The Feeney Amendment, United States v. Booker, and New Opportunities for the Courts and Congress

O. Dean Sanderford

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INTRODUCTION

Observers spanning the political spectrum heralded the passage of the Sentencing Reform Act of 1984 ("SRA")[1] as a cure for the widespread sentencing disparities existing throughout the federal criminal justice system due to the virtually unfettered discretion of sentencing judges. Rather than vest sentencing discretion in one governmental body, the SRA divided the responsibilities among three entities, granting to each duties suited to its institutional role in government. Congress, in its broad policymaking capacity, would issue general directives to the Sentencing Commission ("Commission"), an agency situated within the judicial branch.[2] The judiciary, the body with wisdom accumulated through decades of hands-on experience with sentencing, would comprise a majority of the Commission. The Commission, a panel of specialized experts, would then produce a comprehensive set of guidelines designed to promote uniformity and proportionality in sentencing across the

1. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586 (2000)).

2. The U.S. Sentencing Commission, created by the SRA, is an independent agency within the judicial branch. 28 U.S.C. § 991(a) (2000). The Supreme Court settled the constitutionality of this delegation in *Mistretta v. United States*, 488 U.S. 361, 412 (1989). The duty of the Commission is to draft sentencing standards in order to ensure uniformity in sentencing for all federal criminal prosecutions, *see, e.g.*, 28 U.S.C. § 991(b)(1) (2000), and to periodically revise those standards in order to better achieve the purposes of the SRA. *Id.* at § 994(o).

criminal justice system—the United States Sentencing Guidelines ("Guidelines").

In addition, district court judges were to play a crucial role in assisting the Commission to fine-tune the Guidelines through a so-called "departure" mechanism.[3] Congress and the Commission, aware that they lacked the case-by-case perspective of the trial bench, understood that the Commission would be unable to account for every factor relevant to achieving the SRA's goals of proportionality and uniformity in each individual case. Accordingly, trial judges were given the power to depart from the Guidelines when the "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."[4]

The division of labor between Congress, the Commission, and the Judiciary was the delicate balance of power struck by the SRA after years of debate in Congress. The SRA gave each entity responsibilities corresponding to its own unique perspectives, strengths, and expertise. Many of the failures attributed to the federal sentencing system since the enactment of the SRA can be traced to some action, by one participant or another, that disrupted the SRA's balance of powers. Some complain that the Commission took an unjustifiably narrow view of the trial courts' ability to depart from the Guidelines.[5] Others point to congressional usurpation, through its enactment of mandatory minimum statutes, of the Commission's duty to design sentencing ranges for particular crimes.[6]

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3. Generally speaking, the offense of conviction and other relevant factors determine a narrow range of punishment to which the court must sentence an offender. As will be explained in more detail below, the Guidelines permit the sentencing judge to "depart" from the Guidelines and sentence an offender to a punishment outside the prescribed range in unusual circumstances. *See* UNITED STATES SENTENCING GUIDELINES MANUAL § 5k2.0 (2003) [hereinafter 2003 U.S.S.G.]. For examples of departures, see *infra* note 63 and accompanying text.

4. Pub. L. 98-473, § 212(b), 98 Stat. 1987, (1990) (codified as amended at 18 U.S.C.A. § 3553(b)(1) (West Supp. 2004)).

5. *See, e.g.*, Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 48–49 (2000) (arguing that the Commission took a narrow and restrictive approach to departures); Marc Miller, *Guidelines Are Not Enough: The Need For Written Sentencing Opinions*, 7 BEHAV. SCI. & L. 3, 11 (1989) (noting the reformers' assumption that the vast majority of cases would fall within the prescribed range).

6. *See, e.g.*, Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 99–100 (2000) (criticizing mandatory minimum statutes and noting that they signal congressional distrust of the Commission); Norval Morris, *Towards Principled Sentencing*, 37 MD. L.

The most recent, perhaps the most drastic, and certainly the most blatantly intentional example of such disruption is the Feeney Amendment to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act,[7] an amendment tacked onto a politically popular bill after mere hours of debate.[8]

The objective of the Amendment is to reduce the role of the judiciary in formulating sentencing policy, in large part through further curtailing judicial discretion at sentencing.[9] Though the Amendment achieves this goal primarily by diminishing judicial discretion to depart from the Guidelines range at sentencing, the Amendment's provisions viewed as a whole evidence a distrust of the federal trial bench. While the SRA viewed the judiciary as a cooperating participant in the evolution of federal sentencing law, the Feeney Amendment regards the trial bench as an enemy who must be carefully monitored to ensure compliance with the Guidelines.[10]

Among other things, the Feeney Amendment requires district judges to provide written justifications for any departure from the Guidelines;[11] holds the chief judge in each district individually accountable for compiling a voluminous report on each criminal case tried in the district;[12] orders the Commission "to ensure that the

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REV. 267, 279 (1977) (severely criticizing mandatory minimum statutes generally); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 848 (1992) (noting that mandatory minimum statutes "result in arbitrarily harsh sentences disproportionate to culpability").

7. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

8. The Feeney Amendment, presented by Rep. Tom Feeney of Florida, was added to S. 151, the PROTECT ACT, as section 109 of the engrossed House Amendment to S. 151. *See* H.R. CONF. REP. NO. 108-66, at 58 (2003), *reprinted in* 2003 U.S.C.A.A.N. 683, 693; *see also* Amendment included in Final Version of Bill posted on Rep. Feeney's House website, *at* http://www.house.gov/feeney/downloads/feeneyamd/confrpt.pdf (last visited Jan. 24, 2005) (on file with the North Carolina Law Review). On absence of discussion and debate, see 149 CONG. REC. S5120 (statement of Sen. Kennedy).

9. *See* Part II.

10. Senator Kennedy maintains that certain provisions of the Feeney Amendment are clearly intended to create a "blacklist" of judges who depart from the prescribed Guidelines range. 149 CONG. REC. S5118 (statement of Sen. Kennedy). Chief Justice Rehnquist noted that some provisions may amount to "intimidation" of federal trial judges. *See* Mark H. Allenbaugh, *The PROTECT Act's Provisions, and the Attorney General's Controversial Memo: An Assault Against the Federal Courts*, FINDLAW, *at* http://writ.findlaw.com/allenbaugh/20030813.html (Aug. 13, 2003) (on file with the North Carolina Law Review).

11. PROTECT Act, § 401(c), 117 Stat. 650, 669–70 (amending 18 U.S.C. § 3553(c) (2000)).

12. *Id.* § 401(h), 117 Stat. at 672 (amending 28 U.S.C. § 994(w)(2000)).

incidence of downward departures are substantially reduced";[13] and diminishes the voice of the judiciary on the Commission itself.[14]

As one may expect, many federal judges responded angrily to the new law. U.S. District Judge John S. Martin, declaring that he "no longer want[ed] to be part of our unjust criminal justice system," announced his resignation in a *New York Times* op-ed.[15] Judge Bright of the Eighth Circuit Court of Appeals wrote:

> Let me say further that judges generally do not object to appropriate guidelines for sentencing decisions but the time has come for major reform in the system. I say in this concurring opinion, as I have said in other sentencing opinions that I have written, "Is anyone out there listening?"[16]

Even Chief Justice William H. Rehnquist has taken issue with some of the Amendment's provisions.[17] The Judicial Conference of the United States, a panel of twenty-seven federal judges, voted unanimously to ask Congress to repeal the Feeney Amendment.[18]

But even as Congress was in the process of strengthening the legal authority of the Guidelines, the Supreme Court was moving inexorably towards invalidating them. Starting with its decision in *Apprendi v. New Jersey*,[19] the Court began to redefine the meaning of the Sixth Amendment's jury trial right.[20] The fate of the Guidelines was all but sealed when the Court, in *Blakely v. Washington*,[21]

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13. *Id.* § 401(m)(2)(A), 117 Stat. at 675 (amending 28 U.S.C. § 994 (2000)).

14. The SRA previously provided that *at least* three of the Commission's voting members were to be members of the federal judiciary. *See* 28 U.S.C. § 991(a) (2000). After the passage of the Feeney Amendment, federal judges may hold a *maximum* of three seats on the Commission. § 401(n)(1), 117 Stat. at 675–76 (amending 28 U.S.C. § 991(a)).

15. John S. Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

16. United States v. Flores, 336 F.3d 760, 768 (8th Cir. 2003) (Bright, J., concurring) (quoting United States v. Alatorre, 207 F.3d 1078, 1080 (8th Cir. 2000) (Bright, J., concurring)).

17. Chief Justice Rehnquist wrote that the Feeney Amendment will " 'seriously impair the ability of the courts to impose just and responsible sentences.' " 149 CONG. REC. S5120 (statement of Sen. Kennedy) (quoting letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy (Apr. 3, 2003)). *See* Allenbaugh, *supra* note 10 (discussing downward departures and the federal judiciary's anger at the Feeney Amendment).

18. Linda Greenhouse, *Judges Seek Repeal of Law on Sentencing*, N.Y. TIMES, Sept. 24, 2003, at A23.

19. 530 U.S. 466 (2000).

20. *Id.* at 490 (holding that a jury must find beyond a reasonable doubt any fact that authorizes an increase in the maximum sentence).

21. 124 S. Ct. 2531 (2004).

invalidated Washington State's determinate sentencing scheme to the extent that it permitted facts found only by a sentencing judge to enhance a defendant's sentence beyond that which the jury verdict alone would support.[22] Thus, few were surprised when the Court, squarely faced with the issue in *United States v. Booker*,[23] invalidated the Guidelines system on the same grounds.[24] The Court's remedy, on the other hand, was unexpected. Rather than engraft the Sixth Amendment's requirement that the jury find all facts relevant to increases in punishment, the Court struck just two provisions of the SRA, rendering the Guidelines advisory,[25] and subjecting sentences to "reasonableness" review in the appellate courts.[26] Though the Court rendered the Guidelines advisory, it preserved a key provision that requires sentencing courts to consider, among other factors, the sentence prescribed by the Guidelines.[27] Thus, the Guidelines are now only advisory, but must be consulted.

That the Feeney Amendment and *Booker* push in opposite directions is obvious. While the Feeney Amendment sought to further curtail judicial discretion at sentencing by "mak[ing] Guidelines sentencing even more mandatory than it had been,"[28] *Booker* seemingly returned to the district courts more sentencing discretion than they have enjoyed since the SRA's initial passage. Yet *Booker* preserved both the Guidelines themselves *and* key provisions of the Feeney Amendment, including the statement of reasons required whenever a sentencing court departs from the Guidelines range, and the reporting requirements that make those reasons available to both Congress and the Attorney General.[29]

This Comment, after recounting a brief history of sentencing reform,[30] explores the current state of federal sentencing law by analyzing in detail the key provisions of the Feeney Amendment[31] and the Court's decision in *Booker*.[32] It then examines the effects of *Booker* on the Feeney Amendment and attempts to determine just

22. *Id.* at 2537.
23. 125 S.Ct. 738 (2005).
24. *Id.* at 749–52 (majority opinion of Stevens, J.).
25. *Id.* at 764 (majority opinion of Breyer, J.).
26. *Id.* at 765 (majority opinion of Breyer, J.).
27. *Id.* at 767 (majority opinion of Breyer, J.).
28. *Id.* at 765 (majority opinion of Breyer, J.).
29. See *infra* Part II for discussions of these Feeney Amendment requirements.
30. *See infra* Part I.
31. *See infra* Part II.
32. *See infra* Part III.A.

how much discretion district courts enjoy after *Booker*.[33] As brief analysis of two recent district court opinions reveals, only time will tell.

