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WHITE-COLLAR CRIME

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Challenging the Feeney Amendment: Judicial, Defense Responses

THE FEDERAL JUDICIARY appears to be poised for a pitched battle with Congress and the Justice Department over the future of judicial discretion in sentencing under the United States Sentencing Guidelines.

With the exception of occasional expressions of dismay and isolated critiques of the regime imposed by the guidelines, the judiciary as a whole has, until now, accepted the basic premise that sentencing can, and indeed should be, calculated in an almost purely mechanical fashion, allowing for judicial discretion only at the margins or under the most exceptional circumstances. But Congress' most recent directive to the Sentencing Commission may have gone too far.

The Feeney Amendment, tacked on to legislation aimed at fighting child exploitation, called for radical new limitations on the judges' already circumscribed ability to depart from the guidelines and imposed pernicious new reporting requirements that expose confidential sentencing documents as well as individual judge's sentencing decisions to congressional scrutiny.

Now the isolated, outspoken judges of the past have been joined by moderate and

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even conservative colleagues decrying the Feeney Amendment as an affront to judicial discretion and a threat to judicial autonomy and independence. But the real losers in this battle among the three federal powers are the criminal defendants. Each restriction imposed on the courts in fashioning criminal sentences chips away at a defendant's hope for mercy and individualized justice. It may be, however, that the courts will now be more sympathetic than in the past to legal challenges to the guidelines.

Effect of the Feeney Amendment

The Feeney Amendment, which calls for sweeping changes in sentencing practice for all federal crimes, was a last-minute add-on to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003[1] (the PROTECT Act, more commonly known as the "Amber Alert" law). It was added to the House version of that bill without notice to, let alone consultation with the Sentencing Commission, the judiciary or the bar, and was the subject of only 20 minutes debate. After vehement opposition, some of which came in the form of a letter from Chief Justice William Rehnquist to the Senate Judiciary Committee, the original version of the amendment was watered-down before its eventual passage. But even in its milder state, the amendment draws a line in the sand, clearly establishing Congress' position that judges' ability to depart downward in sentencing should be curtailed.

The final version of the amendment eliminated a number of grounds for departure for defendants convicted of child exploitation crimes and bars the Sentencing Commission from adding any new grounds for departure for a period of two years. It also instructs the commission to amend the guidelines so as to "ensure that the incidence of downward departures are substantially reduced." The commission's response was a major overhaul of the sections relating to downward departures. In amendments that took effect on Oct. 27, 2003, the guidelines have eliminated certain grounds for departure for all defendants, including departures based on gambling addiction and the payment of legally required restitution. The new guidelines have eliminated acceptance of responsibility or a defendant's minor role in the offense as independent grounds for departure, although these latter two grounds remain legitimate grounds for reduction of a sentence under other sections of the guidelines.

The recent guidelines amendments also limit the circumstances under which judges may depart based on extraordinary family circumstances and aberrant behavior — two departures which, although rarely granted, had previously offered some hope of leniency to white-collar criminals. Now, a court considering a departure based on a defendant's family ties and responsibility must consider factors such as: the seriousness of the offense; the involvement of family members in the offense; and the danger to members of the

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defendant's family as a result of the offense. If the departure is based on the loss of financial support or caretaking provided by the defendant, the court may grant the departure only if service of a sentence within the applicable range will: (1) "cause a substantial, direct, and specific loss of essential" caretaking or support, (2) to an extent beyond that ordinarily caused by incarceration of a family member, (3) for which no effective ameliorative programs are reasonably available, and (4) which will effectively be redressed by the departure.[2]

The provision authorizing departure for aberrant behavior now precludes this departure for any defendant who has a prior conviction or significant prior criminal behavior. The commentary has been amended to clarify that the limitation requiring that aberrant behavior departures be granted only for conduct constituting a single transaction without significant planning is likely to preclude such departures for fraud schemes which generally involve "repetitive acts" and "significant planning."[3]

The Feeney Amendment undermines the availability of downward departures in other ways. It limits the authority of prosecutors to develop and implement early disposition programs and the degree of departure that can be granted based on participation in such programs. It changes the scope of appellate review for departure decisions from an abuse of discretion standard to one of de novo review and restricts the bases on which a departure may be granted on remand from an appeal to those grounds found permissible by the appellate court and specifically reduced to writing in the district court's original sentencing order.[4]

The amendment also takes aim at the judges who grant departures. It requires the Sentencing Commission to make available to the House and Senate judiciary committees all the underlying documents it receives from the district court regarding a sentence, including the presentence report and all supporting documentation. Most notably, it requires the commission to provide Congress with judge-specific data on departures that is to be complied by the Justice Department.

