup> and

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45. See *id.* at iv, 24-27. The Commission noted that the lack of specificity and standardization in departure documentation has led to a great deal of analytical difficulty in conducting studies of the Sentencing Guidelines system. *Id.* at iv.

46. *Id.* at iv.

47. *Id.* at 17.

48. See *id.* at 20, 79.

49. See *id.* at 18.

50. See generally *id.*

51. *Id.* at 18. In crafting the amendment, the Sentencing Commission conducted a study of congressional regulation of sentencing as it relates to departures, addressed Congress's concerns in the PROTECT Act, conducted an empirical study of the most frequently cited reasons for departures, solicited and considered public comment, and held public hearings featuring experts from various communities interested in criminal justice. *Id.*

52. *Id.* Areas that are now forbidden grounds for departure include the defendant's acceptance of responsibility for the offense, his aggravating or mitigating role in the offense,

substantially limited other grounds,<sup>53</sup> including limitations on which types of departures will apply to particular classes of defendants.<sup>54</sup> This amendment also attempted to impact the use of departures in a more general manner “by restructuring departure provisions throughout the Guidelines Manual”<sup>55</sup>—including the General Provision on “Grounds for Departure”<sup>56</sup>—to comply more closely with statutory requirements prescribing when a departure is appropriate, including the PROTECT Act requirement that the grounds for departure be stated specifically in writing in the order of judgment and commitment.<sup>57</sup> The Sentencing Commission unanimously approved the emergency amendment on October 8, 2003 and it went into effect on October 27, 2003.<sup>58</sup> The Sentencing Commission also plans to continue working on specific areas within the guidelines that affect the frequency of departures.<sup>59</sup>

This section has demonstrated that the PROTECT Act directives to the Sentencing Commission addressed issues with which they are previously concerned, including an increasing incidence of downward departures and insufficient data submissions to study departure trends. Yet because these reforms came about by congressional mandate and were not initiated by the sentencing “experts” on the Sentencing Commission, many have criticized the October 2003 amendments on the same grounds that criticism of the Feeney Amendment has been advanced.<sup>60</sup>

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the mere choice to plead guilty or enter a plea agreement, the fulfillment of restitution obligations that are required by law, and any addiction to gambling. *Id.* at 18-19.

53. *Id.* at 18. The Sentencing Commission increased restrictions on the availability of departures for the following grounds: “multiple circumstances ...; the defendant’s family ties and responsibilities ...; victim’s conduct; coercion and duress; and diminished capacity.” *Id.* at 19.

54. *Id.* at 18. Departure grounds that have been limited in their use based on the status of the defendant—in terms of the defendant’s past offenses—include aberrant behavior and “over-representation by the defendant’s criminal history category of the seriousness of their criminal history or the likelihood [they will offend again].” *Id.* at 19.

55. *Id.* at 20 (emphasis omitted).

56. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2003).

57. U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 20.

58. *Id.* at 18.

59. *Id.* at 21 (describing planned continuing efforts by the Sentencing Commission).

60. See *infra* Part I.C.

### 3. *The Federal Courts of Appeal*

Prior to the PROTECT Act, government appeals of unfavorable Sentencing Guidelines departure decisions by a district court were rare. The DOJ attributed this trend in large part to the Supreme Court's decision in *Koon v. United States*,<sup>61</sup> which established a deferential standard of review—"abuse of discretion"—for appellate courts reviewing sentencing decisions.<sup>62</sup> The DOJ argued that this deferential standard of review hindered their ability to appeal downward departure decisions.<sup>63</sup> To address congressional concerns regarding district courts' inappropriate departures and non-adherence to the guidelines,<sup>64</sup> Congress sought a more probing review of the appropriateness of departure decisions. In passing the Sentencing Reform Act and the PROTECT Act, Congress indicated that "the courts of appeals are best situated to judge the appropriateness of departures in particular cases."<sup>65</sup> Congress thus reinvigorated the federal courts of appeals' review power over sentencing decisions by enacting a de novo standard of review and ensuring that district courts will re-sentence on remand in accordance with the findings of the appellate courts.<sup>66</sup>

The courts of appeals have adhered to the PROTECT Act and exercised de novo review of appeals of sentencing departure decisions where appropriate. Many of these cases have come about as a result of the DOJ's new focus on utilizing the appellate courts'

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61. 518 U.S. 81 (1996).

62. *Id.* at 91.

63. U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 55. The government appealed only 25 out of 9,985, or 0.25%, of departures in 2001. *Id.* at 55-56. Some data on government appeals pre- and post-*Koon*, however, suggests that the *Koon* decision did not substantially change the number of government appeals. *Id.* Nevertheless, Congress received testimony that the standard of review was part of the reason for limited appeals by the government and thus limited oversight by appellate courts of sentencing departure decisions. *Id.* at 53-54.

64. *Id.* at 53.

65. *Id.* at 53-54. The Sentencing Commission also noted that the Commission is not the proper organization to conduct a review of the appropriateness of a departure in an individual case. *Id.* at 53; see also Andrew D. Goldstein, Note, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 133 YALE L.J. 1955, 1957-58 (2004) (arguing that de novo review is appropriate under the federal guidelines sentencing approach because appellate courts are best situated to make decisions about the guidelines' meaning and whether departures are appropriate).

66. See *supra* notes 11-14 and accompanying text.

new standard of review and appealing adverse departure decisions, per the new DOJ policy announced in July 2003.<sup>67</sup> The results in the federal courts of appeals have been mixed. Some appellate courts have stated that they would affirm or invalidate the decision to depart upward or downward from the Sentencing Guidelines range under either the *Koon* abuse of discretion standard or the new PROTECT Act de novo review standard.<sup>68</sup> Other appellate courts have employed the de novo standard of review and have overturned departure decisions, including *both* upward and downward departures.<sup>69</sup> Still other appellate courts have applied the de novo standard of review and found that the facts and applicable law did indeed warrant the departure.<sup>70</sup>

Moreover, the changed scheme of appellate review of sentencing under the PROTECT Act requires that the district court, when re-sentencing upon remand, not depart on any grounds that were not previously stated as a ground for departure and affirmed as appropriate by the appellate court.<sup>71</sup> Having little evidence to the

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67. See *supra* Part I.B.1.

68. See, e.g., *United States v. Simmons*, 343 F.3d 72, 77-78 (2d Cir. 2003); *United States v. Crawford*, Nos. 02-4760, 02-4761, 2003 WL 22119928, at \*1-2 (4th Cir. Sept. 15, 2003) (per curiam); *United States v. Anderson*, 353 F.3d 490, 507 (6th Cir. 2003); *United States v. Long Turkey*, 342 F.3d 856, 859-60 (8th Cir. 2003); *United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003); *United States v. Andrews*, 353 F.3d 1154, 1155-58, 1157 n.3 (10th Cir. 2003).

69. See, e.g., *United States v. Thurston*, 358 F.3d 51, 68-78 (1st Cir. 2004); *United States v. Cole*, 357 F.3d 780, 782-86 (8th Cir. 2004); *United States v. Phillips*, 356 F.3d 1086, 1098-1101 (9th Cir. 2004); *United States v. Lang*, 364 F.3d 1210, 1213-16 (10th Cir. 2004); *United States v. Saucedo-Patino*, 358 F.3d 790, 792, 795 (11th Cir. 2004); *United States v. Korman*, 343 F.3d 628, 630-32 (2d Cir. 2003); *United States v. Stockton*, 349 F.3d 755, 764-65 (4th Cir. 2003); *United States v. Mallon*, 345 F.3d 943, 945-50 (7th Cir. 2003); *United States v. Willey*, 350 F.3d 736, 738-39 (8th Cir. 2003).

70. See, e.g., *United States v. Daychild*, 357 F.3d 1082, 1104-08 (9th Cir. 2004); *United States v. Blas*, 360 F.3d 1268, 1270-73 (11th Cir. 2004); *United States v. Frazier*, 340 F.3d 5, 13-15 (1st Cir. 2003); *United States v. Clement*, No. 0304605, 2003 WL 22682978, at \*2 (4th Cir. Nov. 14, 2003) (per curiam); *United States v. Archambault*, 344 F.3d 732, 735-37 (8th Cir. 2003); *United States v. Pressley*, 345 F.3d 1205, 1209-11, 1215-18 (11th Cir. 2003).

71. See *supra* text accompanying note 13 (describing the requirements of a district court on remand). But see Tracy Friddle & Jon M. Sands, "Don't Think Twice, It's All Right": Remands, Federal Sentencing Guidelines & the Protect Act—A Radical "Departure"?, 36 ARIZ. ST. L.J. 527, 527-29, 541-49 (2004) (arguing that the PROTECT Act does not limit the options of a judge re-sentencing on remand as much as a literal reading of the language would suggest because of established doctrines related to federal sentencing remands that allow judges to consider grounds for departures that fit within the "limited sentencing approach").



contrary at this point, one can only assume that district courts are complying with this mandate. Yet there are two interesting cases in which district judges have expressed their dissatisfaction with the changes wrought by the PROTECT Act and the concomitant de novo appellate review of sentencing decisions. In one case a judge recused himself from the case and would not impose a sentence, citing his disinclination to “mechanically impose a sentence, previously prescribed by the Court of Appeals [annulling the judge’s previous downward departure]” that the judge believed was clearly contrary to the intent of the Sentencing Guidelines based on the judge’s understanding of the complex facts of the case.<sup>72</sup> Another judge grudgingly imposed a sentence mandated by the court of appeals but wrote a lengthy “Dissent Upon Imposition of Sentence” explaining his disagreement with the current application of the Sentencing Guidelines to sentencing courts such that they usurp the courts’ discretion to depart.<sup>73</sup>

### *C. Response to and Criticism of the Feeney Amendment*

#### *1. Congressional Support and Critiques*

The legislative history of the Feeney Amendment is limited, as there were few hearings and no lengthy floor debate on the sentencing reforms it proposed.<sup>74</sup> The main reasons that congressional supporters<sup>75</sup> cited for the sentencing reforms, however, were

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72. *United States v. Thurston*, 286 F. Supp. 2d 70, 71-72 (D. Mass. 2003) (memorandum and order of recusal).

73. *United States v. Dyck*, 287 F. Supp. 2d 1016, 1018-19 (D.N.D. 2003) (dissent upon imposition of sentence).

74. For a complete discussion of the legislative history of the PROTECT Act and sentencing reform in general, with an emphasis on departures, see generally U.S.S.C. DEPARTURES REPORT, *supra* note 7, app. B.

75. See Tom Feeney, Editorial, *Rights and Wrongs in Sentencing Guidelines*, WASH. POST, Apr. 7, 2004, at A30 (citing a fifty percent increase in non-immigration, non-substantial assistance departures from FY 1996 to FY 2001 as part of the impetus behind his sponsorship of the amendment). One of the other key supporters of the Feeney Amendment and the sentencing reforms was the DOJ. See Letter from Jamie Brown, Acting Assistant Attorney General for Legislative Affairs, DOJ, to House-Senate Conference Committee on S.151, *reprinted in* 15 FED. SENTENCING REP. 355 (2003) (expressing support for the Feeney Amendment, urging that it be included in the final conference bill, citing evidence of the problem with increasing downward departures, and addressing many of the policy concerns

concerns over the increasing rate of downward departures overall—particularly since the Supreme Court's decision in *Koon v. United States*—and concerns over the disparate use of downward departures.<sup>76</sup> Members of Congress were also concerned that the increasing use of downward departures was undermining the goals of the Sentencing Reform Act, especially the aspiration toward certainty and uniformity in sentencing.<sup>77</sup> Furthermore, supporters of the Feeney Amendment, including Representative Feeney, expressed concern that sentencing courts were not faithfully following the Sentencing Guidelines and were using departures inappropriately, thereby creating wide disparities in sentencing.<sup>78</sup> The anxiety over increased downward departures was most acute among members of Congress in cases involving sex crimes against children.<sup>79</sup> The Feeney Amendment passed the House by a vote of 357 to 58, and the House version of the PROTECT Act by a vote of 410 to 14.<sup>80</sup> A conference version of the PROTECT Act was passed by a vote of 400 to 25 in the House and 98 to 0 in the Senate.<sup>81</sup>

Opponents in Congress criticized the factual basis underpinning the amendment by claiming that inappropriate departures were not

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that opponents to the bill expressed); see also Ashcroft Appeals Memo, *supra* note 27, at 1 (expressing DOJ support for the PROTECT Act and the Feeney Amendment).

76. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, app. B at 28-29 (describing Congressional statements about sentencing departure problems); see also Christian Harlan Moen, *Protect Act Amendment 'Intimidates' Judges, Critics Say*, TRIAL, May 1, 2004, at 12 (quoting a January press release by Rep. James Sensenbrenner (R-WI)—“a criminal committing a federal crime should receive as much punishment regardless of whether the crime was committed in Richmond, Virginia or Richmond, California” and “[the Guidelines] were established to address sentencing departures, yet the increasing frequency of downward departures was undermining sentencing fairness throughout the federal system”).

77. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 7.

78. See *id.* app. B at 30-31. Representative Feeney, when introducing the bill, voiced just this concern, stating: “Unfortunately, judges in our country all too often are arbitrarily deviating from the sentencing guidelines enacted by the United States Congress based on their personal biases and prejudices, resulting in wide disparity in sentencing.” See 149 CONG. REC. H2423 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney); see also Tom Feeney, *Reaffirming the Rule of Law in Federal Sentencing*, CRIM. JUST. ETHICS, July 1, 2003, at 2. Senator Hatch, speaking in support of the final conference bill, voiced a similar concern. 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) (declaring that sentencing courts “have strayed further and further from [the Sentencing Guidelines] system of fair and consistent sentencing over the past decade”).

79. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, app. B at 29.

80. *Id.* app. B at 31.

81. *Id.* app. B at 33.

a pervasive problem and by noting that the government itself initiated many downward departures.<sup>82</sup> Critics also decried the haste with which supporters added the amendment to the PROTECT Act, as well as the limited hearings and debate on the issue.<sup>83</sup> Additionally, they advanced arguments that judicial discretion to depart in sentencing was absolutely necessary and crucial to the sentencing system.<sup>84</sup> Members of Congress also argued that the reporting provisions of the Feeney Amendment presented a serious encroachment on judicial independence and the separation of powers principle,<sup>85</sup> and would inappropriately interfere with sentencing by federal judges.<sup>86</sup> Finally, opponents of the Feeney Amendment have introduced a new bill, entitled the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003, or "JUDGES Act,"<sup>87</sup> that intends to repeal all provisions in the PROTECT Act that are collectively referred to as the Feeney Amendment—the sentencing reforms that alter guidelines sentencing and that do not deal specifically with the exploitation of children.<sup>88</sup> These bills were referred to the House and Senate Judiciary Committees, but no further action has been scheduled on them.<sup>89</sup>

## *2. Public Critiques: The Press, Academia, and Public Interest Groups*

Opposition to the Feeney Amendment outside of Congress was swift and in some cases fierce. The press and a wide array of interest groups (or collections of like-minded citizens) wrote letters

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82. See, e.g., 149 CONG. REC. S5113-1, S5119 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy).

83. See *id.*

84. See *id.*

85. See, e.g., 149 CONG. REC. S5145 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy) (arguing, as the ranking member of the Judiciary Committee, that the reporting provisions would create a "hit list" of judges who stray from the guidelines and would "take a sledge hammer to the concept of separation of powers").

86. See 149 CONG. REC. H3060-61 (daily ed. Apr. 10, 2003) (statement of Rep. Jackson-Lee).

87. S. 1086, 108th Cong. (2003); H.R. 2213, 108th Cong. (2003).

88. See U.S.S.C. DEPARTURES REPORT, *supra* note 7, app. B at 33 n.197.

89. *Id.*

to Congress that derided the Feeney Amendment as an ill-conceived attack on the discretion of judges, discretion that judges have traditionally—and certainly since *Koon v. United States*—used in deciding to depart downward from the guidelines.<sup>90</sup> Some critics lamented the limited public debate on the issue and the fact that Congress failed to consult sufficiently with sentencing “experts,” such as the U.S. Sentencing Commission and federal judges, prior to the passage of the law.<sup>91</sup> Others simply used the passage of the

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90. The interest groups coming forward to voice their opposition to Congress were diverse. For example, former Sentencing Commissioners and current members of the U.S. Sentencing Commission wrote to express concern over the process by which the amendments were enacted. See Letter from All Past and Present Chairs of the Sentencing Commission, to Orrin Hatch, Chairman, and Senator Patrick Leahy, Ranking Member, of the Senate Judiciary Committee (Apr. 2, 2003) (on file with author) [hereinafter Sentencing Chairs' Letter]; Letter from Chairs of U.S. Sentencing Commission to Senator Orrin Hatch, Chairman, and Senator Patrick Leahy, Ranking Member, of the Senate Judiciary Committee (Apr. 2, 2003) (on file with author) [hereinafter Sentencing Commissioners' Letter]. In addition, groups representing lawyers, law professors, and criminal defendants weighed in against the amendment on various grounds. See, e.g., Letter from Alfred P. Carlton, Jr., President, American Bar Association, to Senator Orrin Hatch, Chairman, Senate Judiciary Committee (Apr. 1, 2003) [hereinafter ABA Letter]; Letter from Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, on behalf of Federal Public and Community Defenders, to Senator Patrick Leahy, Ranking Member, and Orrin Hatch, Chairman, of the Senate Judiciary Committee (Mar. 28, 2003) (on file with author) [hereinafter Public Defenders' Letter]; Letter from Seven Former Assistant U.S. Attorneys in the Southern and Eastern Districts of New York, to Senator Orrin Hatch, Chairman, and Senator Patrick Leahy, Ranking Member, of the Senate Judiciary Committee (Apr. 7, 2003) (on file with author) [hereinafter Former U.S. Attorneys' Letter]; Letter from Seventy Law Professors, to Senator Orrin Hatch, Chairman, and Senator Patrick Leahy, Ranking Member, of the Senate Judiciary Committee (Apr. 2, 2003) (on file with author) [hereinafter Law Professors' Letter]. Various other interest groups, including civil rights and pro-business interest groups, also voiced opposition to the Feeney Amendment. See, e.g., Press Release, Cato Institute, Federal Sentencing Guidelines in Amber Alert Bill Is Terrible Idea (Apr. 7, 2003) (on file with author) [hereinafter Cato Institute Press Release]; Letter from Hillary O. Shelton, Director, NAACP, to Members of the United States Senate (Apr. 10, 2003) (on file with author).

91. See Former U.S. Attorneys' Letter, *supra* note 90 (expressing concern over the manner in which the Feeney Amendment was enacted); Law Professors' Letter, *supra* note 90 (expressing concern over limited public debate and hearings on the amendment); Sentencing Chairs' Letter, *supra* note 90 (explaining concerns about the lack of input by the Sentencing Commission to the Feeney Amendment); see also Edward R. Becker, *Of Laws and Sausages*, 86 JUDICATURE 7 (July-Aug. 2003) (describing the Feeney Amendment as a poor piece of lawmaking—a “last minute or stealth” amendment slipped into a popular bill and then rammed through the Congress without public hearing and little debate); Editorial, *Three Branches, Not Two: Congress Should Reconsider Recent Assaults on Federal Court Sentencing Discretion*, 86 JUDICATURE 276 (July-Aug. 2003) (arguing that although Congress was within its legislative prerogatives to pass the Feeney Amendment, it should have, as a

law as an opportunity to describe the Sentencing Guidelines scheme as unfair and unjust, arguing as a matter of policy that the sentences that the guidelines provide are too harsh and that Congress should give judges broader discretion to depart from the guidelines to create more just sentences.<sup>92</sup> Many of these criticisms attacked the Feeney Amendment on the grounds that by limiting the discretion of federal judges in sentencing, Congress was attacking the judiciary and the revered concept of judicial independence.<sup>93</sup>

Others have argued that the real attack on judicial independence comes in the form of the reporting requirements, which many critics believe will create a "blacklist" and thus intimidate federal judges.<sup>94</sup>

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matter of policy, consulted the judiciary and the Sentencing Commission prior to passage).

92. See, e.g., Cato Institute Press Release, *supra* note 90 (arguing the Feeney Amendment makes a bad Sentencing Guidelines system worse); Patrice Stappert, Comment, *A Death Sentence for Justice: The Feeney Amendment Frustrates Federal Sentencing*, 49 VILL. L. REV. 693, 693-94, 702-06 (2004) (arguing there is a need to have judges use discretion to allow for compassion and individualized sentences); Ann Woolner, Commentary, *Jail Time by the Book: Is Justice Served When Local Judges Have Little Discretion?*, L.A. BUS. J., Sept. 1, 2003, at 39 (arguing that the Feeney Amendment only exacerbates problems in the sentencing system by eliminating the ability to grant departures and provide justice appropriate for each individual defendant); cf. Frank O. Bowman, III, Editorial, *When Sentences Don't Make Sense*, WASH. POST, Aug. 15, 2003, at A27 (arguing that the Sentencing Guidelines system is not functioning properly, necessitating some departures). But see Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1019 (2004) (describing calls by commentators for greater sentencing "discretion" as actually calls for lower sentences). In a related vein, some critics argue that the discretion taken from judges has, by operation of the Sentencing Guidelines and the Feeney Amendment, devolved to prosecutors—a development they view as granting too much leverage to prosecutors. See, e.g., Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004).

93. See, e.g., ABA Letter, *supra* note 90; Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Discretion May Undermine a Generation of Reform*, CHAMPION, June 2003, at 6 (arguing that the Feeney Amendment attacks the carefully balanced sentencing reforms enacted since 1984 by usurping the discretion of judges); Lawrence S. Goldman, *The Feeney Amendment*, CHAMPION, June 2003, at 4 (consisting of column by the President of the National Association of Criminal Defense Lawyers opposing the Feeney Amendment as part of the "new war on the judiciary" and a "sneak attack"); James K. Jenkins, Editorial, *Give Federal District Judges' Sentencing Discretion Back*, ATLANTA J.-CONST., June 9, 2003, at A9 (arguing that this "sneak attack" on judges will lead to longer sentences—and more sentences—as judges are better situated to set appropriate sentences); Public Defenders' Letter, *supra* note 90.

94. See, e.g., Skye Phillips, Note, *Protect Downward Departures: Congress and the Executive's Intrusion Into Judicial Independence*, 12 J.L. & POL'Y 947, 1006-16 (2004)

These critics have focused on the fact that the DOJ supported the PROTECT Act, and therefore, characterize the sentencing reform that the Act intends—including the limiting of judicial discretion—as an attack on the judiciary by Attorney General John Ashcroft.<sup>95</sup> This criticism is interesting given that at least one survey of U.S. attorneys has shown that the new charging policies implemented at the DOJ in response to the PROTECT Act directives<sup>96</sup> have made little change in the charging and plea bargaining practices of U.S. Attorneys' offices. Most offices said that the policy did not cause a major overhaul and wrought only minor changes from previous practices.<sup>97</sup>

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(arguing that the data collection and reporting provisions in the PROTECT Act interfere with judicial independence); Editorial, *Blacklisting Judges*, N.Y. TIMES, Aug. 10, 2003, § 4, at 10 (characterizing the Ashcroft memo as creating a judicial blacklist and as being part of Ashcroft's "war" on the federal bench); Stephanie Francis Cahill, *Tightening the Reins*, ABA J.E-REPORT, Apr. 4, 2003 (arguing that the Feeney Amendment reporting requirements were designed "to muzzle federal judges"); Patricia Manson, *Bar Eyes Threat to Judicial Independence*, CHI. DAILY L. BULL., Aug. 11, 2003, at 1 (describing a speech by the ABA President in which he argues that the Feeney Amendment creates a judicial blacklist that can threaten judicial independence).

95. Many news articles focused on the DOJ PROTECT Act implementation, discussed *supra* Part I.B.1, characterizing it as a DOJ campaign against an independent judiciary that creates a "blacklist" of judges. See, e.g., Laurie P. Cohen & Gary Fields, *U.S. Prosecutors to Report, Appeal Short Sentences by Federal Judges*, WALL ST. J., Aug. 6, 2003, at A1; Eric Lichtblau, *Justice Dept. to Monitor Judges for Sentences Shorter Than Guidelines Suggest*, N.Y. TIMES, Aug. 8, 2003, at A12; Edward Walsh & Dan Eggen, *Ashcroft Orders Tally of Lighter Sentences: Critics Say He Wants 'Blacklist' of Judges*, WASH. POST, Aug. 7, 2003, at A01; Gary Young, *Bracing for Ashcroft's Action—Fears of a Black List, Weakened Bench*, NAT'L L.J., Sept. 29, 2003, at 1. Editorial writers also opined that the Feeney Amendment was an Ashcroft-led attack on federal judicial independence aimed at consolidating power for the Executive Branch, sometimes lumping criticism of the PROTECT Act in with general criticism of Attorney General Ashcroft's policies and the USA PATRIOT Act. See, e.g., Editorial, *"A Blacklist of Judges,"* ST. PETERSBURG TIMES, Aug. 12, 2003, at 6A; Editorial, *Ashcroft's List*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 18, 2003, at A8; Editorial, *Ashcroft Overreaches*, STAR-LEDGER (Newark, N.J.), Aug. 12, 2003, at 14; Editorial, *Feeney Amendment Undermines Judges*, NEWS-LEADER (Springfield, Mo.), Aug. 11, 2003, at A5; Editorial, *Judicial Restraint—Ashcroft Should Not Pressure Federal Judges*, SAN DIEGO UNION-TRIB., Aug. 18, 2003, at B6; Ann B. Kushner, Editorial, *Justice Too Large to Be a 1-Man Show*, ORLANDO SENTINEL, Sept. 9, 2003, at A13; Editorial, *Let Our Judges Judge*, DENV. POST, Aug. 13, 2003, at B06.