Yet, regardless of how much discretion sentencing judges enjoy post-*Booker*, the combination of the multi-factored approach to sentencing commanded by *Booker* and the Feeney Amendment's requirement of written reasons for each departure from the Guidelines presents district courts with an unprecedented opportunity to regain the position envisioned for them by the SRA and contribute to the formation of future sentencing policy. This Comment explores that opportunity and draws attention to a recent opinion that exemplifies the approach sentencing courts should take.[34]

As Justice Breyer observed, however, Congress is likely to have the last word.[35] Thus, this Comment concludes by suggesting to Congress that it act only after careful study of the post-*Booker* regime.[36] *Booker* has brought the balance of power in sentencing law and policy closer to the original intentions of the SRA than it has been for years. Perhaps in reflecting on post-*Booker* decisions, Congress will rediscover the valuable insights that sentencing courts have to offer.

I. HISTORY

In the pre-Guidelines era, sentencing judges in the federal system enjoyed virtually unfettered discretion.[37] Because rehabilitation was the dominant theory of punishment, people generally believed that an offender's sentence should be tailored to fit the needs of each individual defendant.[38] The predominant players in sentencing decisions were the judge, who set maximum and minimum terms of imprisonment, and parole officers, who determined the actual time a defendant spent in prison on the theory that a proper sentence could not be formulated in advance.[39] Sentencing decisions were subject to

33. *See infra* Part III.B.

34. *See infra* Part IV.

35. United States v. Booker, 125 S.Ct. 738, 768 (2005) (majority opinion of Breyer, J.).

36. *See infra* Part V.

37. *See* Mistretta v. United States, 488 U.S. 361, 363 (1989); Berman, *supra* note 5, at 25.

38. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 3 (1981) (stating that rehabilitation was the dominant theory of punishment until the late 1960s).

39. The Board of Parole was created by Congress in 1948. *See* Act of June 25, 1948, ch. 311, 62 Stat. 854 (codified at 18 U.S.C. § 4201), *repealed by* Pub. L. 98-473, § 218(a)(5), 1984 U.S.C.A.A.N. (98 Stat.) 2027. *See also* Robert W. Sweet et al., *Towards a Common*

extremely deferential appellate review, leaving virtually no check on the district courts' imposition of sentences or the parole boards' eligibility decisions.[40] By the mid-1970s the rehabilitative model began to fall into disrepute and people became increasingly concerned with the erratic and widely disparate sentences meted out to criminal defendants.[41] Especially distressing to many was the growing body of evidence indicating that an offender's race, socio-economic class, and gender accounted for many of the disparities.[42] Many people blamed the disparities on the judiciary.[43]

Because unguided discretion was viewed as the principal cause of sentencing disparities, reformers attempted to formulate mechanisms that would curtail judicial discretion and rationalize the sentencing process.[44] The most influential figure in the reform movement was District Judge Marvin E. Frankel, whom Senator Edward M. Kennedy, the primary proponent of the SRA, called the "father of sentencing reform."[45] Judge Frankel pointed to the system's failure to articulate punishment's underlying rationale as one of the predominant causes of disparity, and advocated the creation of an independent agency that would research the underlying purposes of punishment and propose sentencing guidelines based upon those

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Law of Sentencing: Developing Judicial Precedent in Cyberspace, 65 FORDHAM L. REV. 927, 930 (1996) (noting that the parole board ultimately decided the length of the sentence for any given defendant).

40. *See, e.g.*, Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

41. A report by the Senate Committee on the Judiciary outlined the results of a study in which forty-three district court judges were asked to impose a punishment for nearly identical cases. The disparity between the results was astounding. For example, the most severe sentence imposed on a bank robber was eighteen years in prison plus a fine of five thousand dollars while the least severe sentence was three years in prison. S. REP. NO. 98-225, at 41–44 (1983).

42. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988) (describing race-based disparities in pre-Guidelines sentencing practices); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895 (1990) (noting several studies finding that race, gender, income and religion influenced judicial sentencing decisions).

43. For example, Judge Marvin E. Frankel declared that sentences should not "turn so arbitrarily upon the variegated passions and prejudices of individual judges." Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 8 (1972).

44. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 61–124 (1973) (advocating the creation of an independent agency, the duty of which would be formulating standards to guide judicial sentencing discretion; suggesting the implementation of appellate review for all sentences; and proposing that sentences should be crafted according to the general purposes of punishment).

45. 128 CONG. REC. S26,503 (statement of Sen. Kennedy).

purposes.[46] Reformers deemed Congress ill-equipped to undertake this project for two reasons. First, the rulemaking process would be evolutionary by necessity and Congress lacked the time or the interest to pay constant attention to the process.[47] Second, electoral pressures would give Congress a tendency to overreact to headlines and favor toughness over justice.[48] Reformers believed that an independent agency of knowledgeable experts would not suffer from these defects.[49]

Another important aspect of Judge Frankel's model was the establishment of more rigorous appellate review of sentencing decisions, especially when judges decided to depart from the established standards.[50] This would require trial judges to provide written reasons for the sentence imposed, which would then be subject to review.[51] Other reformers noted that these written reasons, in turn, would provide the agency with valuable information it could use as it continually refined the sentencing standards.[52] This was to be the judiciary's contribution to the development of principled sentencing rules—a common law from which the agency could draw on the experience of the judiciary in order to gradually produce a just sentencing system.[53]

Senator Kennedy introduced a bill in 1975 based primarily on Judge Frankel's ideas.[54] Under Kennedy's plan:

> The sentencing guidelines will recommend to the sentencing

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46. *See* Frankel, *supra* note 43, at 50–51.

47. *See id.* at 50 ("[T]he need for revision of the law is not a one-time thing; the gross inadequacies of the existing situation require continuing study and reform.").

48. *See* FRANKEL, *supra* note 44, at 119 (noting that "legislative action tends to be sporadic and impassioned, responding in haste to momentary crises, lapsing then into the accustomed state of inattention").

49. *Id.* at 119–20.

50. *See id.* at 75–85.

51. *Id.*

52. *See* 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 4(b) ("By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.").

53. *See* Morris, *supra* note 6, at 275. Like Judge Frankel, Professor Morris played a prominent role in the reform movement that culminated in the SRA. *See* S. REP. NO. 98-225, at 37 (1983).

54. *See* S. 2699, 94th Cong., 2d Sess. (1975). It is interesting that the SRA had broad bipartisan support. Though Senator Kennedy was the primary proponent of the bill, the Republican senator from South Carolina, Strom Thurmond, also played a major role in drumming up congressional support for sentencing reform. *See* S. REP. NO. 98-225, at 37; *see also* Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 3 F. SENT. R. 271, 271 (1991) (lauding Senator Thurmond's efforts to gather support for the bill).

> judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender.... If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines. A sentence that is above the guidelines may be appealed by the defendant; a sentence below the guidelines may be appealed by the government.[55]

Because of the arbitrary and discriminatory sentencing decisions of the past, people were rightly skeptical of the relevance of individual offender characteristics to sentencing decisions. Senator Kennedy, however, was confident that the Guideline system's structure and its relative transparency would eliminate the risk of arbitrary and discriminatory sentencing, and still take advantage of the trial bench's individualistic, case-by-case perspective.[56]

The SRA, the culmination of Senator Kennedy's and Judge Frankel's efforts, made three primary changes in the federal sentencing system: it abolished parole,[57] established appellate review of sentencing decisions,[58] and created the Sentencing Commission to formulate a set of guidelines to restrict judicial sentencing discretion.[59]

The SRA ordered the Commission to establish guidelines that would:

> [P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by

55. *See* S. REP. NO. 98-225, at 51–52 (1983) (citations omitted). *See generally* Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUDICATURE 208 (1976) (outlining the major provisions of his proposed bill).

56. *See* Kennedy, *supra* note 54, at 271.

57. *See* 18 U.S.C. §§ 4201–4218 (2000) (repealed 1984).

58. *See* 18 U.S.C. § 3742 (2000) (establishing "reasonableness" review for sentencing decisions). As explained later, the Feeney Amendment amended this provision to provide for de novo review in certain circumstances. *See infra* notes 105–09, and accompanying text. *Booker*, however, invalidated § 3742(e), and found implied in the SRA the same "reasonableness" standard of review that existed before the Feeney Amendment. *See* United States v. Booker, 125 S.Ct. 738, 765 (2005).

59. *See* 28 U.S.C. § 991(a) (2000) (establishing the Sentencing Commission as an independent agency within the judicial branch).

> mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.[60]

The SRA further instructed the Commission to promulgate guidelines setting maximum and minimum punishments, the range between which could not vary more than twenty-five percent or six months, whichever is greater.[61]

Additionally, courts were to:

> [I]mpose a sentence of the kind, and within the range [established by the Commission] unless the court found that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[62]

This is the manner in which the departure mechanism[63] was built into the SRA. The SRA permitted courts to depart from the Guidelines, not only when the Commission had not considered a factor at all, but also when the Commission had not considered the factor to an adequate degree given the circumstances of a particular case.

The Commission viewed its duty as two-fold. In the introduction to the Guidelines Manual, which sets out the Guidelines along with

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60. 28 U.S.C. § 991(b)(1)(B) (2000).

61. *Id.* at § 994(b)(2). The only exception is that if the minimum sentence is thirty years or more, then the maximum may be a life sentence. *Id.*

The SRA also directed the district courts to consider the purposes of punishment when deciding on a sentence to impose. 18 U.S.C. § 3553(a)(2) (2000). The Act set forth four basic purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—and directed the Commission to develop policies that furthered these goals. 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b)(1)(A).

62. 18 U.S.C. § 3553(b)(1). This provision was invalidated in *Booker* because it made the Guidelines mandatory. United States v. Booker, 125 S.Ct. 738, 764 (2005); *see also supra* notes 159–60 and accompanying text.

63. The Guidelines prescribe ranges for permissible sentences and a "departure" occurs when the judge sentences a defendant to a prison term outside that range. *See* 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 4(c). The Guidelines direct judges to depart in certain specific instances, such as when the defendant has provided "substantial assistance" to the government in investigation or prosecution of another person, but only upon motion by the government. *See id.* § 5K1.1. The Guidelines also direct judges to depart whenever the court finds aggravating or mitigating circumstances of a kind or to a degree not adequately taken into account by the Commission. *See id.* § 5K2.0. Cases in which the district court departed downward from the Guidelines without a substantial assistance motion by the prosecutor accounted for 12.1 percent of total cases in 1997 and accounted for 18.3 percent of total cases in 2001. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 51 (2001) [hereinafter SOURCEBOOK], *available at* http://www.ussc.gov/ANNRPT/2001/fig-g.pdf (on file with the North Carolina Law Review).

instructions for applying them, the Commission noted that "Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similarly criminal conduct by similar offenders."[64] Congress also "sought *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity."[65] The Commission realized that tension exists between these two principles and, though attempting to forge a compromise, acknowledged that there is "no completely satisfying solution to this practical stalemate."[66]

The Commission also encountered considerable difficulty in articulating an underlying philosophy of punishment. Specifically, the Commissioners were unable to agree on whether deterrence or retribution should be the underlying rationale of the system.[67] They concluded, however, that resolution of the question was not necessary to their purposes because "the application of either philosophy will produce the same or similar results."[68] Instead of articulating an underlying philosophy, the Commission used an empirical approach, looking to past judicial sentencing practices to establish a starting point from which the Guidelines could evolve.[69] The Commission analyzed data from thousands of previous cases and compiled a list of

64. 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 3 (emphasis in original).