Judicial Outrage

The federal judiciary has reacted to the oversight and reporting requirements of the Feeney Amendment swiftly and vociferously. As reported recently in The New York Times,[5] individual judges within the U.S. Court of Appeals for the Second Circuit have spoken out in various ways against this aspect of the guidelines — ranging from the order of Judge Sterling Johnson of the U.S. District Court for the Eastern District of New York sealing all documents in cases before him and forbidding their examination by Congress without his express approval, to a heated exchange between a panel of the Court of Appeals and an assistant United States attorney concerning the extent of judicial discretion under the guidelines at oral argument in *United States v. Santiago*.[6] The U.S. Court of Appeals for the Ninth Circuit announced last fall that it would form a task force to study the guidelines, amid remarks from its Chief Judge, Mary M. Schroeder, that the Federal Sentencing Guidelines and mandatory minimums do not work well.[7]

New restrictions fall within prohibitions of the Ex Post Facto Clause to the extent that defendants would have been entitled to departures under the the old guidelines.

Even Chief Justice Rehnquist has spoken out against the Feeney Amendment during a speech delivered to the Federal Judges Association Board of Directors Meeting last May. While acknowledging Congress' legitimate need to collect information about sentencing to aid it in its legislative judgment, he stressed that "[t]here can also be no doubt that the subject matter of the questions, and whether they target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."

Judicial opposition to the Feeney Amendment coalesced in September, when the Judicial Conference voted to throw its support behind a bill currently pending in both the House (sponsored by Representative John Conyers Jr., D-Mich.) and the Senate (sponsored by Senator Edward M. Kennedy, D-Mass.), which would repeal those aspects of the PROTECT Act that do not relate to preventing the exploitation of children. That legislation, known as the JUDGES Act (Judicial Use of Discretion to Guarantee Equity in Sentencing)[8] would require the Sentencing Commission to produce a study of the incidence of and grounds for downward departures, solicit the views of the judiciary, hold public hearings on the subject of departures, and repeal those aspects of the PROTECT act aimed at curtailing downward departures and imposing judge-specific reporting requirements on the attorney general and the Sentencing Commission.[9]

Defense Strategy

As comforting as it is that federal judges have taken up the cause of preserving downward departures, the PROTECT Act remains in effect, at least for the time being, and defendants and their counsel must grapple with its immediate impact while hoping for its repeal. Obviously, to the extent a defendant qualifies for a departure under the new, more-stringent guidelines, any and all arguments for departure should be vigorously asserted at sentencing.

Counsel should also be alert to ex post facto concerns raised by the Feeney Amendment and the resulting guidelines amendments. The Supreme Court has long recognized that the Ex Post Facto Clause bars retroactive application of unfavorable sentencing provisions[10] and the guidelines themselves provide that to the extent application of a new guideline would violate the Ex Post Facto Clause, the guideline in effect at the time the crime was committed should be applied.[11] Of course, this leaves it to the defense lawyer to determine in the first instance what particular aspects of a sentence imposed under the Feeney Amendment and the new guidelines are subject to challenge on this basis. Clearly, the new restrictions on departures fall squarely within the prohibition of the Ex Post Facto Clause to the extent that a defendant would have been entitled to a departure under the old version of the guidelines that is no longer available under the amended guidelines. Similarly, to the extent that a defendant's grounds for departure are reduced on

remand as a result of the limitations imposed by the Feeney Amendment, the pre-Feeney rules should apply to re-sentencing of a defendant whose offense was committed before April 30, 2003. Whether the Ex Post Facto Clause governs the heightened standard of appellate review raises more difficult questions, particularly for appeals of sentences imposed after the effective date of the amendment. To the extent the government has a lower burden on appeal from a downward departure, the defendant has a colorable argument that application of that standard runs afoul of the Ex Post Facto Clause. However, in the context of changes to habeas corpus procedures under AEDPA, the Supreme Court has permitted immediate application of new appellate standards, raising some doubt as to whether the Ex Post Facto Clause stands as a bar to immediate application of the more stringent appellate review put in place by Feeney.[12]

Separation of Powers

Another, more ambitious option that defense counsel should consider is a broader challenge to the newly configured guidelines as a violation of the separation of powers doctrine. Such a challenge would argue that the new judge-specific reporting requirements imposed by the Feeney Amendment unduly interfere with judicial independence, rendering unconstitutional the guidelines in their entirety — or at least those portions that relate to downward departures.

Previous arguments that the guidelines violate the separation of powers doctrine have been unavailing, but the Feeney Amendment intrudes farther than before into judicial decision making and may have provided new, more-potent ammunition for a constitutional challenge on separation of powers grounds. In *United State v. Mistretta*,[13] the Supreme Court rebuffed an early challenge to the original structure of the guidelines and the Sentencing Commission, explaining that unconstitutional interference with the judicial branch occurs only when that branch has been assigned tasks more appropriately accomplished by one of the other branches or when a provision of law "impermissibly threatens the institutional integrity of the Judicial Branch." It went on to hold that the guidelines violated neither of these precepts.