96. See *supra* Part I.B.1.

97. G. Jack King, Jr., *USAOs Deny Ashcroft Memo Affecting Plea Bargaining*, CHAMPION, Dec. 2003, at 6 (describing the results of an informal national survey conducted by the National Association of Criminal Defense Lawyers).

### 3. Federal Judiciary Response

The federal judiciary has voiced its displeasure with the Feeney Amendment as well.<sup>98</sup> The Judicial Conference of the United States opposed the passage of the Feeney Amendment. Writing to Congress to express their concerns about the altered appellate standard of review, both the secretary of the Judicial Conference and U.S. Supreme Court Chief Justice William Rehnquist criticized the loss of discretion to depart downward in sentencing decisions—arguing it limited both the courts' ability to impose just and responsible sentences and the reporting requirements identifying specific judges' sentencing decisions, as well as noting the fact that Congress did not fully consult the judiciary and the Sentencing Commission for their views on these amendments.<sup>99</sup>

After passage of the PROTECT Act, federal judges continued to voice their disapproval with the Feeney Amendment's changes to the sentencing system. Criticism even came from members of the Supreme Court. Chief Justice Rehnquist argued that although it is clearly the province of Congress to establish the rules in sentencing as they did in passing the PROTECT Act, the inquiries into the sentencing practices of individual judges could threaten judicial independence if the collection of information goes beyond legitimate legislative fact finding and is used for political intimidation.<sup>100</sup>

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98. For an overview of the judicial response to the passage of the PROTECT Act, see Alan Vinegrad, *The Judiciary's Response to the PROTECT Act*, N.Y.L.J., Jan. 8, 2004, at 4.

99. See Letter from Chief Justice William H. Rehnquist, to Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee (Apr. 3, 2003) (on file with author) (responding to Senator Leahy's letter and expressing the concerns of the judiciary); Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Senator Orrin Hatch, Chairman, Senate Judiciary Committee (Apr. 3, 2003) (on file with author) (opposing several of the sentencing provisions of the PROTECT Act, as they impair the sentencing system and the ability of the courts to impose just and responsible sentences); see also Letter from Jerome B. Simandle, Chair of Federal Judges Association, Sentencing Guidelines Committee, and E. Grady Jolly, President, Federal Judges Association, to Senator Orrin Hatch, Chairman, Senate Judiciary Committee (Apr. 3, 2003) (on file with the author) (urging that the Feeney Amendment be stricken from the PROTECT Act, as it eliminates judges' crucial discretion in the application of the guidelines and destroys fifteen years of work on the Sentencing Guidelines).

100. Chief Justice William Rehnquist, Remarks 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) [hereinafter Rehnquist Speech].

Supreme Court Justice Anthony M. Kennedy made a speech to the American Bar Association that included critiques of the Sentencing Guidelines and the Feeney Amendment.<sup>101</sup> In the speech Justice Kennedy did not mention the Feeney Amendment specifically but criticized the U.S. prison and criminal punishment system in general and expressed his view that, as a policy matter, the federal Sentencing Guidelines are a large part of the problem.<sup>102</sup>

Since the passage of the PROTECT Act, other judges have spoken out against the Feeney Amendment both to the press<sup>103</sup> and in their opinions.<sup>104</sup> One federal district judge even resigned his position on the bench in protest of the Feeney Amendment's restrictions on

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101. See, e.g., Editorial, *Harsh Sentences Fail America*, INT'L HERALD TRIB., Aug. 13, 2003, at 6; *Justice Criticizes Sentencing Guidelines*, WASH. POST, Aug. 10, 2003, at A08; Frank J. Murray, *Supreme Court Justice Urges Shorter Sentences; Justice Kennedy Wants Repeal of Mandatory Sentences After Voting That They Are Constitutional*, WASH. TIMES, Aug. 10, 2003, at A01.

102. Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (on file with author) (stating that "our resources are misspent, our punishments too severe, and our sentences too long").

103. See, e.g., Jonathan Groner, *Federal Judiciary Opposes Sentencing Change*, LEGAL TIMES, Aug. 25, 2003, at 8 (describing various judges' public opposition); Linda Satter, *Judges in a Stew on Federal Sentencing Guidelines Seen as Too Rigid, Unfair*, ARK. DEMOCRAT-GAZETTE, Sept. 1, 2003, at 1 (quoting various federal judges voicing opposition to the federal Sentencing Guidelines and the PROTECT Act reforms).

104. See *United States v. Andrews*, 301 F. Supp. 2d 607, 608 (W.D. Tex. 2004) (criticizing limitations on sentencing discretion, noting that the guidelines work well in many cases but trial judges "familiar with the facts and humanity involved in a particular case must have some modicum of discretion to depart upwardly or downwardly in those relatively rare instances where the sentencing guidelines do not work"); *United States v. Mendoza*, No. 03-CR-730 ALL, 2004 WL 1191118, at \*6-7 (C.D. Cal. Jan. 12, 2004) (invalidating the PROTECT Act Attorney General reporting requirements as presenting a threat to judicial independence that is "blatantly present" and thus violates the separation of powers); *United States v. Kim*, No. 03-CR. 413 (RPP), 2003 WL 22391190, at \*5-8 (S.D.N.Y. Oct. 20, 2003) (departing from the guidelines and arguing that the recent changes to the guideline system are "knee jerk" measures that increase Congress's role in sentencing, thus limiting the ability of the courts to dispense justice fairly and independently, and possibly making the judiciary subservient to other branches of government); *United States v. Kirch*, 287 F. Supp. 2d 1005, 1006-07 (D. Minn. 2003) (refusing to depart in sentencing defendant and claiming that the departure reporting requirements are an unwarranted attack on the judiciary that have intimidated the instant judge); *United States v. Mellert*, No. CR 03-0043 MHP 2003 WL 22025007, at \*1-2 (N.D. Cal. July 30, 2003) (mem.) (granting a downward departure based on "aberrant behavior" and criticizing the PROTECT Act as an attack on judicial independence); see also *supra* text accompanying notes 72-73 (describing the negative reactions of some judges in response to remanded sentencing decisions based on the *de novo* review of appellate courts in accord with PROTECT Act mandates).



judges, writing an opinion piece in a major newspaper to express his displeasure.<sup>105</sup>

Some district judges have implemented special administrative measures in response to the passage of the PROTECT Act. One judge has ordered a videotape recording of each sentencing hearing he conducts in order to ensure that the appellate court exercising de novo review of his sentencing departures fully understands the real world situation that a district judge confronts in sentencing each individual defendant.<sup>106</sup> Two district court judges in the District of Columbia have altered the instructions they give to juries. The judges now state that the sentence given in the case of conviction is not the concern of the jury, but instead is determined by Congress and the Sentencing Commission—a change from the standard instructions that inform the jury of the judge's discretion in sentencing.<sup>107</sup> Another district judge, claiming he is asserting "legitimate judicial authority" to deny Congress the ability to examine his sentencing records, has issued a blanket order sealing all sentencing documents from review except by the U.S. Sentencing Commission.<sup>108</sup>

The Judicial Conference of the United States voted in September 2003 to support a repeal of the Feeney Amendment envisioned by

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105. See John S. Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (resigning judge criticizing the Sentencing Guidelines system as "unjust" and claiming that the PROTECT Act sentencing reforms are meant to intimidate federal judges); see also Zachary L. Berman, *Judge Martin Leaves Bench Critical of Sentencing Rules*, N.Y.L.J., Aug. 15, 2003, at 1 (resigning judge explaining that congressional attempts at sentencing reform act as a "straightjacket" to federal judges). Another federal district judge in Pittsburgh resigned in part because of objections to the Feeney Amendment and other sentencing reforms, which he claims prevent judges from giving out the appropriate sentences for particular crimes. Leonard Post, *Two U.S. Judges Fire at 'Feeney'*, NAT'L L.J., Feb. 9, 2004, at 4.

106. *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004) (mem.); see also John Marzulli, *Judge Will Tape All His Sentencings*, N.Y. DAILY NEWS, Jan. 30, 2004, at 4; Post, *supra* note 105, at 4.

107. The judges explained that they felt the latter statement is no longer true as a result of the limitations on discretion that the PROTECT Act sentencing reforms place on them. Jonathan Groner, *Bench Benched*, LEGAL TIMES, Dec. 22, 2003, at 30.

108. See Editorial, *The Ace of Spades*, N.J.L.J., Dec. 22, 2003, at 18; Vinegrad, *supra* note 98, at 4. The judge, expressing his public defiance of Congress's will said, "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." Vinegrad, *supra*, at 4.

the JUDGES Act introduced in Congress.<sup>109</sup> They claim that Congress should not have passed the Feeney Amendment, severely limiting federal judges' ability to depart from the Guidelines and requiring reporting on individual judges, without consultation of the judiciary.<sup>110</sup>

More recently, Chief Justice Rehnquist again spoke out on behalf of the federal judiciary by criticizing the Feeney Amendment in his 2003 Year-End Report on the Federal Judiciary.<sup>111</sup> In that report, Chief Justice Rehnquist stated that the "traditional interchange between the Congress and the Judiciary broke down"<sup>112</sup> with the passage of the PROTECT Act. Furthermore, he opined that although it is "the prerogative of Congress to determine" how to legislate, Congress would have benefitted from hearing the "unique perspective" of judges on sentencing issues by giving them a meaningful opportunity to be heard—thereby improving both the legislative process and the policy.<sup>113</sup> This rebuke of Congress over the PROTECT Act received a substantial amount of media coverage<sup>114</sup> and led to a variety of critical editorials on the sentencing restrictions and reporting provisions of the PROTECT Act, with most voicing fears that "intimidation" will impinge upon an independent judiciary.<sup>115</sup>

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109. See *supra* text accompanying notes 87-88.

110. News Release, Administrative Office of U.S. Courts, Judicial Conference Seeks Restoration of Judges' Sentencing Authority (Sept. 23, 2003), available at [http://www.uscourts.gov/Press\\_Releases/jc903.pdf](http://www.uscourts.gov/Press_Releases/jc903.pdf). The Federal Bar Association also wrote to Congress in January 2004 to express its support for a repeal of the Feeney Amendment via enacting the JUDGES Act. See Bruce Moyer, FED. LAW., Feb. 2004, at 10.

111. CHIEF JUSTICE WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2004), available at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html> [hereinafter 2003 FEDERAL JUDICIARY YEAR-END REPORT].

112. *Id.*

113. *Id.* The Chief Justice was disturbed by the "collection of departure information on individual" judges, cautioning that judges should "not be removed from office for their judicial acts" and that these reporting provisions could be seen as an inappropriate "effort to intimidate" judges. *Id.*

114. See, e.g., Linda Greenhouse, *Chief Justice Slams Judiciary Law; Judges Scrutinized Over Sentencing*, CHI. TRIB., Jan. 1, 2004, at 20; *Rehnquist Criticizes Sentencing Restrictions; The Chief Justice Chides Congress for Limiting Judges' Ability to Impose Lighter Punishments*, L.A. TIMES, Jan. 2, 2004, at A26.

115. See, e.g., Editorial, *Best Justice Has Common Sense*, SEATTLE POST-INTELLIGENCER, Jan. 26, 2004, at B5; Nat Hentoff, Editorial, *Judges Can't Dispense Justice with Handcuffs On*, CHI. SUN-TIMES, Jan. 18, 2004, at 38; Editorial, *Rehnquist's Good Advice*, BOSTON

The Chairman of the House Judiciary Committee, a proponent of the PROTECT Act, directly responded to the Chief Justice's criticism. He pointed out that Congress, and specifically the Judiciary Committee, knew of the views of the federal judiciary and stated that the disagreement over the PROTECT Act has resulted not from a lack of communication between Congress and the judiciary, but rather from a policy disagreement over what a proper sentencing policy is.<sup>116</sup>

#### *4. Summary of the Critiques and the Argument that the Feeney Amendment Is an Attack on Judicial Independence*

This section has demonstrated that there is a wide array of criticism directed at the Feeney Amendment. Much of the criticism relates to the sentencing reforms as a poor policy choice, with some arguing that it makes a bad policy—the Sentencing Guidelines—even worse. What is more troubling, however, given the delicate nature of our constitutional system, is the argument that this legislation was an attack on judicial independence. In general, this argument proceeds on two fronts. First, many argue that it is the usurping of discretion, the discretion to depart downward, that is an attack on judicial independence. The second major critique is that by requiring reporting on judges who depart from the guidelines, judicial independence is impaired. Often these arguments are advanced by judges and other critics to further their arguments that the Sentencing Guidelines are a poor policy choice, merely using judicial independence as a rallying cry for their arguments.