65. *Id.*

66. *Id.* The problem here is one of balancing. Though the sentencing movement targeted disparity as the principal cause of injustice in pre-Guidelines sentencing practice, an increased insistence on uniformity in sentencing may result in injustice as well. In one sense the sole obligation of the Commission was to find the proper balance between these two goals.

67. *See* 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 3 (admitting an inability to reconcile philosophical differences but suggesting that by using an empirical-based approach and declining to use one underlying philosophy over another, the Guidelines should gain the benefit of widespread acceptance).

68. UNITED STATES SENTENCING GUIDELINES MANUAL § 1A3 (2002) [hereinafter 2002 U.S.S.G.]; *see also* Breyer, *supra* note 42, at 1, 15–18 (noting that the institutional nature of the group writing process precluded the Commission from settling on a single purpose).

69. 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 3. This assertion has met some skepticism. One commentator noted that "[h]ad past judicial sentencing practice been the model, the guidelines would not be nearly so severe." Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 373 (1990). This view may have some merit. One study showed that the average time served under the Guidelines system is more than twice the time served under the pre-Guidelines system. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 164 (1991). The use of past practice as a starting point is contemplated by the SRA, but the Act also instructs the Commission to formulate guidelines that reflect the fact that pre-Guidelines sentences do not always correlate to the seriousness of the offense. *See* 28 U.S.C. § 994(m) (2000).

factors that the courts routinely found relevant to the imposition of a sentence.[70] One result of this process was a list of factors deemed "not ordinarily relevant."[71] For the most part, these factors reflected individual offender characteristics, the judicial consideration of which was widely understood to be one of the root causes of the arbitrary and discriminatory sentencing practices of the past. While the courts were not prohibited from using these factors as a basis for departure, the Commission determined that such departures should be very rare.[72] As a result of its research, the Commission deviated from pre-Guidelines practice in two important respects. First, it apparently felt compelled to accommodate the growing congressional trend of promulgating mandatory minimum statutes.[73] Second, the Commission decided that white-collar crime was not being punished severely enough in proportion to other criminal acts.[74]

The Commission stressed on more than one occasion that the Guideline-writing process was an evolutionary one.[75] It acknowledged that it is difficult to prescribe "a single set of guidelines that encompasses the vast range of human conduct potentially

70. 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 3.

71. Chapter 5, Part H of the Guidelines Manual lists several individual offender characteristics that are "not ordinarily relevant" to sentencing decisions, including age, educational and vocational skills, mental and emotional conditions, physical condition, employment record, and family ties. *See id.* §§ 5H1.1 to 1.6. The SRA directs the Commission to assure that the Guidelines "reflect the general inappropriateness of considering" many of the factors that the Commission deemed "not ordinarily relevant." *See* 28 U.S.C. § 994(d); 2003 U.S.S.G., *supra* note 3, §§ 5H1.1 to 1.6. But the legislative history of the Act emphasizes that these factors may be appropriately considered in some cases and that the Commission should evaluate their relevance in certain situations. S. REP. NO. 98-225, at 175 (1983).

72. 2003 U.S.S.G., *supra* note 3, ch. 5, pt. H, introductory cmt. (noting that these factors may be relevant to a decision to depart from the Guidelines in "exceptional cases").

73. *See* 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 3 (as amended in 1990) (noting that the incorporation of congressional mandatory minimum statutes into the Guidelines is the principal cause of the marked increase in the federal prison population in the post-Guidelines era); *see also* 18 U.S.C. § 2113(e) (2000) (providing a minimum penalty of ten years imprisonment for causing death or kidnapping in the course of a bank robbery); 21 U.S.C. § 841(b)(1)(A) (2000) (providing a minimum penalty of ten years imprisonment for possession of one kilogram of heroin or five kilograms of cocaine); 21 U.S.C. § 845(a) (2000) (providing a minimum penalty of one year imprisonment for distribution or manufacture of a controlled substance within one thousand feet of a school or college).

74. *See* 2002 U.S.S.G., *supra* note 68, § 1A3 (noting that its analysis of past practice "revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior").

75. *See* 2003 U.S.S.G., *supra* note 3, § 1A1.1 at cmt. Editorial Notes 2, 3.

relevant to a sentencing decision."[76] The Commission also noted, however, that to do so at that point was unnecessary because, "[b]y monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted."[77] Thus, the Commission seemed to be enlisting the help of the experienced federal judiciary just as Judge Frankel and Senator Kennedy had hoped. The Commission intended that the judiciary:

> [T]reat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.[78]

But the Commission sent mixed messages to the courts about the propriety of departure. Because the Commission believed it had taken all relevant factors into account, it warned courts that relevant factors not reflected in the Guidelines will occur rarely and that departures "will be highly unusual."[79]

In order to help achieve the SRA's goals of uniformity and proportionality, the Commission originally intended to create a "real offense" system that punished criminals according to their actual conduct rather than the offenses with which they are formally charged.[80] It was unable, however, to find a practical way to assimilate the vast range of human conduct into a workable system.[81] Thus, the Commission compromised and adopted a mixed real offense and charge-based system that "take[s] account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken."[82]

When the Guidelines were formally implemented on November 1, 1987, the federal judiciary's reaction was less than enthusiastic. Many federal judges opposed the Guidelines and a few even resigned

76. *Id.* at cmt. Editorial Note 4(b).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at cmt. Editorial Note 4(a).
81. *Id.*
82. *Id.*

as a result.[83] Members of the judiciary articulated two primary criticisms of the Guidelines. The first was that sentences under the Guidelines were unfairly severe.[84] One commentator noted that the sentences imposed under the Guidelines are more severe than those in any of the states.[85] Second and related, many judges believed that the Commission unduly stressed the congressional mandate of uniformity over proportionality.[86] This obsession with uniformity has caused an upward adjustment of Guideline ranges in general as the Commission struggles to assimilate Congress's unusually severe mandatory minimum statutes.[87] The Commission is certainly not commanded to incorporate Congress's mandatory minimums into the Guidelines structure and could simply work around them; but it apparently perceives a source of disparity in allowing the statutes to stand as anomalies within an otherwise comprehensive system.[88]

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83. Michael M. Mihm & Nancy Gertner, *Teaching Judges How to Sentence*, 11 FED. SENT. R. 96, 96–98 (1998). The opposition by the federal judges is evidenced by the fact that in a relatively short time there were over two hundred rulings declaring the Guidelines unconstitutional, mostly on separation of powers grounds. *See, e.g.*, United States v. Dahlin, 701 F. Supp. 148, 148 (N.D. Ill. 1988) (finding the creation of the Commission within the judicial branch to be an unconstitutional delegation of congressional authority); United States v. Perez, 696 F. Supp. 55, 56 (S.D.N.Y. 1988) (holding the SRA unconstitutional on separation of powers grounds); United States v. Whyte, 694 F. Supp. 1194, 1195 (E.D. Pa. 1988) (same). The Supreme Court settled the constitutionality of the Guidelines in *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

84. Even Justice Anthony Kennedy who has been consistently tough on crime has said, "Our resources are misspent, our punishments too severe, our sentences too long." Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (on file with the North Carolina Law Review).

85. *See* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1690 (1992).

86. *See, e.g.*, Henry Weinstein & David Rosenzweig, *How Judges Will Use Discretion is the Big Question*, L.A. TIMES, Jan. 13, 2005, at 24 (quoting U.S. District Judge David O. Carter: "Uniformity under the sentencing guidelines was a shield for defendants who deserved harsher sentences and a sword that struck down rehabilitation for those who deserved leniency.").

87. *See* U.S. SENTENCING COMM. 102D CONG., SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20 (1991) (stating that the Commission has tried to incorporate the mandatory minimum statutes into the Guidelines); *see also* Berman, *supra* note 6, at 109 (noting that "the Commission, concerned about potential disparities created by the application of mandatory sentencing terms, has continually pegged the severity of all guideline sentences to the harsh scale of Congress' mandatories").

88. For example, assume that the Commission has determined that possession of five hundred grams of marijuana is equivalent in seriousness to grand larceny and establishes a presumptive range in punishment for both of two years imprisonment. If Congress passes a mandatory minimum statute setting five years as the minimum for possession of five hundred grams of marijuana, the Commission may perceive a disparity and raise the penalties for grand larceny for the sake of consistency.

II. THE FEENEY AMENDMENT

The primary purposes of the Feeney Amendment were to further restrict judicial discretion at sentencing, and reduce the judiciary's role in the formulation of sentencing policy.[89] The Amendment seeks to achieve these goals through a number of mechanisms.

First, the Amendment imposes new requirements on sentencing judges. Whenever a sentencing judge departs from the Guidelines, the Feeney Amendment requires that reasons for the sentence be stated "with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera. . . ."[90] Prior to the Feeney Amendment, judges were only required to state their reasons for departure in open court.[91] As discussed in Part III, this provision, while certainly imposing additional requirements on district court judges, also provides them with a forum for elaboration of their reasons for imposing certain sentences.[92]

Additionally, the chief judge of each district must "ensure that, within 30 days following entry of judgment in every criminal case," the court submits to the Commission a report that includes the offense, demographic information about the offender, the judgment and commitment order, the statement of reasons for the sentence imposed, any plea agreement, the indictment, the pre-sentence report, and any other information the Commission deems appropriate.[93] This provision amends 28 U.S.C. § 994(w), which previously required the "appropriate judge or officer" to submit the report which needed to contain only the sentence, a description of the offense, personal characteristics of the offender, information regarding factors relevant under the guidelines, and other information the Commission found appropriate.[94] The clear purpose

89. *See* 149 CONG. REC. S5114–S5116 (2003) (statement of Sen. Hatch) (expressing concerns about judges' downward departures from the Guidelines with respect to crimes against children and explaining how the PROTECT Act addresses those concerns).

90. PROTECT Act, Pub. L. No. 108-21, § 401(c)(1), 117 Stat. 650, 669 (2003) (codified as amended at 18 U.S.C.A. § 3553(c)(2) (West Supp. 2004)).

91. 18 U.S.C. § 3553(c) (2000) (amended 2003).

92. As also explained in Part III, the *Booker* decision further expands this opportunity.

93. PROTECT Act, § 401(h), 117 Stat. at 672 (codified at 28 U.S.C.A. § 994(w) (West Supp. 2004)).

94. *See* 28 U.S.C. § 994(w) (2000) (amended 2003). The Commission, though not mandated by Congress, previously required almost the same information required by the Amendment save the statement of purposes. SOURCEBOOK, *supra* note 63, at iii (listing all requirements except the statement of purposes).

of the new provision is to hold a single individual responsible for the report in order to ensure that the Commission receives the information. This in itself is not necessarily a bad thing; after all, if the Commission is to improve the Guidelines it needs information on how they are being implemented in practice.

But read in light of the surrounding provisions, these reporting requirements evidence congressional distrust of the federal trial bench. The Commission is directed to make the written reports and underlying records available to the House and Senate Committees on the Judiciary.[95] The Amendment also requires the Commission to provide Congress with an annual report detailing which districts, in the Commission's view, are not complying with the reporting requirements.[96] The Commission also must make available to the Attorney General any data on sentences that it keeps in electronic form.[97] Because the Commission maintains a comprehensive electronic "Integrated Case Management System,"[98] this provision virtually ensures the Attorney General access to all of the information the Commission possesses.

This degree of oversight by the elected branches is remarkable in a society that so greatly values the independence of its judiciary. True, departures serve an informational function to help the Commission fine-tune the Guidelines over time and are thus open and transparent by design; but, the congressional judiciary committees are not directly involved in refining the Guidelines, and the Attorney General serves the Commission in only an *ex officio* capacity.[99] The underlying purpose of these provisions must be to coerce the district courts through exposure. This need to coerce, however, presupposes a judiciary that is hostile to the SRA program. Instead of inviting the trial bench to air its views to the Commission, these reporting provisions positively discourage the judiciary from expressing an opinion contrary to that of the Commission's through the very mechanism—departures—specifically designed for that purpose.