But the challenge in *Mistretta* centered primarily on the composition of the Sentencing Commission and whether requiring judges to sit on the commission required them to perform extrajudicial functions or interfered with their judicial independence. By contrast, the separation of powers challenge to Feeney lies in the congressionally mandated reporting requirements that will subject judges who grant downward departures to individual scrutiny. Such efforts go beyond ordinary congressional oversight. Many judges have echoed Judge Rehnquist's lament that these requirements constitute an overt effort to intimidate those judges who persist in showing lenience when sentencing criminal defendants despite congressional dismay.

The separation of powers doctrine guarantees that defendants have the "right to have claims decided by judges who are free of potential domination by other branches of government."[14] To the extent that judges are concerned that they will be called on the congressional carpet for granting departures, they cannot function entirely independently of Congress, or of the executive branch which has been charged with reporting such judges to Congress. And such fears are not merely hypothetical. Congress has already threatened to subpoena the sentencing records of one outspoken critic of the guidelines — Chief Judge James Rosenbaum of the U.S. District Court for the District of Minnesota. At least one federal court has already based its refusal to grant a downward departure on its fear that doing so might subject the judge to congressional scrutiny,[15] and not all judges are likely to be as forthcoming about the intimidation they feel by virtue of the Feeney Amendment's reporting requirements. Moreover, even if some judges are able to withstand congressional pressure without having it affect their sentencing decisions, separation of powers is still at risk if the public confidence in judicial impartiality is shaken. As Southern District Judge Robert P. Patterson noted in his recent decision in *United States v. Kim*,[16] "[i]f, as a result of Congress' increasing pressure to eliminate any departures from the Guidelines, trial judges' sentencing decisions do not comply with the basic tenets of fairness and justice, the confidence of our citizens that the courts play an independent and fair role in the dispensation of justice will be diminished or lost."

It certainly appears that the combination of the content of the Feeney Amendment and the heavy-handed approach taken by Congress in challenging the motivation of judges who grant departures, may have rendered the federal courts far more amenable than before to a separation of powers challenge to the guidelines. Judges at all levels of the federal judiciary are clearly bridling at the latest efforts to curb their discretion through direct legislation and more indirect efforts at intimidation. Just when we thought the Guidelines were here to stay, the time may well be ripe for a successful constitutional challenge.

(1) Pub. L. No. 108-21 (April 30, 2003).

(2) §5H1.6.

(3) §5K2.20.

(4) PROTECT ACT §401 (e), codified at 18 USC §3742(g) See Lisa A. Cahill and Kevin F. Clines, "Waiver Dangers Under The Protect Act," The New York Law Journal, Aug. 23, 2003 (noting that this provision poses a risk of waiver for any ground not raised at a defendant's original sentencing).

(5) Ian Urbina, "New York's Federal Judges Protest Sentencing Procedures," The New York Times, Dec. 8, 2003.

(6) No. 02-1217, (2d Cir.), reported in Tom Perrotta, "Panel Laments Lack of Judicial Discretion," NYLJ Oct. 28, 2003.

(7) Ninth Circuit Court of Appeals, News Release, Sept. 26, 2003.

(8) 108th Cong. 1st Sess. H.R. 2213 & S. 1086.

(9) The inquiry required by this legislation would go a long way toward debunking the assumption underlying the Feeney Amendment that district judges are increasing the rate at which the grant departures in defiance of the Guidelines. The National Association of Criminal Defense Attorneys has concluded that any increase in the number of departures granted in recent years is attributable to "government-driven" requests for departures based on substantial assistance or in connection with "fast-track" programs to expedite the prosecution of immigration cases, rather than by independent exercises of judicial discretion.

(10) See, e.g., *Miller v. Florida*, 482 US 423 (1987); *Weaver v. Graham*, 450 US 24 (1981).

(11) §1B1.11(b).

(12) See Peter Goldberger & Felicia Sarner, "The Feeney Amendment: Effective Date and ex post facto Issues," Champion (July 2003), available at http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Feeney_June03.pdf.

(13) 488 US 361 (1989).

(14) 478 US 833 (1986). See also, *In re Verizon Internet Services, Inc.*, 257 FSupp2d 244 (D.D.C. 2003) (independence of the judiciary unconstitutionally compromised by executive or legislative action that prevents judge from "approach[ing] any dispute … in an entirely objective, unbiased fashion.").

(15) *United States v. Kirsch*, No. 02 Cr. 288, 2003 WL 22384760 (D. Minn. 10/17/03).

(16) No. 03 413, 2003 WL 22391190 (SDNY Oct. 20, 2003).