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GLOBE, Jan. 6, 2004, at A14; Editorial, *Stealing Judges' Power*, L.A. TIMES, Jan. 12, 2004, at B12; Tom Teepen, Editorial, *Rehnquist Calls Congress on Intimidation*, SEATTLE POST-INTELLIGENCER, Jan. 8, 2004, at B7.

116. *Sensenbrenner Statement on Chief Justice Rehnquist's Year-End Report on the Federal Judiciary*, U.S. NEWSWIRE, Jan. 1, 2004 (describing numerous public hearings on sentencing issues over the past few years and an extensive record before Congress to act upon in passing PROTECT Act; also describing the committee's consideration of the views of federal judges in passing the law).

## II. DEFINING JUDICIAL INDEPENDENCE

Judicial independence is the subject of much discussion and scholarly debate. It has been the subject of countless academic articles and symposia worldwide.<sup>117</sup> Both the founders of our constitutional system and modern commentators alike treat this subject with great reverence. The first Chief Justice of the United States, John Jay, stated that “[a] Judicial Controul, general & final, was indispensible” to our constitutional system.<sup>118</sup> Likewise, Alexander Hamilton noted that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>119</sup> Modern commentators have called judicial independence “the most essential characteristic of a free society” and “the backbone of American democracy.”<sup>120</sup> Chief Justice Rehnquist has described judicial independence as the “crown jewel” of our constitutional system.<sup>121</sup> American judges and academics worldwide have touted the American ideal of judicial independence as crucial to the concept of American liberty.<sup>122</sup>

The reason for this reverence of judicial independence is not that it is viewed as an inherent good. Rather, most would agree that judicial independence is important because of what it protects: the rule of law and the freedoms that the Constitution guarantees to

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117. Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141, 141 (2001).

118. L. Ralph Mecham, Introduction, *Mercer Law Review Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 638 (1995) (quoting Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY 3 (Maeva Marcus ed., 1992) (quoting John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York, Apr. 12, 1790)).

119. THE FEDERALIST No. 78, at 484 (Alexander Hamilton) (Henry Cabot Lodge ed., 1895).

120. Jipping, *supra* note 117, at 142.

121. Gerald E. Rosen & Kyle W. Harding, *Reflections upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution’s “Crown Jewel”*, 29 FORDHAM URB. L.J. 791, 791 (2002).

122. See, e.g., Patricio M. Serna, *An Independent Judiciary*, 20 QUINNIPIAC L. REV. 747 (2001) (address by New Mexico Supreme Court Justice to the Supreme Court of Chihuahua, Mexico, espousing the virtues of judicial independence and judicial review); see also Jipping, *supra* note 117, at 141-42 (describing how the topic of judicial independence has been “the subject of conferences and publications from Australia to Kenya, Britain to Tanzania, Canada to Slovakia, and France to Sri Lanka”).

the people.<sup>123</sup> The argument proceeds that in our system of shared powers, the independent courts serve as a check on the other two branches of our tripartite governmental system to protect individual rights.<sup>124</sup> James Madison, the principal author of the Constitution, described judicial independence as indispensable to our democracy as a guard of the individual rights incorporated into the Constitution and an "impenetrable bulwark against every assumption of power in the legislature or executive ...."<sup>125</sup> The independent judiciary has demonstrated its value throughout our history by protecting individual rights in pivotal cases where it often stood against the tides of public opinion or the power of the politically elected branches. Examples include the role of the federal courts in ending racial segregation, holding Presidents accountable to the rule of law, according women equal treatment, and protecting the rights of accused criminals.<sup>126</sup>

Given the recognized importance of the concept of judicial independence, it is important to define what the concept entails. Yet the concept of judicial independence is one that is evolving and difficult to define precisely.<sup>127</sup> A fair definition of judicial independence at its most basic level is that judges should be allowed to decide a case "free from pressures or inducements,"<sup>128</sup> and free from

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123. See Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1007 (2002) (quoting Chief Justice Rehnquist's description of judicial independence as the unique idea, at the time of Founding, "that the rights guaranteed by the Constitution would be enforced by judges who were independent of the executive"); Mecham, *supra* note 118, at 638-39 (arguing that "without a judiciary that operates independently ... the rights of the citizens under a constitution go unchecked"); J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241 (2001) (examining the assertion that "justice [and] human rights guaranteed by the Constitution" would be denied to the people "without a free and independent judiciary").

124. See Serna, *supra* note 122, at 747-48 (arguing that judicial independence requires the judiciary to act as a check on the other branches of government).

125. Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URB. L.J. 835, 835-36 (2002) (quoting James Madison, Speech to the House of Representatives (June 8, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON 198, 207 (Robert A. Rutland et al. eds., 1977)); see also *id.* at 835-38 (describing judicial independence as "the most critical barometer" of democratic health and the bulwark of the republic).

126. Johnson, *supra* note 123, at 1007-08, 1008 nn.3-6.

127. See Wallace, *supra* note 123, at 241 (describing judicial independence as an evolving doctrine shaped by societal need).

128. See Mecham, *supra* note 118, at 638 (footnote omitted).

acute political pressure in their decision making.<sup>129</sup> Judicial independence is best understood, however, by examining the safeguards our system of government has established to preserve the independent judiciary.

The first, and most important, guarantee of judicial independence is Article III of the Constitution, which establishes the federal judiciary and provides that all judges shall serve “during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>130</sup> The framers considered these twin protections—life tenure and undiminished compensation—as crucial to maintaining the independence of the judiciary, the “least dangerous” branch, from encroachment by the more powerful political branches of government.<sup>131</sup> The framers included this

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129. See Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 697 (1995); see also Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996). Cox describes judicial independence as implying:

1) that judges shall decide lawsuits free from outside pressure: personal, economic, or political, including any fear of reprisal; 2) that the courts' decisions shall be final in all cases except as changed by general, prospective legislation, and final upon constitutional questions except as changed by constitutional amendment; and 3) that there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.

130. U.S. CONST. art. III, § 1.

131. See THE FEDERALIST No. 78, at 478 (Alexander Hamilton) (Henry Cabot Lodge ed., 1895). The judiciary was considered vulnerable to the political branches, because those branches wielded substantial powers—the President wielding the power of the sword and the Congress the power of the purse and the ability to create legislation—while the judiciary wielded no such power. See *id.* (stating that the judiciary “ha[s] neither *force* nor *will*, but merely judgment”). Hamilton explained that life tenure was necessary for an effective and independent judiciary:

If ... the courts of justice are to be considered as the bulwarks of a limited Constitution, against Legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty .... That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from Judges who hold their offices by a temporary commission.

*Id.* at 487, 489. Hamilton also argued that the guarantee of undiminished compensation helped to ensure an independent judiciary, because “in the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” THE FEDERALIST No. 79,

guarantee because they had witnessed the lack of judicial independence caused by King George's practice of making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."<sup>132</sup> Modern commentators agree that these baseline protections are the bedrock of the federal courts' independence and protect judges from political influence and retribution for unpopular decisions.<sup>133</sup>

In addition to the baseline Article III protections, history demonstrates that both the judiciary itself and the political branches have created additional protections to maintain the judiciary's independence. The next most cited safeguard of judicial independence is the power of judicial review. Established by Chief Justice Marshall in *Marbury v. Madison*,<sup>134</sup> this power has been interpreted as ensuring judicial independence, as it emphasizes the key role of the judiciary as a safeguard of constitutional rights, even in the face of action by the political branches that violates those rights.<sup>135</sup> This judicial review function protects the judiciary as a whole, and is viewed as a protection of the institutional independence of the judiciary<sup>136</sup>—as opposed to decisional independence in individual cases, which is protected by Article III and other political protections built up over time.<sup>137</sup>

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at 491 (Alexander Hamilton) (Henry Cabot Lodge ed., 1895). He argued that leaving the payment of the judiciary to the will of the Congress would never allow for complete independence, as the judiciary would be dependent on Congress for "occasional grants" of "pecuniary resources." *Id.*

132. Hon. James L. Morse, *A Declaration About Judicial Independence*, 20 QUINNIPIAC L. REV. 731, 732 (2001) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

133. See Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 221-23 (2003); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 160-61 (2003); Johnson, *supra* note 123, at 1008; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 58-59 (2001); Morse, *supra* note 132, at 731-32; Redish, *supra* note 129, at 697; Rosen & Harding, *supra* note 121, at 792.

134. 5 U.S. (1 Cranch) 137 (1803).

135. See, e.g., Rosen & Harding, *supra* note 121, at 792 (describing how the power of judicial review provides institutional independence); Serna, *supra* note 122, at 747-48 (arguing that judicial review is an essential pillar of our constitutional structure for protecting individual rights).

136. See Rosen & Harding, *supra* note 121, at 792.

137. See *supra* text accompanying notes 130-33; *infra* text accompanying notes 140-45.

Federal judges, as noted above, are commonly viewed as having life tenure, as they serve "during good Behavior."<sup>138</sup> Federal judges are "Civil Officers of the United States;" and, therefore, Congress may remove them from office only "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>139</sup> Impeachment of federal judges has been extremely rare and actual conviction after an impeachment is even more rare, with only twelve judges having been impeached and only six actually having been convicted.<sup>140</sup>

Furthermore, consistent historical practice has limited impeachment of federal judges to impeachment for reasons other than their decisions in office or judicial acts. The impeachment and acquittal of Associate Supreme Court Justice Samuel Chase in 1804 first established this practice. Judge Chase was an extremely partisan Federalist and was impeached for his actions during the sedition trial of an anti-Federalist.<sup>141</sup> Many viewed this impeachment as an attack by the Republicans in Congress, led by President Jefferson, on the largely Federalist-appointed federal judiciary.<sup>142</sup> The Senate, however, acquitted Chase, an outcome that many argue has had lasting significance for the future of judicial independence. Chief Justice Rehnquist argues that the significance of this moment in our "unwritten constitutional law" was that it established the political principle that Congress should not use impeachment to remove judges for judicial acts.<sup>143</sup> Other commentators have reached the same conclusion on this unwritten political limitation of the

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138. U.S. CONST. art. III, § 1.

139. U.S. CONST. art. II, § 4.

140. See George, *supra* note 133, at 226 n.22 (noting only 1 of 108 Supreme Court Justices has been impeached, and he was acquitted; only 11 out of 2,383 District Court judges have been impeached, and only 6 of them have been convicted).

141. William H. Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835, 837-40 (1975).

142. See *id.* at 840. The Senate had just convicted Federalist judge John Pickering in the first impeachment proceedings against a federal judge, and many speculated that the Republican Congress would have impeached more federal judges. *Id.* at 840-41.

143. See *id.* at 842. The Chief Justice made this same argument when making a speech in opposition to the Feeney Amendment, describing the Chase impeachment incident as setting a "political precedent" that "a judge's judicial acts may not serve as a basis for impeachment." Rehnquist Speech, *supra* note 100; see also 2003 FEDERAL JUDICIARY YEAR-END REPORT, *supra* note 111 (stating again the principle that judges are not to be removed from office for their judicial acts).



impeachment power<sup>144</sup> and the types of cases in which impeachment has been used since the Chase impeachment incident are proof this limitation has been respected. Almost all of the judges convicted of impeachment offenses, were removed from office for nonjudicial acts, including financial improprieties, tax evasion, and perjury.<sup>145</sup>

### III. THE OVERSTATED THREAT TO JUDICIAL INDEPENDENCE

Judicial independence has a distinguished history in the proper functioning of our constitutional system. Various protections have been codified in the Constitution itself or developed by the political branches throughout our history. When critics claim that a law or other action by the political branches is an attack on judicial independence, therefore, it is rightly taken very seriously. The remainder of this Note, however, argues that such claims are not appropriate in discussing the Feeney Amendment. Although many of the critics, including judges, may disagree with the law as a matter of policy and may even disagree with the entire Sentencing Guidelines system—that does not automatically make the law a violation of judicial independence. In fact, our constitutional system delegates the making of sentencing policy to the body that made the policy choice in this instance, the legislature.