In addition to imposing more rigorous reporting requirements, the Amendment seeks to further circumscribe the discretion exercised by the courts under the SRA. Previously the courts were

95. § 401(h)(2), 117 Stat. at 672.
96. § 401(h)(3).
97. § 401(h)(4).
98. *See* Sweet et al., *supra* note 39, at 938.
99. *See* 28 U.S.C. § 991(a).

permitted to reduce the sentence one level[100] if the offender promptly provided "complete information to the government concerning his own involvement in the offense" or promptly notified the government that he intended to plead guilty.[101] According to the Commission, because "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility," the decision in these situations rested solely with the trial judge and was "entitled to great deference on review."[102] Under the Feeney Amendment, this sentencing reduction is now only available for a prompt guilty plea and then only upon a motion from the government.[103] Rather than eliminating discretionary choice, this provision merely shifts the discretion from judge to prosecutor.[104]

The Amendment also sought to reduce the incidence of downward departures by establishing de novo review of sentences imposed outside of the Guideline range in the following four circumstances: if the district court fails to provide a written statement of reasons; if the sentence departs based on a factor that does not advance the objectives set forth in 18 U.S.C. § 3553(a)(2);[105] if the sentence is not authorized under § 3553(b);[106] or, if the sentence is not justified by the facts of the case.[107] This provision essentially

100. A decrease of one level generally lowers the length of imprisonment by three to nine months. *See* 2003 U.S.S.G., *supra* note 3, Sentencing Table, § 5A. The percentage drop in the sentence varies according to the severity of the sentence. *Id.*

101. *See* 2002 U.S.S.G., *supra* note 63, § 3E1.1(b).

102. *Id.* § 3E1.1 cmt. 5. The commentary, as well as the policy statements in the Guidelines Manual, is authoritative and thus binding on the courts. *Id.* § 1B1.7 ("[F]ailure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal.").

103. PROTECT Act, Pub. L. No. 108-21, § 401(g)(1), 117 Stat. 650, 671 (2003).

104. Furthermore, the Amendment expressly precludes judges from departing based on an aggregation of factors that standing alone would be insufficient to warrant a departure. *See* § 401(f), 117 Stat. at 671.

105. The purposes laid out in § 3553(a)(2) are the commonly stated and often contested purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. *See* 18 U.S.C. § 3553(a)(2) (2000).

106. 18 U.S.C. § 3553(b)(1) states that:

> [T]he court shall impose a sentence of the kind, and within the range [established by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Id. § 3553(b)(1). The Supreme Court invalidated this provision in *Booker*. *See infra* notes 159–60 and accompanying text.

107. PROTECT Act, § 401(d), 117 Stat. at 670. These bases of reversal involve questions of law. The trial judge's factual determinations are still reviewable only under a "clearly erroneous" standard. *See* 149 CONG. REC. S5116 (2003) (statement of Sen.

overruled the Supreme Court's unanimous decision in *Koon v. United States*[108] in which the Court, reasoning that district courts had "an institutional advantage over appellate courts in making [sentencing] determinations," interpreted review for "reasonableness" to establish abuse of discretion as the proper standard of review for sentences that departed from the Guidelines.[109] As explained in greater detail below, the *Booker* decision eliminated de novo review of sentencing decisions and reinstated "reasonableness" as the governing standard.[110]

By their nature, appellate courts approach cases from a point more removed from the human elements of each particular case. It is the trial bench's experience with the actual human beings involved in the cases that makes district court judges such a valuable source of information for the Commission in the eyes of the SRA. By directing appellate courts to review departures as if they were deciding the case in the first instance, the Feeney Amendment indicates Congress's view that the trial judge's first-hand perspective has little, if anything, to add to individual sentencing determinations.

While the provisions discussed above either chill departures through exposure or limit the discretion to depart altogether, they all address the judiciary's adjudicative role in sentencing, not its role on the Commission itself. But Congress thought of that, too. The seven-member Commission can now consist of a maximum rather than a minimum of three federal judges,[111] thus allowing the judiciary only a minority voice in an agency within its own branch.

The bulk of the Amendment targets trial judges, but certain provisions directly address the Commission as well. The Commission is permanently precluded from amending the provisions related to acceptance of responsibility[112] and may not introduce any new grounds for departure until May 1, 2005.[113] The Act also directs the Commission to promulgate "appropriate amendments . . . to ensure that the incidence of downward departures are substantially

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Hatch).

108. 518 U.S. 81 (1996).

109. *See id.* at 98–99. Interestingly, the Court noted that "[t]o ignore the district court's special competence—about the 'ordinariness' or 'unusualness' of a particular case—would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case." *Id.* at 99 (quoting United States v. Rivera, 994 F.2d 942, 951 (1st Cir. 1993)).

110. *See infra* notes 161–62 and accompanying text.

111. § 401(n)(1), 117 Stat. at 676.

112. § 401(j)(4), 117 Stat. at 673.

113. § 401(j)(2), 117 Stat. at 673.

reduced."[114]

The Commission dutifully responded to these directives in the 2003 version of the Guidelines Manual. For instance, it expressly eliminated gambling addiction as a basis for departure,[115] and made clear that a departure based on an offender's role in the offense, however minor, is also not permitted.[116] The Commission also thoroughly revised its general policy statement on departures. The previous manual permitted departures based on factors not taken into account by the commission "under some circumstances."[117] It allowed departures based on factors present in a case to a degree not taken into account by the Commission under "unusual circumstances."[118] The 2003 manual advised in stronger language that departures on either of these grounds are available only in "exceptional cases."[119]

The fundamental assumption underlying the Feeney Amendment, that judicial discretion in sentencing is the principal problem with the Guidelines system, is misconceived. Unless one contends that the Guidelines in their present form are capable of reaching a just result in all cases, one must admit that discretion to depart from the Guidelines is a necessary and even desirable mechanism for both reaching just results and for providing the Commission with the information necessary to improve the Guidelines. As stated in the Senate Committee Report, "the purpose of the Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."[120]

Practical necessity forced the Commission to create a system with a limited number of categories and factors in order for the system to be workable.[121] Thus, the Commission had to compromise absolute accuracy in each case to develop a sentencing structure that was comprehensible and not too difficult to apply.[122] The inevitable result of such a system is that it cannot possibly reach the proper and just

114. § 401(m)(2)(A), 117 Stat. at 675.
115. 2003 U.S.S.G., *supra* note 3, § 5H1.4.
116. *Id.* § 5H1.7
117. *See* 2002 U.S.S.G., *supra* note 68, § 5k2.0.
118. *Id.*
119. *See* 2003 U.S.S.G., *supra* note 3, § 5K2.0(a)(2)(B) & (a)(3).
120. S. REP. NO. 98-225, at 52 (1983).
121. 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 3.
122. *See* Breyer, *supra* note 42, at 8–12 (acknowledging the Commission's compromise of real and charge offense systems to avoid the risk of unfairness and unworkability). *But see* Berman, *supra* note 5, at 100–01 (noting that many judges still believe the Guidelines to be overly complex and unworkable).

result in all cases. The Commission itself is cognizant of this problem and thus permits departures from the Guidelines when the case before the court falls outside of the "heartland" that embodies the conduct that each guideline described.[123] The Commission, however, warned that such departures would be appropriate in few cases because "[r]elevant distinctions not reflected in the guidelines probably will occur rarely."[124] The assumption upon which this assertion rests is that the Commission, in its analysis of past practice and in its continuing analysis of sentencing practices, has been successful in identifying the factors that judges ordinarily take into account. But given that judges in the pre-Guidelines system were not required to give reasons for the sentences imposed, the information available to the Commission was necessarily incomplete.

Some commentators believe that the Commission's gravest mistake was its failure to strike the proper balance between uniformity and proportionality.[125] The goal of the SRA was to eliminate *unwarranted* disparity, not disparity per se.[126] When the Guidelines set a range of punishment that would result in excessive uniformity when applied to a particular case, it is the duty of the court to depart from the Guidelines in order to achieve the goal of proportionality. Departures are not, therefore, necessarily violations of the Guidelines; indeed, at times a failure to depart would violate the Guidelines.

Furthermore, the departure mechanism was intended to be the primary way in which the judiciary was to be involved in the Guidelines-writing process.[127] The Guidelines system was originally conceived as a joint effort between Congress, the Commission, and the judiciary. Congress was to set out broad parameters for the promulgation and evolution of a set of guidelines that takes advantage of the system-wide perspective of expert commissioners and the case-level experience of the federal judiciary;[128] the Commission was to issue a set of Guidelines;[129] and the judiciary was

123. 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 4(b).

124. *See* 2002 U.S.S.G., *supra* note 68, § 1A3.

125. *See generally* Schulhofer, *supra* note 6, at 851–53 (arguing that excessive uniformity leads to exactly the type of problems the SRA was designed to eliminate).

126. *See* 28 U.S.C. § 994(f) (2000) (directing the Commission to issue Guidelines with the aim of "providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities"); *see also* S. REP. NO. 98-225, at 161 (1983) ("The key word in discussing unwarranted sentencing disparity is 'unwarranted.' ").

127. *See supra* notes 3–4, 63 and accompanying text.

128. Berman, *supra* note 5, at 96.

129. *Id.* at 37–38.

to state specific reasons for departures, which in turn would provide meaningful feedback that the Commission could use to fine-tune the Guidelines.[130]

The difference in institutional perspective between the Commission and the judiciary cannot be overstated. While the Commission has the advantage of viewing the system in the abstract from a distance, trial judges are in the unique position to confront cases in an individualized way. Therefore, the Commission should welcome the comments of a judge who, in confronting cases from this "micro" perspective, believes that a particular sentence imposed under the Guidelines system is too long or too short.

Congress's apparent association of departures with the disparity that existed in the pre-Guidelines system ignores important differences. Under the pre-Guidelines system, judges were not required to give reasons and rarely did so.[131] This precluded the development of a common law of sentencing that could potentially result in an accumulated body of reasoned opinions available to other judges for consultation. It also kept the sentencing process hidden from public view and, therefore, invited the arbitrary and discriminatory practices that the SRA was designed to prevent.[132] Only the judge knew why a particular sentence was imposed on a particular offender, and there was no mechanism by which that decision could be checked or criticized.[133]

Departures under the Guidelines, by contrast, are open and subject to review both by the appellate courts and by the Commission. Even before the Feeney Amendment (but after the creation of the Guidelines system), judges were required to state reasons for departures,[134] albeit not written ones, and these reasons, when available, went both to the Commission for analysis[135] and upon appeal to the appellate courts for reasonableness review.[136] Departures may not always be warranted, but they occur in the open and, therefore, do not pose the same risk of hidden evasion and unchecked error that existed in the pre-Guidelines era.[137]

Despite the necessity of departures to the fair and accurate

130. *Id.*
131. *See* Frankel, *supra* note 43, at 9–16.
132. *See supra* notes 41–44 and accompanying text.
133. *See* Frankel, *supra* note 43, at 9–16
134. *See* 18 U.S.C. § 3553(c)(2) (2000).
135. *See* SOURCEBOOK, *supra* note 63, at iii.
136. *See* 18 U.S.C. § 3742(e) (2000) (superseded by *United States v. Booker*, 125 S.Ct. 738 (2005)).
137. *See supra* notes 37–40 and accompanying text.

administration of the Guidelines system, departures, if they occur too frequently, undeniably have the potential to undermine the Guidelines system by introducing an undesirable level of disparity and unpredictability into the system. The *Congressional Record* reveals that many of the proponents of the Feeney Amendment were concerned about the marked increase in departures over the last five years.[138] The increase may be cause for concern, but the simple fact that departures are on the increase does not necessarily mean that federal district court judges have too much discretion.

Though departures specifically requested by the government[139] are now outnumbered by those not specifically requested by the government, the American Bar Association reported to Congress that the government agreed to seventy-nine percent of downward departures and did not appeal them.[140] The fact that the government acquiesces in these departures suggests that the cause of the increase in departures is not "soft on crime" federal judges.[141] Furthermore, departures in border districts that have special "fast track" departure policies designed to manage the enormous load of immigration cases in those districts account for almost seventy percent of the increase in the departure rate over the last few years.[142] All of these "fast track"

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138. *See, e.g.*, 149 CONG. REC. H3061 (2003) (statement of Rep. Feeney). Indeed, the rate of departures not explicitly requested by the government (i.e., non-substantial assistance departures) rose from 12.1 percent in 1997 to 18.3 percent in 2001. *See* SOURCEBOOK, *supra* note 63, at 51.

139. Substantial assistance departures are departures made by the court "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." 2003 U.S.S.G., *supra* note 3, § 5K1.1. Prior to the passage of the Feeney Amendment, this was the only type of departure that required explicit governmental authorization. The Feeney Amendment requires a governmental motion for any "acceptance of responsibility" adjustment as well. *See* PROTECT Act, Pub. L. No. 108-21 § 401(g)(1), 117 Stat. 650, 671 (2003).

140. *See* 149 CONG. REC. H3067 (2003) (statement of Rep. Scott).

141. *See* 149 CONG. REC. S5115 (2003) (statement of Sen. Hatch) (calling downward departures "soft-on-crime departures").

142. *See* Letter from Leonidas Ralph Mecham, Secretary, U.S. Sentencing Commission, to Orrin G. Hatch, Senator (Apr. 3, 2003), *reprinted in* 149 CONG. REC. S5120–S5121 (statement of Sen. Kennedy). "Fast track" proceedings have been authorized by Congress in certain districts in the Southwest in order to expedite the enormous number of immigration-related cases decided in those districts. *See* Greenhouse, *supra* note 18. In exchange for a guilty plea, defendants in these immigration cases may receive a sentence reduced further than that authorized by the Guidelines for acceptance of responsibility. *See* 149 CONG. REC. S5119 (statement of Sen. Kennedy); *cf.* 2003 U.S.S.G., *supra* note 3, § 3E1.1 (allowing a reduced sentence when a defendant accepts responsibility). The degree to which "fast track" proceedings have caused the increase in departure rates is unclear. *See* Lewis J. Liman, *Protect Act § 401(m): Chance to Revise Sentencing Guidelines*, August 27, 2003, N.Y. L.J. 3, 7 (noting that there is

departures have governmental support.[143] If these "fast track" departures are excluded in calculating the percentage of cases with non-substantial assistance departures, the percentage of cases in which non-substantial assistance downward departures occur drops to a mere ten percent of total cases.[144]

This is not to suggest that the recent increase in downward departures may not be cause for concern. As Senator Hatch pointed out, twenty percent of downward departures are based upon grounds not specifically mentioned in the Guidelines.[145] The point is that the specific causes of the increase in departures are likely varied and complex, and not simply attributable to the leniency of the federal judiciary. A number of questions are left unanswered, however. For example, if the rate of the departures is indeed antithetical to the Guidelines system, why does the government support so many of them? Is the increase in the rate of departures the result of increases in departures in certain types of cases? Are there some specific unenumerated grounds for departure that the courts rely on more than others? These are important questions that warrant extensive study and debate, which the rushed passage of the Feeney Amendment precluded. As it turns out, the Supreme Court's decision in *United States v. Booker* gives Congress the opportunity to try again.

III. *UNITED STATES V. BOOKER*

The Court's decision in *Booker* worked significant changes in the sentencing system as modified by Congress in the Feeney Amendment, yet also left much of the system untouched. This Part will first explain the essential holdings of the *Booker* decision. It will then evaluate the changes the decision made to the post-Feeney Guidelines system.

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evidence showing that seventy percent of the increase in downward departures since the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), is attributable solely to "fast track" dispositions in the Southwest).

143. *See* Letter from American Bar Association to Rep. Scott (Apr. 9, 2003), *reprinted in* 149 CONG. REC. H3067 (statement of Rep. Scott.); Memorandum from the Department of Justice, to All Federal Prosecutors (Sept. 22, 2003) (on file with the North Carolina Law Review).

144. *See* 149 CONG. REC. S5119 (statement of Sen. Kennedy). Senator Kennedy also noted that the Congress that passed the SRA in 1984 contemplated a departure rate of twenty percent. By that estimate departures occur far less frequently than originally anticipated. *See id.* at S5134. For perspective, though, upward departures occurred in only 0.6 percent of cases in 2001. SOURCEBOOK, *supra* note 63, at 51.

145. *See* 149 CONG. REC. S5115 (Statement of Sen. Hatch).

A. *The* Booker *Decision*

The decision contained two distinct majority opinions: the "constitutional" opinion, authored by Justice Stevens, which declared the Guidelines system to be unconstitutional, and the "remedial" decision, authored by Justice Breyer, which rendered the Guidelines advisory. Each opinion is discussed in turn.

1. The Constitutional Decision

The Court's decision declaring the Guidelines to be unconstitutional was widely anticipated, especially following *Blakely v. Washington*,[146] in which the Court invalidated the state of Washington's determinate sentencing system. In *Blakely*, the defendant pleaded guilty to the kidnapping of his estranged wife. The facts contained in his plea supported a maximum sentence of fifty-three months, but the judge, pursuant to state law, imposed an "exceptional" sentence of ninety months upon a judicial finding that the defendant had acted with "deliberate cruelty."[147] The Court held that the sentencing enhancement violated the defendant's Sixth Amendment right to a jury trial under the rule set forth in *Apprendi v. New Jersey*:[148] " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury [or admitted by the defendant], and proved beyond a reasonable doubt.' "[149]

As Justice O'Connor observed in her *Blakely* dissent, the Federal Sentencing Guidelines and the Washington State sentencing system were indistinguishable in all constitutionally relevant respects.[150] Both systems attempted to achieve uniformity and proportionality in sentencing by blending charge-based and real-conduct-based considerations.[151] The jury found beyond a reasonable doubt (or

146. 124 S.Ct. 2531 (2004).

147. *Id.* at 2534.

148. 530 U.S. 466 (2000).

149. *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490).

150. *Id.* at 2544–50 (O'Connor, J., dissenting).

151. *See* United States v. Booker, 125 S.Ct. 738, 749 (2005) (majority opinion of Stevens, J.). Using the Hobbs Act as an example, Justice Breyer illustrated the vast range of conduct that a single criminal statute can encompass. The Hobbs Act prohibits extortion that affects commerce or "the movement of any article or commodity in commerce." *Id.* at 760 (majority opinion of Breyer, J) (quoting 18 U.S.C. § 1951(a) (2000)). As Justice Breyer explains, it would cover a person who "threatens to injure a co-worker unless the co-worker advances him a few dollars from the interstate company's till," as well as a person who makes a similar demand but "causes far more harm by seeking far more money, by making certain that the co-worker's family is aware of the threat, [and] by arranging for deliveries of dead animals to the co-worker's home to show

more often, the defendant admitted in a plea agreement) the facts necessary to convict the defendant of the crime *with which he was charged*, but the sentencing judge tailored the defendant's sentence to his *actual conduct* by finding additional facts that could often enhance the defendant's sentence beyond that which the jury's verdict (or the defendant's admissions) alone would support.[152] It was in this latter aspect, the sentencing enhancement based upon judicial factfinding, that the Court found constitutional infirmity.

Thus, it was no surprise when the same, oddly-formed coalition of justices that had decided *Apprendi* and *Blakely* invalidated the Federal Sentencing Guidelines in *Booker*.[153] The Court brushed aside the government's formalistic arguments distinguishing the sentencing scheme at issue in *Blakely* and the Federal Guidelines on the grounds that the *Blakely* scheme was legislatively enacted and the Guidelines were an administrative creation.[154] It was not the source of the Guidelines system that was constitutionally significant, but rather the fact that its "sentencing rules [were] mandatory and impose[d] binding requirements on all sentencing judges."[155] The Court further explained that, were the Guidelines merely advisory, they would raise no constitutional problem, for the Court had "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."[156]

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he is serious." *Id.* at 760 (majority opinion of Breyer, J.). The latter person clearly deserves greater punishment than the former but the statute treats them the same. Only by taking into account the offender' actual conduct will he be sentenced according to the harm he has caused.

152. The facts in defendant Booker's case provide a clear example of the distinction. The jury, after hearing evidence that Booker possessed 92.5 grams of cocaine, found him guilty under 21 U.S.C. § 841(a)(1) of possession with intent to distribute at least fifty grams of crack cocaine. *Id.* at 746 (majority opinion of Stevens, J.). Based solely on the facts found by the jury, § 841(a)(1) permitted a maximum sentence of life imprisonment, the relevant Guidelines provisions permitted a maximum sentence of only 262 months imprisonment. *Id.* (majority opinion of Stevens, J.). In a post-trial sentencing proceeding, however, the judge found by a preponderance of the evidence that Booker had actually possessed an additional 566 grams of cocaine. *Id.* (majority opinion of Stevens, J.). Based on these additional facts, the Guidelines required the judge to sentence Booker to a prison term between 360 months and life. Booker received a 360 month sentence, far more severe than the 262 months in prison he could have received based solely on the facts found by the jury. *Id.* (majority opinion of Stevens, J.).

153. *See id.* at 746, (majority opinion of Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.); *Blakely*, 124 S. Ct. at 2534 (opinion of Scalia, J., joined by Stevens, Souter, Thomas, and Ginsburg, JJ.); *Apprendi*, 530 U.S. at 468 (opinion of Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.).

154. *Booker*, 125 S.Ct. at 752–53 (majority opinion of Stevens, J.).

155. *Id.* at 749–50 (majority opinion of Stevens, J.).

156. *Id.* at 750 (majority opinion of Stevens, J.).

2. The Remedial Decision

In what has probably been correctly perceived as an attempt to rescue as much of the SRA and Guidelines from the Court's constitutional ruling as possible,[157] the remedial majority (whose only common denominator with the constitutional majority was Justice Ginsburg), severed only those provisions of the SRA that made the Guidelines binding upon sentencing judges.[158] The Court excised 18 U.S.C. § 3553(b)(1), which commanded sentencing judges to sentence within the Guidelines range unless a departure was warranted, thus rendering the Guidelines advisory.[159] The Court also severed the section, newly enacted by the Feeney Amendment and briefly discussed above,[160] that provided for de novo review of sentencing decisions because it found the section depended too heavily on the Guidelines' mandatory nature.[161] All other provisions of the SRA, including those recently added by the Feeney Amendment, remain in force.[162]

Significantly, the Court left untouched § 3553(a) which requires sentencing courts to take the Guidelines into account. Thus, while sentencing judges are not bound by the Guidelines, they violate § 3553(a) if they do not consider the Guidelines when determining a

157. *See* Douglas A. Berman, *The Revenge of Breyer?*, Sentencing Law and Policy Blog (Jan. 13, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/2005/week2/index.html (on file with the North Carolina Law Review). Because Justice Breyer played a key role in the passage of the SRA as chief counsel of the Senate Judiciary Committee and later served on the Commission, some observers suggested that he should have recused himself from participating in *Booker*. *See* Linda Greenhouse, *Supreme Court Transforms Use of Sentencing Guidelines*, N.Y. TIMES, Jan. 13, 2005, at A1 (noting Breyer's involvement in the SRA and Guidelines); Tony Mauro, *Supreme Court: Sentencing Guidelines Advisory, Not Mandatory*, LEGAL TIMES, online ed., *at* http://www.law.com (Jan. 13, 2005) (reporting that some judicial ethics experts suggested that Breyer should have recused himself) (on file with the North Carolina Law Review).