This section demonstrates that the allegation that the Feeney Amendment is an attack on judicial independence is overwrought. Part III.A provides an explanation of the limitations on the concept of judicial independence, most importantly the limitations that Congress places on the federal courts consistent with Congress's constitutional role. In Part III.B, this Note examines how the Feeney Amendment is an appropriate act of legislative policy and is consistent with the Sentencing Guidelines system that Congress created and the Supreme Court approved. Finally, Part III.C addresses the main concerns of the critics claiming a violation of

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144. See, e.g., Geyh, *supra* note 133, at 165-66 (arguing that a constitutional custom has developed among the political branches that removing judges for wrong-headed decisions would be against the concept of judicial independence); Morse, *supra* note 132, at 734 (describing the Chase impeachment episode as a political event that set a "hands off" congressional tone for the next 200 years).

145. See Rehnquist Speech, *supra* note 100 (noting that one of the judges was convicted by default because he had become a Confederate judge in 1862).

judicial independence and demonstrates that the concerns raised are actually not as severe as the critics charge and that the key tenets of judicial independence are still intact.

*A. Judicial Independence Is Not a Talisman: The Role of Accountability to the Law and Inter-Branch Interdependence*

The preceding discussion<sup>146</sup> described the importance of judicial independence in our constitutional system and the major protections that it is afforded. The concept engenders broad, sweeping descriptions, such as the words of Alexander Hamilton, “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>147</sup> In addition, in reading much of the scholarly work that advocates a broad view of judicial independence and much of the commentary regarding the Feeney Amendment as an “attack on judicial independence,” one would think that the independence guaranteed to the judiciary is complete and absolute. It seems as if many believe an independent judiciary is, as one commentator puts it, “the font of justice, the rule of law and individual rights, if not the font of all good things.”<sup>148</sup> This simplistic broad reading of the judicial independence concept, however, is somewhat naive and, at the same time, inconsistent with our constitutional system as well as with the goals that an independent judiciary is designed to preserve.<sup>149</sup> The judiciary is not a completely independent branch. Instead, it is accountable both to the rule of law and to the political branches of the federal government.

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146. See *supra* Part II.

147. THE FEDERALIST No. 78, at 484 (Alexander Hamilton) (Henry Cabot Lodge ed., 1895).

148. Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 195 (2003) (criticizing this simplistic view of treating judicial independence as an “unalloyed good”).

149. See *id.* at 195, 202.

1. *Judicial Accountability as Accountability to the Law and the Argument Against Judicial "Policymaking"*

A primary limitation on the independence of the federal judiciary is the judges' duty to decide cases "according to law."<sup>150</sup> A fundamental argument that is often posited against vesting the judiciary with too much independence is that "policymaking" is a political decision and, therefore, a role for the political branches, whereas judges must uphold the law, including key baseline constitutional protections. Indeed, some have argued that engaging in policymaking or "legislating from the bench" is itself a major threat to judicial independence, as it weakens the role of the judiciary as an independent arbiter of the law.<sup>151</sup>

This fear of an overly independent judiciary is not of recent vintage. In fact, during the Constitution ratification debates many prominent Anti-Federalists, including Thomas Jefferson, opposed the virtues of an independent judiciary under the constitutional scheme because, according to them, it left little room to check judicial power.<sup>152</sup> Opponents feared that the independence provided

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150. See Cox, *supra* note 129, at 566-67 (explaining how judges are obligated to decide cases "according to law"—i.e. "according to a continuity of reasoned principle found in the words of the Constitution, statute, or other controlling instrument"); Manning, *supra* note 133, at 61 (describing how the historical background for the separation of powers reinforces the principle that a sharp separation of judicial and legislative powers was designed to limit judicial discretion and promote governance according to the rule of law); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 630 (1999) (describing judicial independence as a "grant" from the people that judges must work to sustain by acting in a way "accountabl[e] to the law").

151. See George, *supra* note 133, at 222-23 (arguing that the greatest threat to judicial independence comes from judges themselves ruling based on their ideology and ambition); Jipping, *supra* note 117, at 158-59 (arguing that judicial restraint—avoidance of "legislating from the bench"—is crucial to maintaining judicial independence); Rosen & Harding, *supra* note 121, at 800, 803 (arguing that "[u]nwarranted judicial forays into the policy arena" jeopardize the concept of judicial independence and describing the Sentencing Reform Act of 1984 as Congress's response to their perception that the judiciary was overstepping its bounds); Wallace, *supra* note 123, at 257-58 (arguing that judicial restraint helps to foster judicial independence by gaining the respect of the citizenry); cf. Manning, *supra* note 133, at 70 (arguing that the English concept of "equity of the statute"—the granting of great discretionary powers to judges in applying the law consistent with the judge's conception of reason—is inconsistent with the separation of powers ideal in our constitutional system).

152. See Rosen & Harding, *supra* note 121, at 793-94 (describing opposition to the expansive view of the independent judiciary under the Constitution by "Brutus," author of an Anti-Federalist essay, and Thomas Jefferson, writing in a letter in 1821 to Charles

to the judiciary via the Article III protections would make them superior to the legislature, usurp the rights and powers of the states, and lead to a potentially omnipotent judicial branch—thus negating the key purpose of the separation of powers concept, avoiding any single all-powerful branch.<sup>153</sup>

As one commentator has opined,

[t]o the public ... judicial cries of invasions of their independence that are directed largely at legitimate institutional mechanisms of accountability sound curiously like a power struggle rather than an aspirational statement about the role of our judiciary in our system of government. The notion that established mechanisms of institutional accountability to the political branches ... constitute infringement on appropriate judicial authority is potentially a very hazardous perspective for the judiciary.<sup>154</sup>

This concept—that policymaking is not the province of the judiciary—is vitally important in evaluating many of the claims that the Feeney Amendment invades judicial independence by limiting the discretion of judges. Given that many of these arguments concern the merits of the Sentencing Guidelines system or Congress's decision to limit downward departures, they are in fact arguments about legislative policy choices. There is a danger, therefore, that arguments decrying an attack on judicial independence on these grounds may be misplaced. The next section of this Note explains another limitation on judicial independence: the mechanisms in the constitutional system holding the judiciary accountable to the people via institutional accountability to the political branches.

## *2. Constitutional Accountability: The Accountability of the Federal Judiciary to the Political Branches*

The independence of the judiciary is further constrained by the Constitution, the very same document that grants the judiciary its most powerful protections. Although Article III grants life tenure

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Hammond).

153. *See id.*

154. Zemans, *supra* note 150, at 630.

and undiminished pay to the judiciary to preserve independence, it also gives a variety of tools, some very powerful, to the political branches to act as a check to hold the judiciary accountable.<sup>155</sup> The first of these tools is the power to control the membership of the courts via appointment of judges, which by Article II is given solely to the President, with the advice and consent of the Senate.<sup>156</sup> Greater powers for regulation of the federal courts were given to Congress in terms of regulation of the courts' administration and jurisdiction, as well as the substantive rules of decision to be applied. These powers are remarkably potent.

Congress has the power over creation and abolition of the federal courts. Initially, the Constitution gave Congress the choice whether to establish lower federal courts at all and the concomitant power to abolish the lower federal courts if it so chose.<sup>157</sup> Moreover, Congress has a large amount of control over the jurisdiction of the federal courts, including the appellate jurisdiction of the Supreme

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155. See Cross, *supra* note 148, at 205-10 (describing the manner in which the judiciary is held accountable to the political branches); Redish, *supra* note 129, at 697-98 (describing how the Framers of the Constitution made "pragmatic balances," as they did elsewhere in the Constitution, by giving the judiciary a large amount of independence under Article III, while simultaneously limiting that independence by granting Congress a broad power of regulation over the federal courts). Congress also has the power to impeach federal judges, and some have argued that this power is one of the means by which Congress can control the judiciary. See Cross, *supra* note 148, at 205. Yet the idea that impeachment should be used only to remove judges for misconduct, not for their decisions in office or for political acts, has developed over time and has become a consistent political practice. See *supra* notes 141-45 and accompanying text.

156. See U.S. CONST. art. II, § 2. Many commentators have noted that this power may also serve as a source of the political branches' influence over the federal judiciary, either in terms of a judge seeking an original appointment through the political process or a subsequent appointment to a higher court via the same process. See Cross, *supra* note 148, at 207-08 (describing how the desire for promotions renders judges accountable to other branches of the government); Rosen & Harding, *supra* note 121, at 802-03 (describing how the judicial nomination and confirmation process can lead to the potential for political influence on decisions).

157. See U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power .... To constitute Tribunals inferior to the supreme Court ...."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). This text and generally accepted constitutional history establish that Congress was not required to establish the lower federal courts. Redish, *supra* note 129, at 697 n.2. The Supreme Court has also reasoned that the power to create these courts includes the power to abolish them. See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); see also Redish, *supra* note 129, at 697-98 n.2 (discussing the Supreme Court's subsequent reading of *Lockerty*).

Court in many types of cases.<sup>158</sup> Article III defines the original jurisdiction of the Supreme Court in a limited way—"all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party"—and provides for Congress to limit its appellate jurisdiction.<sup>159</sup> The most striking example of this power is *Ex Parte McCordle*,<sup>160</sup> an 1868 case involving a statute that Congress passed, over a Presidential veto, that repealed Supreme Court jurisdiction to hear cases involving *habeus corpus* brought under an act passed in 1867.<sup>161</sup> The Supreme Court dismissed the already argued and pending case for want of jurisdiction, noting that under Article III Congress had the power to make exceptions to the appellate jurisdiction of the Supreme Court and Congress appropriately exercised that power in this instance by passing the 1868 repealing act.<sup>162</sup> Additionally, Article III provides no jurisdiction for the lower courts except that which Congress provides.<sup>163</sup>

Although Article III protects judges by providing undiminished compensation, Congress still exerts a great deal of control over the federal courts by its control of the purse strings of the government, making the judiciary dependent on the legislature for much of its sustenance.<sup>164</sup>

Congress has exercised these powers extensively since the Founding, beginning with the Judiciary Act of 1789, by which

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158. See Cross, *supra* note 148, at 206-07; Redish, *supra* note 129, at 697-98, 697 n.2.

159. See U.S. CONST. art. III, § 2 ("[T]he supreme Court shall have appellate jurisdiction ... with such Exceptions, and under such Regulations as the Congress shall make."). This language has been construed over time to allow Congress to establish and alter the jurisdiction of the federal courts (aside from the original jurisdiction of the Supreme Court) including the jurisdiction of the district courts and courts of appeal. See Cross, *supra* note 148, at 206-07; Mecham, *supra* note 118, at 640; Redish, *supra* note 129, at 697-98 n.2.

160. 74 U.S. (1 Wall.) 506 (1868).

161. *Id.* at 507-08.

162. *Id.* at 513-14.

163. See *supra* note 159.

164. See, e.g., Cross, *supra* note 148, at 207 (describing how Congress's control of judicial administrative budgets and resources can serve as an accountability mechanism); Mecham, *supra* note 118, at 639-41 (describing the "interdependence" of the judiciary as a result of congressional control over jurisdiction and resources); Rosen & Harding, *supra* note 121, at 800-01 (describing Congress's use of its power of the purse in its attempts to control the judiciary).

Congress first created the federal court system.<sup>165</sup> In the two hundred plus years since, Congress has enacted what the Federal Judicial Center describes as twenty-one statutes that are fundamental to the structure of the judiciary and its authority.<sup>166</sup> These statutes cover topics such as creating various kinds of courts, expanding and reorganizing circuits and courts of appeals, and providing administrative support agencies for the federal courts.<sup>167</sup> In addition, Congress exercised its constitutional powers to define the courts' jurisdiction and provided for rules and procedures in the courts.<sup>168</sup>

Congress's most important power over the federal courts is making substantive law that provides the framework for the decisions of the courts. Under Article I, Congress has the power "to make all laws ... necessary and proper for carrying into Execution" the powers enumerated to Congress and "all other Powers vested by this Constitution in the Government of the United States"—thus establishing the legislature as the sole branch with the wide discretion to make legislative policy choices.<sup>169</sup> In creating the laws, Congress thereby provides the substantive rules of decision in the federal courts—rules that the unelected federal judiciary has no authority to ignore or alter.<sup>170</sup>

There are limitations on Congress's broad power to provide substantive rules of decision by law. Most importantly, the courts may disregard a congressionally created rule of decision and use the power of judicial review to strike down a law that violates constitutional protections, such as due process or equal protection.<sup>171</sup> Additional areas of substantive constitutional restrictions on Congress's lawmaking power occur in the area of criminal lawmak-

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165. See Federal Judicial Center, *Federal Judicial History*, at [http://www.fjc.gov/history/home.nsf/page/legislation\\_bdy](http://www.fjc.gov/history/home.nsf/page/legislation_bdy) (last visited Feb. 20, 2004).

166. *Id.*

167. *Id.*

168. *Id.*

169. See U.S. CONST. art. I, § 8, cl. 18; see also *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 406-10, 419-21 (1819) (explaining that the Necessary and Proper Clause must be interpreted broadly, as it was included in the Constitution to give Congress a broad range of discretion in choosing what laws it would enact in order to execute its legitimate constitutional powers); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* § 3.2 (2d ed. 2002).

170. Redish, *supra* note 129, at 715.

171. *Id.*

ing. Federal courts may use the power of judicial review to invalidate criminal statutes that violate the prohibitions on bills of attainder and *ex post facto* laws,<sup>172</sup> that attempt to re-define the crime of treason,<sup>173</sup> that create certain kinds of punishment for treason,<sup>174</sup> and that inflict cruel and unusual punishment.<sup>175</sup> Also, Congress may pass substantive rules of decision that apply generally to all cases. Congress may not pass a law that is directed at adjudicating specific litigation before the courts, however, as such action violates the principle of separation of powers.<sup>176</sup> An example of the Supreme Court applying this separation of powers principle to invalidate a law that Congress passed was the post-Civil War case of *United States v. Klein*.<sup>177</sup> In that case, the Court found Congress's law unconstitutional and held that Congress had overstepped its role within the separation of powers framework because it went beyond creating "such exceptions from the appellate jurisdiction" as it may find appropriate<sup>178</sup> and instead passed a law mandating the Court's resolution of a specific case.<sup>179</sup>

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172. U.S. CONST. art. I, § 9, cl. 3.

173. U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

174. U.S. CONST. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person attainted.").

175. U.S. CONST. amend. VIII; see also *infra* notes 236-56 and accompanying text (discussing current challenges to the Sentencing Guidelines on Sixth Amendment grounds).

176. The Supreme Court described the *Klein* decision as creating a principle, based on Article III, forbidding legislation that "prescribe[s] rules of decision to the Judicial Department of the government in cases pending before it." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *United States v. Klein*, 80 U.S. (1 Wall.) 128, 146 (1871)) (holding that the statute did not violate this principle but violated Article III for other reasons). Some commentators opine that the lesson of *Klein* is that if Congress passed legislation directed at resolution of a particular case pending before the Court, it would violate both the formalist model and functionalist model of separation of powers, because it would involve Congress performing a judicial function or unduly interfering with the judicial function, respectively. Redish, *supra* note 129, at 718-20. An alternative reading of the *Klein* decision is that the statute was held to be an unconstitutional legislative act, because it instructed the Court on how it should perform constitutional interpretation—the interpretation of the President's pardon power—and thus violated separation of powers. *Id.* at 720.

177. 80 U.S. (1 Wall.) 128 (1871).

178. This type of action would have been permissible under *Ex Parte McCordle*. See *supra* notes 160-63 and accompanying text for a discussion of this principle.

179. *Klein*, 80 U.S. (1 Wall.) at 145-48.



In light of this delineation of the lawmaking and the judicial power, it is fair to say that our federal judiciary is "independent at retail, not at wholesale"—making the courts independent in particular cases but not so independent as to change the fundamental content of the law."<sup>180</sup> In order to be an appropriate use of legislative power, therefore, the Feeney Amendment must fit properly within the congressional power to regulate the federal courts, which includes the power to make substantive rules of decision for these courts by passing laws of general applicability. The next section of this Note explains how the Feeney Amendment meets this standard.

### *B. The Feeney Amendment as an Appropriate Act of Legislative Policy*

No argument has been advanced that the Feeney Amendment itself violates either the substantive constitutional prohibitions on Congress' lawmaking power<sup>181</sup> or the *United States v. Klein* principle.<sup>182</sup> Chief Justice Rehnquist, in a speech ostensibly in opposition to the Feeney Amendment, noted that even though judicial independence does require that judges not be impeached for judicial acts, that "does not mean that Congress cannot change the rules under which judges operate. Congress establishes the rules to be applied in sentencing; that is a legislative function."<sup>183</sup> What the

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180. Cross, *supra* note 148, at 213 (noting that this conception of judicial independence is also consistent with the practice of striking down laws as unconstitutional—a key role of the independent judiciary—as the rarity of that practice shows that the judiciary is not intent on a wholesale overhaul of the nation's laws).

181. See *supra* notes 171-75 and accompanying text (discussing constitutional limitations on Congress's substantive lawmaking power). In *United States v. Vizcaino*, the court rejected procedural and substantive due process challenges to the Sentencing Guidelines, holding that restrictions on "discretionary individualized sentencing" in non-capital cases were not a denial of due process. 870 F.2d 52, 54-57 (2d Cir. 1989).

182. The Feeney Amendment is not directed at a specific case but rather is a substantive rule of general applicability. Cf. *supra* notes 176-79 and accompanying text. There have been, however, some recent constitutional challenges to the Sentencing Guidelines system as a whole on Sixth Amendment grounds, and a Supreme Court decision is forthcoming on this issue. See *infra* notes 236-56 and accompanying text.

183. Rehnquist Speech, *supra* note 100.

Chief Justice recognized was the same principle the Supreme Court recognized in *Mistretta v. United States*.<sup>184</sup>

In *Mistretta*, the Court recognized that sentencing has never been within the exclusive authority of one branch but noted that Congress "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."<sup>185</sup> Furthermore, the Court noted that the genesis of the Sentencing Guidelines was dissatisfaction with judges' unfettered discretion under the pre-Guidelines sentencing system, leading to great variation in the sentences imposed upon similarly situated defendants and an uncertainty about how long they would spend in prison.<sup>186</sup> The Sentencing Guidelines are thus aptly described as "a constitutional mechanism for channeling the discretion that a sentencing court would otherwise enjoy' in the absence of the Guidelines."<sup>187</sup> Since *Mistretta*, the Supreme Court has consistently upheld the validity of the Sentencing Guidelines and their binding nature on the federal courts,<sup>188</sup> as well as Congress's primacy as the driving force behind the Sentencing Guidelines.<sup>189</sup>

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184. 488 U.S. 361 (1989) (upholding the validity of the Sentencing Guidelines and the Sentencing Commission against challenges that the Sentencing Reform Act of 1984, which created both, violated the nondelegation doctrine and separation of powers).

185. *Id.* at 364. The *Mistretta* Court noted that even in the old "indeterminate-sentenc[ing] system" Congress still had a fair degree of control over sentencing, as it set the range of punishment for each federal crime. Judges, however, were allowed to grant probation if they saw fit. *Id.* at 365.

186. *Id.* at 365.

187. *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000) (quoting *United States v. Mack*, 229 F.3d 226, 244 (3d Cir. 2000) (Becker, C.J., concurring)).

188. See, e.g., *Stinson v. United States*, 508 U.S. 36, 46-47 (1993) (holding that interpretive and explanatory Guidelines commentary, as well as the Guidelines themselves, are binding on federal courts); *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (holding that it is the government's right, not its duty, to file a motion for departure based on substantial assistance, and that the only inquiry a sentencing court may make is whether refusal to file a motion violates constitutional protections); *Williams v. United States*, 503 U.S. 193, 200-02 (1992) (holding that the Guidelines and policy statements accompanying the Guidelines constrain judges' ability to depart).

189. See *United States v. Labonte*, 520 U.S. 751, 752-54, 757 (1997) (invalidating a Sentencing Commission commentary that conflicted with Congressional statutory guidance, and holding that the Commission's broad discretion must bow to the specific directives of Congress); see also *United States v. Gaines*, 122 F.3d 324, 330 (6th Cir. 1997) ("When Congress and the Sentencing Commission disagree on matters of sentencing policy, Congress trumps.").

Many opponents of the Feeney Amendment argue that the limitation of the discretion of sentencing judges is itself inconsistent with the spirit of the guidelines system. They often cite the Supreme Court's decision in *Koon v. United States*,<sup>190</sup> wherein the Supreme Court noted that appellate courts should give due deference to sentencing determinations of the sentencing court and review them for abuse of discretion.<sup>191</sup> Yet the Court also noted that this standard of deference was required, in part, because Congress had mandated this standard.<sup>192</sup> The Court also noted that sentencing courts may depart from the guideline sentencing range only in limited situations.<sup>193</sup> Although the Court did hold in *Koon* that limited discretion was left with the sentencing court, in part because Congress had mandated it, the understanding in *Mistretta* that Congress intended to create a much more circumscribed system of sentencing—as it was authorized to do—is still good law.<sup>194</sup> The scheme that the Sentencing Guidelines created, and that *Mistretta* validated, was one of “rigid strictures from which departure would be unusual,” aimed to eliminate unwarranted disparities in sentencing.<sup>195</sup>

The Chief Justice, in the speech mentioned above discussing the Feeney Amendment, reaffirmed the principle that the courts will generally defer to Congress's determinations on sentencing policy, stating:

It is well settled that not only the definition of what acts shall be criminal, but the prescription of what sentence or range of sentences shall be imposed on those found guilty of such acts, is

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190. 518 U.S. 81 (1996).

191. *Id.* at 97-98.

192. *Id.* at 98.

193. *Id.* at 93-95 (explaining that departures are warranted only in instances where the Guidelines, arguably, had not taken into account a particular aggravating or mitigating factor).

194. See *United States v. Gaines*, 122 F.3d 324, 330 (6th Cir. 1997); *United States v. Vizcaino*, 870 F.2d 52, 54 (2d Cir. 1989); *supra* text accompanying notes 185-89.

195. *United States v. DeRiggi*, 45 F.3d 713, 717 (2d Cir. 1995); see *id.* at 716-17 (describing the Sentencing Reform Act of 1984, its legislative history, and interpretive case law as demonstrating that the Act intended to create a rigid system in which the courts would find departures to be rare); *Vizcaino*, 870 F.2d at 54 (explaining that the principal goal of the legislation was to reduce unwanted disparities, and that grounds for departure will be eliminated over time).

a legislative function—in the federal system, it is for Congress. Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a decision is for Congress, just as the enactment of the Sentencing Guidelines nearly twenty years ago was.<sup>196</sup>

In addition to being a valid exercise of legislative power over sentencing policy to which the courts traditionally defer,<sup>197</sup> the Feeney Amendment is also consistent with the original intent of the guidelines system.

*C. This Legitimate Legislative Act of Sentencing Reform Does Not Destroy Judicial Independence*

Setting aside the various policy critiques of the Feeney Amendment,<sup>198</sup> the remaining critique is that the amendment is an attack on judicial independence.<sup>199</sup> Assuming that this is a proper exercise of legislative control over both the federal courts and setting sentencing policy,<sup>200</sup> the key aspect of the law that still must be analyzed is if it encroaches upon the independence of the federal judiciary. Those who believe it does argue that independence is under attack as a result of the removal of “discretion” in sentencing by trial judges and as a result of the reporting requirements, creating concerns of a judicial blacklist and intimidation of

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196. Rehnquist Speech, *supra* note 100.

197. The Supreme Court has shown deference to state legislatures in establishing sentencing policy as well. In 2003, the Court upheld states’ “three strikes” laws. *See* *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003). In *Ewing*, the Court explained that “[t]hrough three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important [criminal punishment] policy decisions is longstanding.” *Id.* at 24. In addition, the Court stated that “[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.” *Ewing*, 538 U.S. at 25 (Kennedy, J., concurring in part).

198. These critiques, which criticize the value of departures in the sentencing scheme overall and the process by which the Feeney Amendment was enacted, are not within the purview of this Note.

199. *See supra* Part I.C.4.

200. *See supra* Parts III.A, III.B.

judges.<sup>201</sup> On both fronts much of the concern for the independence of the judiciary has been overstated.

As an initial matter, the Feeney Amendment leaves untouched the key structural protections of federal judicial independence, the constitutional mandates of life tenure and undiminished compensation.<sup>202</sup> The Feeney Amendment in no way purports to alter the structures and processes for judicial termination and compensation.<sup>203</sup> The amendment also does not impair another key tenet of judicial independence—the power of judicial review to protect individual constitutional rights against the tyranny of the majority. Most of the criticisms of the Sentencing Guidelines and of the Feeney Amendment raise issues with the factual underpinnings of sentencing policy decisions or if the appropriate policy decisions are being made. When citizens, however, make challenges that the Sentencing Guidelines or the amendments to them, including the Feeney Amendment, do violate some fundamental constitutional right or the separation of powers, the federal courts have not hesitated to analyze the constitutional claim.<sup>204</sup> One would infer

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201. See *supra* Part I.C.4.