158. *Booker*, 125 S.Ct. at 756 (majority opinion of Breyer, J.). The majority justified its remedial decision on the grounds that, among the available alternatives, the majority's approach conformed most closely to Congress's probable intent in light of the Court's constitutional conclusion. *See id.* at 757. (majority opinion of Breyer, J.).

159. *Id.* (majority opinion of Breyer, J.). The remedy is indeed puzzling in light of the Court's constitutional holding. The Guidelines were constitutionally deficient because they vested too much power in the sentencing judge at the expense of the jury, yet the Court remedied that deficiency by vesting in the judiciary more sentencing discretion than it had enjoyed under the unconstitutional system.

160. *See supra* notes 105–09 and accompanying text.

161. *Booker*, 125 S.Ct. at 765 (majority opinion of Breyer, J.) (severing 18 U.S.C. § 3742(e)).

162. *Id.* at 764 (majority opinion of Breyer, J.). Furthermore, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research and revising the Guidelines accordingly." *Id.* at 767 (majority opinion of Breyer, J.).

sentence.[163] Furthermore, while the Court severed the section providing for de novo appellate review of sentencing decisions, it found implicit in the SRA a "reasonableness" standard of review.[164] In so holding, the Court effectively reinstated the pre-Feeney Amendment status quo.[165]

B. *The Effect of* Booker *on the Feeney Amendment*

At first glance, the *Booker* decision seems to vest in the judiciary more sentencing discretion than it has enjoyed in decades.[166] After all, the Guidelines no longer bind sentencing judges, and appellate courts, while still authorized to review sentencing decisions, are instructed to adopt a more deferential posture in doing so. The *Booker* decision doubtless shifts the balance of power, fundamentally tilted by the Feeney Amendment, back towards the district courts. Many federal district judges who felt that the Guidelines forced them to impose unjust sentences have warmly welcomed the *Booker* decision, claiming that it gives them the power to tailor the sentence to the individual case before them in such a way as the Guidelines, especially as modified by the Feeney Amendment, precluded them from doing.[167]

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163. *Id.* at 764 (majority opinion of Breyer, J.) ("Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

164. *Id.* at 765 (majority opinion of Breyer, J.).

165. *Id.* ("Until 2003, § 3742(e) explicitly set forth [the reasonableness] standard.").

166. *See, e.g.*, Natasha Korecki & Abdon Pallasch, *Court Gives Judges Last Word on Sentences*, CHI. SUN-TIMES, online ed. (Jan. 13, 2005), *at* http://www.suntimes.com (last visited Jan. 25, 2005) (reporting that "[s]ome experts say judges now have more power than ever to impose sentences") (on file with the North Carolina Law Review). Mauro, *supra* note 157 (quoting Professor Frank Bowman III as saying, "You can argue that, after [*Booker*], judges have the greatest sentencing power they've ever had in the history of the republic."); David G. Savage, *Judges Freed from Sentencing Rules*, L.A. TIMES, Jan. 13, 2005, at A1 (declaring *Booker* a "victory for the judiciary and a setback for lawmakers who would like to limit judges' sentencing authority").

167. *See, e.g.*, Alicia Caldwell, *Justices: "Mandatory Guidelines" Unconstitutional*, DENVER POST, Jan. 13, 2005, at A1 (quoting U.S. District Judge John Kane: "I think it's a very positive thing because it puts the decisionmaking responsibility on the person who is supposed to be making the decision, and that is the judge."); Stephanie Hanes, *High Court Upsets Rule on Sentencing*, BALT. SUN, Jan. 13, 2005, at A1 (quoting U.S. District Court Judge Catherine C. Blake as stating that "[i]t appears . . . that the Supreme Court has left in place a system that will truly guide a judge's discretion at sentencing without mandating what might in an individual case be an unjust result"); Carl Hulse & Adam Liptak, *New Fight Over Controlling Punishments is Widely Seen*, NY. TIMES, Jan. 13, 2005, at A27, (quoting U.S. District Judge Jack B. Weinstein: "It gives us the discretion to deal with individual cases without being unnecessarily harsh. This is now, if Congress leaves it, a marvelous system."); Shelley Murphy, *2 Boston Jurists Hail Return of Discretion*, BOSTON GLOBE, Jan. 13, 2005, at A20 (noting that U.S. District Court Judge Nancy Gertner

To the extent that *Booker* does give trial judges more discretion in sentencing, it alleviates many of the concerns discussed above that were exacerbated by the Feeney Amendment, including the failure of the Guidelines system to take full advantage of the trial bench's experience with the actual human actors involved in the sentencing drama. Yet, just how much discretion sentencing judges enjoy remains to be seen.[168] Certain aspects of the *Booker* opinion, the provisions of the Feeney Amendment that survived constitutional attack, and district judges' undoubted awareness that Congress will be watching them very closely (using many of the tools provided by the Feeney Amendment) suggest that district judges may not enjoy as much discretion as it initially appears.

As mentioned above, the Court's remedial decision makes the Guidelines advisory by eliminating 18 U.S.C. § 3553(b)(1) which commanded trial judges to impose a sentence within the applicable Guidelines range unless a departure was permitted. The decision left in place, however, § 3553(a), which requires sentencing judges to consider, among other factors, the applicable Guidelines range. *Booker* also spared § 3553(c)(2), the recent addition from the Feeney Amendment that requires sentencing judges to provide specific, written reasons whenever they depart from the applicable Guidelines range. Read together, these provisions indicate that a sentencing judge must still provide good reasons for departing from the Guidelines range, despite the fact that the Guidelines are now only advisory. Also significant is the fact that *Booker* retained appellate review of sentencing decisions, albeit in diluted form.[169] If a district judge departs from the Guidelines range and the government appeals, the appellate court will still receive the district court's statement of reasons justifying the departure. If the court of appeals decides that the departure from the Guidelines range is "unreasonable," it will reverse. If the district judge decides to ignore the "advisory"

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understood *Booker* to permit judicial consideration of individual offender characteristics); Weinstein & Rosenzweig, *supra* note 86, (reporting that U.S. District Court Judge Dickran Tevrizian said *Booker* "gives judges the discretion to sentence the individual and not just the crime"); Deborah Yetter, *Mandatory Sentencing Rules Eased*, COURIER-J. (Ky.), Jan. 13, 2005, at A1 (quoting U.S. District Judge Edward H. Johnstone: "I think it restores to the trial judge some of the discretion the guidelines took away.").

168. As Professor Douglas Berman observed, "the only certainty about the future of federal sentencing after *Booker* is uncertainty." Douglas A. Berman, *Take a Deep Breath*, Sentencing Law and Policy Blog (Jan. 13, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/2005/week2/index.html (on file with the North Carolina Law Review).

169. *See Booker*, at 765 (majority opinion of Breyer, J.) (finding an implied "reasonableness" standard of review).

Guidelines altogether, the court of appeals will surely reverse. Though the "reasonableness" standard of review was interpreted by the Supreme Court in *Koon v. United States*[170] to permit reversal only upon a finding that the district court abused its discretion,[171] courts of appeals often evaluated downward departures very strictly under that standard.[172]

Furthermore, the various "exposure" provisions of the Feeney Amendment remain in force. Not only must each sentencing judge provide a written statement of reasons whenever she departs from the applicable Guidelines range, but the chief judge of each district is still required to ensure that the Commission receives a detailed report of each sentence, including the reasons for any departure.[173] This information is still available to the Attorney General and the House and Senate Committees on the Judiciary.[174] A recent letter from the Sentencing Commission to all district judges confirmed that both the statement of reasons for departure and the sentencing report are still required after *Booker*.[175] These requirements ensure that sentencing judges are aware that Congress is watching what they do and the reasons for which they do it.[176] Those judges who welcome the sentencing discretion bestowed upon them by *Booker* may wish to walk softly for fear of quick and drastic congressional action. And by all accounts, Congress is likely to start thinking about sentencing again soon.[177]

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170. 518 U.S. 81 (1996).

171. *Id.* at 98–99.

172. Although the government certainly does not appeal every downward departure, it is telling that in fiscal year 2001, the federal appellate courts affirmed only twenty percent of those appealed. *See* SOURCEBOOK, *supra* note 63, at table 58.

173. *See* PROTECT Act, § 401(h), 117 Stat. 650, 672 (amending 28 U.S.C. § 994(w) (2000)).

174. *See* § 401(h)(2), (4).

175. *See* Douglas A. Berman, *Always Remember to Show Your Work*, Sentencing Law and Policy Blog (Jan. 21, 2005) (discussing a letter from Ricardo H. Hinojosa, Chair of United States Sentencing Commission, to all federal district judges), http://sentencing.typepad.com/sentencing_and_policy/2005/01/always_remember.html (on file with the North Carolina Law Review).

176. As District Judge Ruben Castillo aptly observed, "I think Congress will be looking for any judges who will be doing anything unusual." Korecki & Pallasch, *supra* note 166.

177. Justice Breyer's opinion for the Court expressly indicated that Congress has the next move. United States v. Booker, 125 S.Ct. 738, 768 (2005) (majority opinion of Breyer, J.) ("Ours, of course, is not the last word: The ball now lies in Congress's court."); *see also* Jerry Bier, *Ruling May Impact Porn Case*, FRESNO BEE, Jan. 15, 2005, *at* http://www.fresnobee.com/local/story/9773986p-10637228c.html (quoting District Judge Oliver W. Wanger: "We know we are going to get a response from Congress, and I suspect we're going to get it sooner than later.") (on file with the North Carolina Law Review); Hulse & Liptak, *supra* note 167 (reporting that "lawmakers in both parties said

Yet, unlike § 3553(b)(1), which mandated compliance with only the Guidelines themselves, the new governing provision § 3553(a) directs sentencing judges to consider, in addition to the applicable Guidelines range, a variety of factors including: the need for the sentence to reflect the purposes of punishment (deterrence, retribution, incapacitation, and rehabilitation), the need to avoid unwarranted sentencing disparities among similarly situated defendants, the need to provide restitution to the victim, and perhaps most welcome of all to many federal district judges, "the nature and circumstances of the offense and the history and characteristics of the defendant."[178] Furthermore, the so-called "parsimony provision" of § 3553(a) directs judges to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" set forth above.[179] Two remarkably thoughtful post-*Booker* sentencing decisions reflect the widely divergent manners in which sentencing judges may respond to the ascendancy of § 3553(a) as the principal sentencing guidepost.

Just one day after *Booker* was decided, District Judge Paul G. Cassell issued an opinion concluding that sentencing courts should continue to give the Guidelines "considerable weight" when determining what sentence to impose, because the Guidelines themselves most accurately reflect the purposes sent forth in § 3553(a).[180] Judge Cassell placed a great deal of emphasis on congressional intent.[181] In regards to the purposes of punishment set forth in § 3553(a)(1), Judge Cassell concluded that "Congress' creation of the Commission and subsequent approval of the Commission's Guidelines provides strong reason for believing that Guidelines sentences satisfy the congressionally-mandated purposes

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they expected that hearings on sentencing guidelines would be quickly covered").