202. See *supra* notes 130-33 and accompanying text.

203. Some critics have argued that the reporting provisions will be used to create a "blacklist" of judges that could lead to eventual removal or blocking of nominations to higher federal courts. From a constitutional point of view, this statute does not trammel the protections of judicial independence, as the reporting requirements are not in place to serve as a review or evaluative tool for individual judges. Instead, Congress is requiring the collection of information on sentencing decisions and departures by the Sentencing Commission and by the DOJ to ensure that sentencing policy, specifically departure policy, is improved and to ensure that the government is taking appropriate appeals of adverse sentencing decisions.

204. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (analyzing claims that the Sentencing Guidelines and the creation of the Sentencing Commission violated the separation of powers); *United States v. Vizcaino*, 870 F.2d 52, 54 (2d Cir. 1989) (analyzing a challenge to the Sentencing Guidelines on due process grounds); *United States v. Schnepfer*, 302 F. Supp. 2d 1170, 1199-1200 (D. Haw. 2004) (ruling on a challenge to the Feeney Amendment as altering the Sentencing Guidelines to the extent that it violates the separation of powers); *United States v. Mendoza*, No. 03-CR-730, ALL, 2004 WL 1191118, \*6-7 (C.D. Cal. Jan. 12, 2004) (ruling on a challenge to the Feeney Amendment). The federal courts have shown their willingness to address constitutional challenges to the Sentencing Guidelines system very recently. In the wake of the Supreme Court's June 2004 decision that invalidated Washington State's sentencing guidelines scheme—a scheme very similar to the Federal Sentencing Guidelines—on Sixth Amendment grounds, many federal district and appeals courts quickly addressed the applicability of the Supreme Court's newly announced Sixth Amendment rule to the Federal Sentencing Guidelines, with many courts holding the Sentencing Guidelines unconstitutional. The Supreme Court has agreed to decide this issue

that they would continue to do so if a claim were made that sentencing policy violated the Eighth Amendment's prohibition on cruel and unusual punishment or violated some other substantive constitutional prohibitions on Congress's power to make criminal law,<sup>205</sup> although no such claim has been made in the Feeney Amendment debate.

### *1. The Difference Between Discretion and Independence*

Critics would still protest that the limitations on a sentencing court's discretion to depart downward are in fact a violation of judicial independence. Yet this argument is conflating two issues. Discretion is not the same thing as judicial independence. Judges clearly have discretion in deciding individual cases and in using the power of judicial review to protect individual rights free from outside pressures and inducements—this discretion is protected by the concept of judicial independence. This discretion, however, is not unbridled as Congress has the power to set the substantive rules of decision in the federal courts,<sup>206</sup> including setting the policy on sentencing.<sup>207</sup> By arguing that denying judges some discretion to depart downward in sentencing is an attack on judicial independence, critics of the Sentencing Guidelines and the Feeney Amendment may weaken judicial independence by advancing an argument that judges ought to set policy—the role appropriately of Congress—as opposed to being accountable to the law.<sup>208</sup>

As one self-described “activist” federal district judge said, “If you asked me if I like the sentencing guidelines ... I’ll tell you no, I don’t. I follow them because they’re the law, and that’s good enough for me.”<sup>209</sup> The judge went on to note that although the Guidelines

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on an expedited basis. See *infra* notes 236-56 and accompanying text.

205. See *supra* notes 171-75 and accompanying text (describing the substantive constitutional limitations on Congress’ criminal lawmaking power).

206. See *supra* notes 169-70 and accompanying text (describing how Congress’s substantive lawmaking power controls the substantive rules of decision in the federal courts).

207. See *supra* Part III.B (examining how the Feeney Amendment is consistent with congressional control over federal sentencing policy).

208. See *supra* Part III.A.1 (describing “accountability to the law” as a check on judicial independence).

209. Robert H. Merhige, Jr., *The Federal Courts: Observations from Thirty Years on the Bench*, 32 U. RICH. L. REV. 867, 872, 886-87 (1998) (interview with a federal district judge

have taken away discretion in sentencing decisions for judges, that does not mean judicial independence has been eroded, because "there's a difference in discretion and independence," and "judicial independence isn't taken away with [the Sentencing Guidelines and mandatory minimum sentences]."<sup>210</sup> Another federal judge, who has served on the Sentencing Commission, accurately summed up an appropriate response to the argument that the Sentencing Guidelines' restriction on judges' discretion is a violation of the tenet of judicial independence.<sup>211</sup> She noted, "When Congress acts to curb the discretion that judges have historically exercised, some judges have taken the view that those restrictions are also a threat to the judiciary's independence,"<sup>212</sup> an argument that sounds very similar to the arguments raised against the Feeney Amendment. In discussing criticism of the Sentencing Guidelines system, she noted that "what is perceived as a threat to the independence of the judiciary in curbing discretion is in fact Congress carrying out its constitutional powers."<sup>213</sup> The same can be said of the Feeney Amendment reforms by which Congress has made a policy choice to alter the sentencing system to reduce the number of downward departures.

Additionally, much of the argument against the Feeney Amendment focuses on the fact that departures will be eliminated. This is not entirely true. Judges will still be allowed to depart downward as long as they clearly state the reasons for the departure in writing and base the departure on a factor that advances the objectives of sentencing policy set forth in the guidelines, and as long as the factor is one justified by the facts of the case.<sup>214</sup> Only in cases involving child abduction and child sex offenses is the court prohibited from departing downward, unless it finds a mitigating

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with thirty years of service, conducted as part of a symposium on the federal courts); *see also* Michael S. Gerber, *A Judge's View*, LEGAL AFF., March/April 2004, at 74 (including a letter from a current federal district court judge praising his lack of discretion under the current guidelines system because it leads to a fairer, more uniform federal sentencing regime).

210. Merhige, Jr., *supra* note 209, at 886-88.

211. *See* Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 654-55 (1995).

212. *Id.* at 654.

213. *Id.* at 655.

214. *See* U.S.S.C. DEPARTURES REPORT, *supra* note 7, at 9-10 (explaining the PROTECT Act revisions of permissible reasons for reversal of a sentencing decision).

circumstance of a kind or a degree *affirmatively and specifically identified* as a permissible ground for departure.<sup>215</sup> Furthermore, the fact that much of the discretion to depart that district courts previously enjoyed may now be reviewed *de novo* by the federal courts of appeals does not mean that the independence of the federal judiciary as a whole is imperiled, as a higher federal court will still make decisions on the appropriateness of the sentencing decision.<sup>216</sup> The federal courts of appeals have also interpreted narrowly the PROTECT mandate to review departure decisions *de novo*, holding that it applies only to decisions *to depart* and not to a judge's decision *not to depart*.<sup>217</sup>

## 2. Fears of a "Judicial Blacklist" as a Threat to Judicial Independence Are Overstated

Many critics of the Feeney Amendment point to the reporting requirements it creates<sup>218</sup> and fear that there will be a judicial "blacklist" or "hit list" of judges who do not adhere to the government's desired sentence.<sup>219</sup> Chief Justice Rehnquist alluded to such a concern in his speech criticizing the Feeney Amendment.<sup>220</sup> After describing the Samuel Chase impeachment and the political precedent arising out of it that "a judge's *judicial* acts may not serve as a basis for impeachment,"<sup>221</sup> the Chief Justice went on to caution that, although Congress may have a legitimate interest in collecting departure information to legislate effectively, the collection of information on individual judges' sentencing practices

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215. *See id.*

216. *See United States v. Phillips*, 346 F.3d 846, 861 (9th Cir. 2004) (explaining that the power to determine the appropriateness of individual departures remains with the judiciary and thus the PROTECT Act *de novo* standard of review does not violate the separation of powers). Early indications show that, since the passage of the PROTECT Act, federal courts have not been uniformly reversing departure decisions; rather, that the results have been mixed. *See supra* text accompanying notes 68-70.

217. *See United States v. Linn*, 362 F.3d 1261, 1262-63 (9th Cir. 2004).

218. *See supra* notes 18-20, 22-25, 28-34, 45-48 and accompanying text (describing the reporting provisions contained in the Feeney Amendment and the implementation related to those provisions by the U.S. Sentencing Commission and the DOJ).

219. *See supra* Part I.C (describing this critique as coming from the press, opponents of the Feeney Amendment in Congress, and the federal judiciary).

220. Rehnquist Speech, *supra* note 100.

221. *Id.*



could, if used improperly, "intimidate individual judges in the performance of their judicial duties" and thus infringe upon judicial independence.<sup>222</sup> Even though this is a legitimate concern, the implementation of the Feeney Amendment to date and the traditional public role of federal judges mitigate this concern.

The most draconian reporting provisions that Congress imposed upon the DOJ, those that require reporting to Congress each time a judge departs from the guidelines, were obviated by the manner in which the DOJ has responded to the Feeney Amendment. The DOJ has revamped charging and appeal policies, and requires internal reporting of adverse downward departure decisions in order to determine if an appeal is necessary.<sup>223</sup> Although this appeal decision reporting process will include the name of the sentencing judge, it would be ridiculous not to, as it is that judge's decision that is being appealed. There has been no suggestion that, in deciding on whether to appeal *any case*, the government should somehow redact the name of the district judge who presided over the trial, as knowing the name of the judge making the decision does not violate judicial independence. Additionally, the more stringent requirements on reporting to the Sentencing Commission and to the court of appeals, via requiring judges to write the reasons for departure in the written order of judgment and commitment, serve valid purposes.<sup>224</sup> Without this information, it would be very difficult for an appellate court to properly render judgment on the merits of the departure. As for the reports to the Sentencing Commission, as noted above, reporting of sentencing information to the Commission in order to improve the functioning of the system is nothing new.<sup>225</sup> In addition, the Sentencing Commission has already noted that the increased detailed information that the PROTECT Act requires is having a salutary effect on their ability to analyze the departure phenomenon.<sup>226</sup>

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222. *Id.*; see also 2003 FEDERAL JUDICIARY YEAR-END REPORT, *supra* note 111 (alluding to this same concern again in criticizing the Feeney Amendment).

223. See *supra* Part I.B.1 (describing the DOJ implementation of the Feeney Amendment).

224. See *supra* notes 18-20, 45-48 and accompanying text (discussing reporting to the Sentencing Commission); see also *supra* text accompanying notes 9, 57 (discussing the requirement for a written order of judgment and commitment on appeal).

225. See *supra* notes 44-45 and accompanying text.

226. See *supra* text accompanying notes 46-48.

Much of the concern regarding the reporting provisions stems from the use of individual judge's names. This critique seems overly dramatized when one looks at the traditional role of a federal judge. A federal judge is an officer of the United States and conducts much of his business in the public eye. With the exception of *in camera* proceedings held for security and other reasons, a federal court is a transparent body. A judge writes and issues opinions that are published for all to read and holds hearings and trials, for the most part, in a courtroom open to the public. It seems odd, therefore, that critics fear judges will be intimidated by their names being associated with their sentencing decisions, as their names always have been associated with all of their decisions.<sup>227</sup>

When one reads a published opinion of a court of appeals reviewing a sentencing decision, at the outset it clearly states the identity of the sentencing judge—just as it does when an appeals court reviews any decision of a lower court. In addition, when courts render key opinions or decisions in high profile cases, the media widely reports the decision, often including the name of the judge. Some federal judges and others have noted this fact when analyzing the claim that the reporting of individual judges names will serve to intimidate them.<sup>228</sup> For example, one federal district judge in Utah wrote an opinion in support of the contention that a downward departure was appropriate in one particular case even in light of the Feeney Amendment, saying, in reference to concerns about the intimidation of judges by these reporting requirements,

[T]he overriding fact remains that judicial departure decisions (like any other judicial action) are *already* matters of public record. This court's sentencing decisions, for example, are all easily available both in the court's public files and on an internet website .... In any event, since the suggestion has been

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227. See F. James Sensenbrenner, Jr., *Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary*, 87 JUDICATURE 202 (2004) (expressing view that Congress may, constitutionally, obtain and review the public records of the judicial branch, and arguing that federal judges are given life tenure so that they can better withstand public scrutiny and criticism).