178. *See* 18 U.S.C. § 3553(a)(1), (2), (6) & (7) (2000).

179. *See id.* § 3553(a). Professors Miller and Wright, two highly regarded sentencing scholars, have argued that the parsimony provision indicates that Congress intended sentencing judges to have "substantial power" to sentence outside the Guidelines range. Marc. L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746–47 (1999) (cited in United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005)).

180. *See* United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005). It is worth noting at the outset that Judge Cassell has been one of the Guidelines' most forceful advocates on the federal trial bench. *See generally* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN L. REV. 1017 (2004) (supporting the Guidelines and attacking criticisms that they are too severe).

181. This is probably a wise approach, given that Congress will have the last word on sentencing, and as discussed in more detail below, will probably act sooner than later. *See supra* note 177 and accompanying text.

of punishment."[182] Furthermore, Judge Cassell reasoned, Congress "reconfirmed that its expectations that courts follow the Guidelines in the recently-adopted 'Feeney Amendment,' " which "was meant to 'put strict limitations on departures . . . .' "[183] He also noted that § 3553(a)(6) requires consideration of the need to reduce sentencing disparities among similarly situated defendants. The only way to assure uniformity on a national scale among hundreds of district judges, he reasoned, is to comply with the only national standard available: the Guidelines.[184] Judge Cassell also discounted the potentially mitigating effects of the parsimony provision. He repeated that congressional approval of the Guidelines suggests the Guidelines' sentences are "sufficient" to attain the purposes of § 3553(a), and also noted that the parsimony provision binds, not only the courts, but the Commission as well.[185] In language largely echoing the Guidelines' language concerning departures, Judge Cassell concluded that he would impose sentences outside the Guidelines range only in "unusual" and "exceptional" cases.[186]

Judge Cassell's reliance on the Feeney Amendment is evidence that Congress intends judges to comply with the Guidelines and merits attention. It suggests, not only an understanding that Congress is likely to respond to *Booker*, but that the Feeney Amendment, as Congress's most recent pronouncement on sentencing, likely resembles the approach that Congress will take in the near future. Perhaps most notably absent from Judge Cassell's opinion is any substantial discussion of § 3553(a)(1), which requires sentencing judges to consider the history and personal characteristics of the defendants they sentence. Given Judge Cassell's affinity for the Guidelines, this omission should not be surprising since the Guidelines generally preclude departures based on such personal characteristics as age, education, mental or emotional condition, drug dependence, family ties, socio-economic status, or lack of guidance as a child.[187]

In *United States v. Ranum*,[188] District Judge Lynn Adelman took a decidedly different approach, arguing that Judge Cassell's opinion

182. *See Wilson*, 350 F. Supp. 2d at 915.

183. *Id.* at 915–16 (quoting 149 CONG. REC. H3061 (Mar. 27, 2003) (statement of Rep. Feeney)).

184. *Id.* at 924.

185. *Id.* at 923 (citing 28 U.S.C. § 994(b)(1) (2000)).

186. *Id.* at 912, 925.

187. *See* 2003 U.S.S.G., *supra* note 3, § 5H1.1–1.12.

188. No. 04-CR-31 (E.D. Wis. Jan. 18, 2005).

was inconsistent with *Booker*.[189] Her reasoning centered upon the inconsistencies between the Guidelines and § 3553(a), especially in their treatment of the personal characteristics of individual defendants discussed above. In her view, a sentencing court that neglects to consider the personal characteristics of the defendant, though in compliance with the Guidelines, fails to fulfill its statutory mandate.[190] The Guidelines are merely advisory, but compliance with § 3553(a) is required. Judge Adelman further noted that § 3553(a)(2)(D), which requires sentencing judges "to evaluate the need to provide the defendant with education, training, treatment or medical care in the most effective manner," is often in conflict with the Guidelines' prescription of prison in most cases. She also approached the parsimony provision quite differently than Judge Cassell, citing Justice Kennedy's recent public condemnation of the harshness of the federal sentencing system.[191]

Needless to say, neither of these opinions is authoritative. Some district courts have followed Judge Cassell's reasoning,[192] others have followed Judge Adelman's lead and placed more emphasis on the personal characteristics of individual defendants,[193] and others will

189. *Id.* slip op. at 2.

190. *Id.* slip op. at 4. In his majority opinion in *Booker*, Justice Breyer conspicuously failed to make any mention of § 3553(a)(1)'s requirement that sentencing judges consider the personal characteristics of the defendant. Yet he did draw attention to a related provision, § 3661, that survived *Booker*. *See* United States v. Booker, 125 S.Ct. 738, 760 (2005) (majority opinion of Breyer, J.). Although he drew support from § 3661 for his conclusion that Congress intended the survival of a sentencing system that considered the defendant's real conduct, the statute also mandates consideration of the defendant's background and character. *See* 18 U.S.C. § 3661 (2000) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

191. *See Ranum*, slip op. at 4 n.1. The full text of Justice Kennedy's widely publicized speech can be found on the United States Supreme Court's official website: http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Mar. 1, 2005) (on file with the North Carolina Law Review).

192. *See* Douglas A. Berman, *Anecdotes, Data, and the USSC's Big Challenge*, Sentencing Law and Policy Blog, Jan. 20, 2005 (noting that some district judges have followed Judge Cassell's approach), http://sentencing.typepad.com/sentencing_law_and_policy/2005/week3/index.html (on file with the North Carolina Law Review); *see also* Hulse & Liptak, *supra* note 167 (quoting Chief Judge William G. Young: "I personally will try to be completely faithful to [*Booker*], which means I will consider the advice of the guidelines and consider it seriously.").

193. *See* Dan Herbeck, *Thanks to High Court, Drug Defendant Gets 2nd Chance*, BUFF. NEWS, Jan. 20, 2005, at B1 (2005 WL 62858039) (describing a case in which the Guidelines sentence was two years, but the judge sentenced the defendant to three years supervised release in part because the defendant had quit using drugs, had a full-time job, and was attending community college); Ken Kobayashi, *Hawaii Defendant's Sentence*

doubtless develop additional approaches. Moreover, only time will tell how much deviation from the Guidelines appellate courts will consider "reasonable," and, as mentioned above, it is probably only a matter of time before Congress steps back into the debate. Until then, however, district judges should take advantage of the unprecedented opportunity to contribute to the development of sentencing policy presented by the newly established authority of § 3553(a) and the Feeney Amendment's "written reasons" requirement. The next Part addresses this development.

IV. A NEW ROLE FOR THE DISTRICT COURTS

Commentators have criticized trial courts for failing to assert themselves in the role set out for them by the SRA.[194] Trial judges were to give input for the evolution of the Guidelines by providing reasons for departures that would help the Commission fine-tune the Guidelines and allow the appellate courts to develop a common law of sentencing.[195] The idea was that the Commission had much to learn from the experience of the federal judiciary. Requiring a statement of reasons by the trial judge would have all of the advantages that the common law system brings to bear on the law in general. Statements of reasons would permit the creation of an accumulated and visible body of law that the Commission and federal judges could follow, criticize, and build upon.[196]

The early sentencing reformers, including Senator Kennedy, believed that trial judges should be required to abide by the

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Reduced, HONOLULU ADVERTISER, Jan. 19, 2005 (2005 WL 60802697) (noting that District Judge David Ezra reduced a defendant's sentence below the Guidelines sentence because the defendant was devoted to his family, was a successful and trustworthy businessman, and had undergone excessive treatment).

194. *See* Berman, *supra* note 6, at 99 ("Federal judges have not seized their opportunities to develop a meaningful common law of sentencing and thus have not effectively fulfilled their role as sentencing lawmakers with the SRA scheme."); Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT. R. 235, 235 (1991) (noting that the judiciary wears "self-imposed handcuffs").

195. 2003 U.S.S.G., *supra* note 3, § 1A1.1 cmt. Editorial Note 4(b). Professor von Hirsch argues that the development of a common law of sentencing would be ineffective to improve the Guidelines. He believes that, because Guidelines are flawed at a structural level, they cannot be cured by simple amendments. *See* von Hirsch, *supra* note 69, at 380–81. Furthermore, he contends that the absence of an underlying rationale in the Guidelines precludes the development of a coherent body of law. *See id.* at 381–82. Professor von Hirsch may be correct in these observations, but the Guidelines seem to be here to stay. Absent conclusive proof of his points it seems that the judiciary should do what to can with the tools available to it.

196. Miller, *supra* note 5, at 16.

Guidelines or provide written justifications for departure,[197] but the SRA only required judges to state their reasons for departure in open court.[198] Thus, it is no surprise that trial judges generally have failed to write thoughtful sentencing opinions.[199] The statement of reasons in open court is only available to those who hear the statement and those with access to the transcript; thus, appellate courts have access to the statement if the case is appealed, but the public, the Commission, and other trial judges do not.[200] The statement in open court is also likely to be incomplete because the trial judge is unlikely to comprehensively state the facts that would give other judges a sense of her reasoning and its applicability to other cases.[201] A trial judge is probably unlikely to take the time to write sentencing opinions when there is neither a body of law upon which to build nor a general audience for the opinion.

The Feeney Amendment's requirement that sentencing judges provide written reasons for each departure from the Guidelines answers these concerns and is actually more in tune with the original intentions of the sentencing reformers than was the SRA.[202] Though it may appear a burden in some cases, sentencing judges should take advantage of the opportunity, especially now that *Booker* has opened the door to considerations beyond the Guidelines themselves by establishing § 3553(a) as the statute that guides sentencing decisions. As mentioned above, § 3553(a) requires sentencing judges to consider the applicable Guidelines range but also requires them to account for the personal characteristics of the defendant before them and the degree to which the sentence will further the various purposes of punishment. District judges across the nation who felt constrained by what they felt were unjustly severe Guidelines welcome the freedom

197. *See* Kennedy, *supra* note 54, at 271.

198. *See* 18 U.S.C. § 3553(c) (2000).

199. Berman, *supra* note 6, at 106 (noting that the failure of judges to write thoughtful sentencing opinions has been especially detrimental to the development of a common law of sentencing).

200. Sweet, et al., *supra* note 39, at 940 (noting that "transcripts of sentencing statements are generally unavailable both to the public and sentencing judges").

201. *Id.*

202. PROTECT Act, Pub. L. No. 108-21 § 401(c), 117 Stat. 650, 669–70 (2003). The extent to which the Feeney Amendment fulfills the desires of the original sentencing reformers should not be over-exaggerated. This is perhaps the one provision with which they would agree. As discussed above, Senator Kennedy, the primary congressional proponent of the SRA, has recently introduced a bill that would essentially repeal the Feeney Amendment in the PROTECT Act. *See* JUDGES Act, S. 1086, 108th Cong. (2003); 149 CONG. REC. S6711 (statement of Sen. Kennedy).

that *Booker* brings,[203] but many understand that their freedom may be short-lived depending on how quickly Congress acts.[204] As Judge Cassell observed in *United States v. Wilson*, Congress has consistently approved of the Guidelines,[205] so a sentencing judge certainly faces an uphill battle in convincing Congress in a particular case that departing from the Guidelines range is the just result despite the fact that strict adherence to the Guidelines would preclude a departure. This only suggests, however, that sentencing judges should choose their battles wisely and engage thoughtfully with the factors § 3553(a) requires them to consider.[206]

Take Judge Adelman's application of § 3553(a) in *United States v. Ranum*[207] as an example. The defendant Ranum, a loan officer employed by State Financial Bank, had made loans larger than he was authorized to grant to a startup cruise company.[208] When the company began to falter, the defendant loaned it even more money.[209] Although he believed and told his superiors that the second loan was "cash collateralized" and thus "risk free," it turned out that he was wrong.[210] The company eventually went under and the bank's total loss amounted to over $1 million.[211] The defendant was convicted of two counts of misapplication of bank funds and one count of making a false statement in connection with a loan application.[212]

Judge Adelman began by calculating the Guidelines sentence, and concluded that the Guidelines suggested imprisonment for thirty-seven to forty-six months.[213] She then observed that, though the defendant had clearly been "abusing his employer's trust," been dishonest with his employer, and acted recklessly with his employer's money, the defendant had not acted for personal pecuniary gain or for improper personal gain of another.[214] Although he made poor

203. *See supra* note 167.
204. *See supra* note 177.
205. *See* United States v. Wilson, 350 F. Supp. 2d 910, 915 (D. Utah 2005).
206. Although district judges may have been deterred in the past from taking the time to write sentencing opinions by the rate at which appellate courts have reversed downward departures from the Guidelines, they should be invigorated by the new "reasonableness" standard of review and the Guidelines' "advisory" nature. *See United States v. Booker*, 125 S.Ct. 738, 764–65 (2005).
207. 04-CR-31, slip op. at 6 (E.D. Wis. Jan. 19, 2005).
208. *Id.* slip op. at 7.
209. *Id.*
210. *Id.*
211. *Id.* slip op. at 8.
212. *Id.* slip op. at 8–9.
213. *Id.* slip op. at 9–10.
214. *Id.* slip op. at 10.

decisions, his actions demonstrated that he made serious attempts to protect the bank. The Guidelines, however, failed to take the defendant's motives into account. By "mechanical[ly]" correlating pecuniary loss with the offense level, "the guidelines treat a person who steals $100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child."[215] Thus, the Guidelines, by unduly stressing the harm done, fail to account for the defendant's actual culpability.

She then turned to personal characteristics of the defendant. She noted, among other things, that the defendant had done an "excellent" job raising two daughters as a single parent, had a solid employment history, and provided care and support for his aging parents, one of whom suffered from Alzheimer's disease and the other of whom suffered from depression.[216] Judge Aldeman concluded that imprisoning the defendant for the term suggested by the Guidelines "would have a profoundly adverse impact on both his children and his parents."[217] The defendant had asked to be sentenced to some period of home confinement, but, "in order to promote respect for the law and in recognition of the significant loss to the bank," Judge Aldeman sentenced the defendant to a year and a day in prison.[218]

The care with which Judge Aldeman weighed the various § 3553(a) factors should serve as a model for the sentencing judge seeking to exercise the discretion *Booker* grants in a way that should command the respect (if not the approval) of even the toughest "crime control" advocate in Congress or on the appellate bench. She gave significant weight to the Guidelines sentence, calculating it openly, and imposing a sentence that reflected in part the Guideline's heavy emphasis on the harm done to the victim. But she also considered other factors, including the motive and culpability of the defendant, which speaks largely to the "just punishment for the offense" and the need "to protect the public from further crimes of the defendant."[219] Finally, she placed some emphasis on "the nature and circumstances of the offense and the history and characteristics of the defendant."[220] This multi-factored approach is not only consistent with § 3553(a), but appraises the Commission and Congress of the

215. *Id.* slip op. at 11.
216. *Id.* slip op. at 12.
217. *Id.*
218. *Id.* slip op. at 13.
219. *See* 18 U.S.C. § 3553(a)(2)(A) & (D) (2000).
220. *Id.* § 3553(a)(1).

considerations she found relevant but lacking in the Guidelines. Although Judge Aldeman cannot ensure that the Commission and Congress will listen, she is fulfilling the role envisioned for her by the early sentencing reformers.[221]

V. RECOMMENDATIONS TO CONGRESS

Just over a year ago, Congress enacted a statute sternly rebuking the district courts, and making the Guidelines "even more mandatory than they had been."[222] *Booker* made the Guidelines advisory and returned to the district courts even more discretion than the Feeney Amendment took away. A congressional response is certain. This Part argues that Congress should take time to study and analyze the effects that the recent increase in judicial discretion in sentencing has on the administration of justice in the federal system.

As discussed above, though the increase in the rate of downward departures *may* present serious problems to the fair administration of justice, the rate of downward departures may be a result of other forces, including the rapid increase in "fast track" dispositions and increased governmental support of departures in certain cases.[223]

Congress simply did not take the time to address these important issues when it proposed the Feeney Amendment. The House of Representatives tacked the Feeney Amendment onto the PROTECT Act less than a month before it was passed into law.[224] The congressional review consisted of a hearing at the subcommittee level in the House of Representatives on a portion of the Amendment and limited debate on the House and Senate floor.[225] Neither the federal

221. Some district judges may respond that calculating the sentencing range according to the overly complex Guidelines (which, of course, *Booker* and § 3553(a) explicitly require) leaves them without time to write sentencing opinions. Berman, *supra* note 6, at 102 (noting that the "sheer bulk of sentencing law created by the Commission . . . leave[s] judges with relatively less time and fewer opportunities to engage in the meaningful common-law dialogue about sentencing that is essential if they are to contribute effectively to the evolution of the guideline system"). Moreover, the Feeney Amendment's new reporting requirements place a heavier burden on judges' time than existed before. PROTECT Act, § 401(h), 117 Stat. at 672. These contentions underestimate the creativity and resourcefulness of federal judges. One chief district court judge has already successfully passed off his reporting requirements to the U.S. Attorney's office, noting that the statute only requires that the chief judge "ensure that" the reporting is accomplished completely and punctually. *See* United States v. Ray, 273 F. Supp. 2d 1160, 1165 (D. Mont. 2003), *aff'd*, 375 F.3d 980 (9th Cir. 2004).

222. United States v. Booker, 125 S.Ct. 738, 765 (2005) (majority opinion of Breyer, J.).

223. *See supra* notes 142–44 and accompanying text.

224. *See* S. 151 EAH, 108th Cong. § 109 (2003).

225. *See* Letter from Leonidas Ralph Mecham, Secretary, U.S. Sentencing Commission, to Orrin G. Hatch, Senator (Apr. 3, 2003), *reprinted in* 149 CONG. REC.

judiciary, the Sentencing Commission, nor the organized bar were given a meaningful opportunity to consider the proposal.[226] Senator Leahy and Representative Waters suggested that the Amendment was attached to the PROTECT Act because the Act had almost universal support in Congress and because even those who opposed the amendment would not likely want to be perceived as voting against a bill concerning the abduction of children.[227]

It was to avoid these kinds of hasty judgments and political maneuvers that the SRA vested sentencing authority in the independent U.S. Sentencing Commission.[228] As an independent agency designed for the sole purpose of creating and refining a fair sentencing system, the Commission is institutionally more capable than Congress of addressing complex sentencing issues such as the causes of the increase in the rate of downward departures. Rather than rushing to judgment and blaming the judiciary for the rising departure rate, the better course would have been to direct the Sentencing Commission to study the issue and report to Congress on what it deems the proper solution to the problem.

Perhaps Congress should use as a model the Judicial Use of Discretion to Guarantee Equity on Sentencing (JUDGES) Act—a bill proposed by Senator Kennedy in response to the Feeney Amendment.[229] The bill would have repealed those provisions of the Feeney Amendment that *Booker* left in force.[230] The bill also would have required the Commission to compile a report within 180 days that includes, among other things: information on rates of departures in various districts, an analysis of the grounds upon which district judges depart from the Guidelines, an assessment of the extent to which departures promote or circumvent the Guidelines system, an assessment of the extent to which various departures further the ultimate goals of punishment, and an assessment of the extent to which appellate review of departures is sufficient to further the goals of the Guidelines system.[231] In compiling its report, the Commission would have been required to hold at least one public hearing at which

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S5120–S5121 (statement of Sen. Kennedy).

226. *See* Letter from American Bar Association to Rep. Scott, (Apr. 9, 2003), *reprinted in* 149 CONG. REC. H3067 (statement of Rep. Scott).

227. *See* 149 CONG. REC. S5130 (statement of Sen. Leahy); H3071 (statement of Rep. Scott).

228. *See supra* notes 46–49 and accompanying text.

229. S. 1086, 108th Cong. (2003).

230. *Id.* § 3(a). The bill would repeal most of the major provisions of the Feeney Amendment but would leave the rest of the PROTECT Act unaffected.

231. *Id.* § 2(b).

all interested parties, including the Department of Justice and the federal judiciary, could inform the Commission of their views.[232]

A cautious approach that gives the Commission time to gather information from all interested groups for analysis is perhaps even more appropriate in the aftermath of the *Booker* decision.[233] Because of the novelty of the system *Booker* created, Congress should take time to evaluate its strengths and weaknesses. Though Congress may very well decide to enact a different system, it may wish to retain elements of the *Booker* system. The only way to know would be to take time to observe and study how sentencing practices unfold.

CONCLUSION

Although the precise amount of discretion that sentencing judges enjoy after *Booker* is difficult to determine in light of the sentencing law still in force, there is no question that *Booker* has, at least temporarily, helped to restore to the district courts some of the power the SRA intended them to wield. Congress is sure to respond, and may respond quickly. District judges should use the time they have and the tools provided by *Booker* and the Feeney Amendment to make their voices heard and hopefully convince Congress that some

232. *Id.* §2(c). Senator Hatch maintains that the Commission has been aware of Congress's concern over the rising departure rate since 2000 and that the Commission's failure to reach any conclusions demonstrates that departures are "simply not a priority to the Sentencing Commission." 149 CONG. REC. S5123 (statement of Sen. Hatch). Senator Kennedy pointed out, however, that, at the time of the passage of the PROTECT Act, the Commission was undertaking an extensive study of departures and simply needed more time to reach any definitive conclusions. *See* Letter from Leonidas Ralph Mecham, Secretary, U.S. Sentencing Commission, to Orrin G. Hatch, Senator (Apr. 3, 2003), *reprinted in* 149 CONG. REC. S5120–S5121 (statement of Sen. Kennedy).

233. Many Congresspersons, scholars, and judges have already urged Congress to approach sentencing reform slowly. *See, e.g.*, Douglas A. Berman, *Why Congress Should Go Slow, and What the USSC Should Say*, Sentencing Law and Policy Blog, Jan. 16, 2005 (urging Congress to move cautiously), http://sentencing.typad.com/sentencing_law_and_policy/2005/week2/index.html (last visited Mar. 1, 2005) (on file with the North Carolina Law Review); Hanes, *supra* note 167 (quoting Magistrate Judge James K. Bredar: "I hope Congress will not act precipitously in an effort to curtail judicial discretion and instead will direct the U.S. Sentencing Commission to monitor and report on judges' sentencing decisions over the next year or two"); Mauro, *supra* note 157 (quoting Senator Patrick Leahy: "Congress should resist the urge to rush in with quick fixes that would only generate more uncertainty and litigation and do nothing to protect public safety."); Torsten Ove, *Jurists Here Reacting Favorably*, PITTSBURGH POST-GAZETTE, Jan. 13, 2005, online ed., *at* http://www.post-gazette.com/pg/05013/441447.stm (last visited Mar. 1, 2005) (quoting District Judge Robert Cindrich: "I can only hope that the Congress will take a serious look at the sentencing laws as the court has suggested and that the future sentencing laws will be more of reason and sensibility than has been demonstrated in the past.") (on file with the North Carolina Law Review).

amount of judicial discretion in sentencing is necessary if the system is to be fair to criminal defendants on an individualized basis.

O. DEAN SANDERFORD