228. See Dan Herbeck, *Elfvig Faces Scrutiny Over Lenient Sentences*, BUFF. NEWS, Sept. 5, 2003, at C1 (quoting the Chief Judge of the Western District of New York commenting on the DOJ reporting and appeal policies: "Everything I do in the courtroom is already open to public scrutiny.... If someone wants to report to Washington or appeal one of my sentences, they have the right to do that.").

raised, this court wishes to observe that it is not concerned about close scrutiny of its downward (or upward) departure decisions by Congress, the public, or otherwise.<sup>229</sup>

Others have pointed out that the bedrock Article III constitutional protections of life tenure and undiminished compensation ensure that changes to the sentencing process will not intimidate federal judges.<sup>230</sup>

Another federal judge, in ruling that the PROTECT Act alterations to the sentencing system were constitutional in response to a separation of powers challenge, found that the limitations on discretion to depart and the reporting provisions of the law were not threatening the institutional integrity of the judicial branch.<sup>231</sup> The judge further stated that the reporting requirements and congressional review provided for in the PROTECT Act—which the defendant claimed had an impermissibly intimidating effect on judges—were in many ways not different in substance from the effects of the original Sentencing Reform Act, which the Supreme Court upheld against a separation of powers challenge in *Mistretta v. United States*.<sup>232</sup> Moreover, he explained that any intimidation that may exist would have little additional impact on the sentencing decisions of judges and the integrity of the judicial branch, given that the information requested in the reporting requirements was already available to the public and that the only direction Congress

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229. *United States v. VanLeer*, 270 F. Supp. 2d 1318, 1324 (D. Utah 2003); see also Pamela Manson, *Judge Asserts His Right to Stray from Guidelines*, SALT LAKE TRIB., July 28, 2003, at A1 (describing the *VanLeer* decision).

230. See *United States v. Schnepfer*, 302 F. Supp. 2d 1170, 1198-99 (D. Haw. 2004) (noting that life tenure and undiminished compensation help to ensure that federal judges are not intimidated); Vinegrad, *supra* note 98, at 4 (describing the comments of one Southern District of New York district judge: “they can have their blacklist, but we have life tenure”); see also Editorial, *Monitoring Sentences Will Hardly Intimidate Judges*, TAMPA TRIB., Aug. 19, 2003, at 10 (noting that federal judges, having life tenure, should not be intimidated by the mere reporting of their sentences, and arguing that judges will still make what they believe to be the appropriate sentencing decision).

231. *Schnepfer*, 302 F. Supp. 2d at 1194-99. But see *United States v. Mendoza*, No. 03-CR-730-ALL, 2004 WL 1191118, \*6-7 (C.D. Cal. Jan. 12, 2004) (holding that the requirement on reporting individual judges’ sentencing practices via the process implemented by the DOJ in response to the PROTECT Act violates the separation of powers).

232. *Schnepfer*, 302 F. Supp. 2d at 1194-97. In *Mistretta*, the Supreme Court held that nothing in the Sentencing Reform Act “creates any coercive power over members of the Judicial Branch.” *Mistretta v. United States*, 488 U.S. 361, 406 n.28 (1989).

could give in altering the guidelines system was through validly enacted legislation.<sup>233</sup> Finally, the judge noted that disagreements, even public ones, between either the judicial branch and the executive branch or the judicial branch and Congress, are common and that judges are free to state their views and not to be swayed improperly by the other branches because of the constitutionally imposed safeguards of life tenure and undiminished compensation.<sup>234</sup>

The actions of federal judges, both over the history of our nation and in response to the Feeney Amendment,<sup>235</sup> demonstrate that, as an open body, the federal judiciary is not shy about making the choices it believes to be correct under the law, regardless of whether their decisions are open to public scrutiny. It is hard to imagine that sentencing decisions, even after the Feeney Amendment, will be any exception to this general practice.

### CONCLUSION

The passage of the Feeney Amendment, which restricts the ability of federal judges to depart downward from the U.S. Sentencing Guidelines, has been widely criticized on a variety of grounds. Critiques of the Feeney Amendment as a policy matter may be warranted. This Note has shown, however, that the overall theme that critics of the amendment advance—that the amendment violates the principle of judicial independence—is unsupported. Judicial independence does not include policymaking discretion by judges and the provisions of the amendment are consistent with the constitutional power of Congress to set policy, including sentencing policy. In addition, the perceived attacks on the independent judiciary are not as severe as critics would make them seem. By co-opting one of the key tenets underlying our constitutional system of government to make a policy argument about the merits of sentencing policy, many of the critics of the Feeney Amendment

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233. *Schnepper*, 302 F. Supp. 2d at 1196-97.

234. *Id.* at 1198-1200.

235. See *supra* Part I.C.3 for a discussion of the response of the judiciary to the Feeney Amendment, both in their judicial acts and in public statements; see also *supra* note 204 and accompanying text (discussing the willingness of the courts to hear constitutional challenges to the Sentencing Guidelines and the Feeney Amendment).

have expanded the concept of judicial independence beyond its appropriate reach.

#### AUTHOR'S NOTE

In June 2004, the U.S. Supreme Court decided *Blakely v. Washington*,<sup>236</sup> a case that could have a major impact on the future of the U.S. Sentencing Guidelines. This case and the aftermath it has spawned in the federal courts do not implicate the issues of judicial independence discussed in this Note. Yet this Section will briefly outline the issues since they are relevant to the future of the Sentencing Guidelines system as a whole. In *Blakely*, the 5-4 majority of the Court held that the sentence imposed on a defendant under the Washington state sentencing system, although within the statutory maximum punishment for his crime of conviction under Washington law, violated the defendant's Sixth Amendment right to a trial by jury. The Court applied the principle it had announced in *Apprendi v. New Jersey*<sup>237</sup> that "[o]ther than a fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt."<sup>238</sup>

What was new about *Blakely*, however, was the refining of the idea of what is a "statutory maximum." According to the majority, it no longer means the overall upper limit of the statutory punishment set by the legislature, but instead means the upper limit of the presumptive guideline range that would apply in the determinate sentencing guidelines system based on the facts reflected in the jury's verdict or admitted by the defendant.<sup>239</sup> The judge's imposition, thus, was based on a judicial finding of "deliberate cruelty," of an "exceptional sentence" of ninety months—less than the statutory maximum but greater than the high end of the presumptive guidelines range for the crime for which the jury

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236. 124 S. Ct. 2531 (2004).

237. 530 U.S. 466 (2000).

238. *Id.* at 490.

239. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S. Ct. at 2537.

convicted him—was deemed to violate the defendant's Sixth Amendment rights.<sup>240</sup>

The Supreme Court majority explicitly stated that “[t]he Federal Guidelines are not before us, and we express no opinion on them.”<sup>241</sup> Yet, that statement has not stopped the decision from greatly impacting the Federal Sentencing Guidelines landscape. Justice O'Connor, dissenting in *Blakely*, predicted that the decision would affect many sentencing guideline systems, including the federal system.<sup>242</sup> She pointed out the similarities between the federal and Washington state guidelines, and noted that the structural differences between the two systems may be irrelevant in the majority's constitutional analysis, and may in fact make the federal guidelines more vulnerable to constitutional attack.<sup>243</sup> She predicted that the *Blakely* ruling will have disastrous consequences for both the federal guidelines and various state guidelines sentencing schemes,<sup>244</sup> stating that, “[o]ver 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy,”<sup>245</sup> and noting the difficult questions that will immediately face lower federal courts as a result of the *Blakely* ruling.<sup>246</sup>

There have in fact been serious reverberations from *Blakely* in the federal courts and a great deal of confusion regarding its effect on sentencing under the Sentencing Guidelines.<sup>247</sup> Some federal district and appeals courts have held that *Blakely* does apply to the

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240. *Id.* at 2537-38.

241. *Id.* at 2538 n.9.

242. Justice O'Connor stated, “[i]f the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.” *Id.* at 2550 (O'Connor, J., dissenting). Justice Breyer, in his dissent, was also not optimistic about the future of the Federal Sentencing Guidelines—“[p]erhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.” *Id.* at 2561 (Breyer, J., dissenting).

243. *Id.* at 2549-50 (O'Connor, J., dissenting).

244. *Id.* at 2548-50.

245. *Id.* at 2550.

246. *Id.* at 2549.

247. For a more in-depth discussion of the effects of the *Blakely* decision on sentencing in the federal courts, see generally Steven G. Kalar et al., *A Blakely Primer: An End to the Federal Sentencing Guidelines?*, CHAMPION, Aug. 28, 2004, at 10; see also Amy Baron-Evans & David Debold, *Blakely v. Washington: A Survival Guide for Practitioners*, ANDREWS WHITE COLLAR CRIME REP., Aug. 30, 2004, at 2; Stephanos Bibas, *How Long?: A Close Supreme Court Decision Trades Decades of Sentencing Reform for a Confusing Future*, LEGAL TIMES, July 5, 2004, at 52; Laurie P. Cohen & Gary Fields, *Legal Quagmire: High Court Ruling Unleashes Chaos Over Sentencing*, WALL ST. J., July 14, 2004, at A1.

Sentencing Guidelines and thus the Guidelines are unconstitutional due to the various enhancements that may be added to a sentence based on a judge's finding of facts not proven to a jury or admitted by a defendant.<sup>248</sup> Other courts of appeals have held that *Blakely* does not affect the Federal Sentencing Guidelines,<sup>249</sup> and at least one court of appeals certified the question of *Blakely* applicability to the Supreme Court.<sup>250</sup> Additionally, the district courts have applied a myriad of different sentencing approaches in the wake of the *Blakely* decision.<sup>251</sup> Due to this confusion, the Supreme Court has agreed, at the urging of the DOJ, to hear two cases on this issue on an expedited basis.<sup>252</sup> The cases, both of which are appeals from lower court rulings that held the Guidelines unconstitutional in light of *Blakely*, present two questions for decision by the Court. First, whether *Blakely* applies to the Federal Guidelines such that imposing an enhanced sentence based on judicial fact-finding violates the Sixth Amendment.<sup>253</sup> Second, if the answer to the first question is "yes," are the Guidelines as a whole inapplicable in such a case as a matter of severability analysis.<sup>254</sup> Although how the

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248. See *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 2004 WL 1713654, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104); *United States v. King*, 328 F. Supp. 2d 1276 (M.D. Fla. 2004); *United States v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass. June 18, 2004); *United States v. Marrero*, 325 F. Supp. 2d 453 (S.D.N.Y. 2004); *United States v. Shamblin*, 323 F. Supp. 2d 757 (S.D.W. Va. 2004); *cf. United States v. Green*, No. CR.A. 02-10054-WGY, 2004 WL 1381101 (D. Mass. 2004) (pre-*Blakely* decision holding Guidelines unconstitutional on Sixth Amendment grounds); *United States v. Harris*, 325 F. Supp. 2d 562 (W.D. Pa. 2004); *United States v. Croxford*, 324 F. Supp. 2d 1255 (D. Utah 2004).

249. See *United States v. Hammoud*, No. 03-4253, 2004 WL 2005622 (4th Cir. Sept. 8, 2004); *United States v. Koch*, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004); *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004).

250. See *United States v. Penaranda*, 375 F.3d 238 (2nd Cir. 2004).

251. See *Baron-Evans & Debold*, *supra* note 247, at 2 (describing the various sentencing approaches taken by federal district courts since the *Blakely* decision).

252. See Shelly Murphy, *Top Court to Weigh Sentencing Guide*, BOSTON GLOBE, Aug. 3, 2004, at B2; see also *United States v. Booker*, No. 04-104, 2004 WL 1713654 (U.S. Aug. 2, 2004) (mem.) (writ of certiorari to the Seventh Circuit granted; case consolidated with *United States v. Fanfan*; briefing schedule established; oral argument set for Oct. 4, 2004); *United States v. Fanfan*, No. 04-104, 2004 WL 1713655 (U.S. Aug. 2, 2004) (mem.) (writ of certiorari before judgment of the First Circuit granted; case consolidated with *United States v. Booker*; briefing schedule established; oral argument set for Oct. 4, 2004).

253. Petition for Writ of Certiorari of the United States of America at I, *United States v. Booker*, No. 04-104, 2004 WL 1713654 (U.S. Aug. 2, 2004) (mem.).

254. *Id.*

Court will rule is uncertain,<sup>255</sup> this issue will be resolved very soon, as the cases are set to be argued in early October, 2004.<sup>256</sup>

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255. See Baron-Evans & Debold, *supra* note 247, at 2 (speculating on various possibilities of how the Supreme Court may rule). There is also the possibility that Congress may attempt to solve the problem by legislating to alter the nature of the Guidelines, although both the DOJ and the federal judiciary have urged Congress to defer a legislative solution until the Supreme Court clarifies its stance on the application of *Blakely* to the Sentencing Guidelines. See Cohen & Fields, *supra* note 247, at A1.

256. See Murphy, *supra* note 252, at B2.

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