

# Appendix B

## LEGISLATIVE HISTORY

The legislative history of sentencing reform generally, and the Sentencing Reform Act specifically, has been reviewed and written about exhaustively.<sup>1</sup> This chapter reviews the legislative history of sentencing reform, however, with a particular emphasis on departures.

### A. THE EARLY YEARS OF SENTENCING REFORM

The Sentencing Reform Act of 1984 represents one of the most significant pieces of sentencing legislation ever enacted by the United States Congress. For more than a century, Congress had delegated virtually unfettered discretion to federal judges to determine what a sentence should be within a typically wide range prescribed by statute.<sup>2</sup> “The federal judge decided the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”<sup>3</sup> The lack of uniformity in sentencing was exacerbated by the creation of a parole system that applied to only a portion of those sentenced and that focused the release of prisoners according to their potential for or actual rehabilitation.<sup>4</sup>

---

<sup>1</sup> See, e.g., United States Sentencing Commission [USSC], THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, Vol. I (December 1991) [hereinafter USSC 1991 Report]; Kate Stith and Steve Y. Yoh, *The Politics of Sentencing Reform: The Legislative History of the Sentencing Guidelines*, 28 WAKE FOREST L. REV. 225 (1993); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993); see also, the extensive legislative history of the Sentencing Reform Act outlined in S. REP. NO. 98-225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1983).

<sup>2</sup> USSC 1991 Report, *supra* note 1, at 9. The “unfettered discretion” of judges in determining sentencing outcomes would become one of the single biggest reasons Congress would cite for sentencing reform during the years leading up to passage of the Sentencing Reform Act. See, e.g., the dissenting views of Representatives Gekas and Sensenbrenner in H.R. REP. NO. 98-1017, 98<sup>th</sup> Cong., 2d Sess. 252 (1984) (“Sentencing disparity of truly alarming proportions exists today largely because individual trial judges are permitted unfettered discretion in sentencing.”).

<sup>3</sup> USSC 1991 Report, *supra* note 1, at 9.

<sup>4</sup> *Id.* (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

During the 1950s and 1960s, concern grew that the indeterminate, rehabilitation-based sentencing system was not working and losing the public faith.<sup>5</sup> In March 1966, President Lyndon Johnson, recognizing the faults in the federal criminal code and sentencing system, called for Congress to work with him in creating a “National Strategy on Crime.”<sup>6</sup> President Johnson’s message to Congress resulted in formation of the “Brown Commission,”<sup>7</sup> charged with creating a wholly revised Federal criminal code, including reform of a criminal sentencing system that lacked any general sentencing scheme.<sup>8</sup>

In January 1971, the Brown Commission released its Final Report.<sup>9</sup> Although sentencing reform was not the main focus of the Brown Commission’s work, it did propose some sentencing reform measures that would carry through to the passage of the Sentencing Reform Act, including: a list of authorized sentences for federal crimes, limits on cumulation of punishments for multiple offenses, and appellate review of sentences.<sup>10</sup>

By the 1970s, “there was a broad and rising level of concern in Congress regarding problems with the Federal criminal code, particularly with the serious problems of sentencing disparity.”<sup>11</sup> It had become clear that at that time “Federal sentencing practices provide[d] neither rationality nor fairness.”<sup>12</sup> The bipartisan efforts to reform the criminal code begun in the

---

<sup>5</sup> *Id.* at 10. For an extensive discussion of the various approaches to penal justice, including the rehabilitative model, see Paul Hofer & Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L.R. 19 (2003); FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

<sup>6</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 32.

<sup>7</sup> The Brown Commission was named after its chairman Edmund G. Brown, then Governor of California. The Brown Commission comprised twelve members: three Federal judges, three Senators, three House members, and three individuals appointed directly by the President. See *id.* at 32, n.6 & 7; Pub. L. No. 89-801, 80 Stat. 1516 (1984).

<sup>8</sup> William J. Wilkins, Jr., Phyllis J. Newton & John Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 365 (1991).

<sup>9</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 32.

<sup>10</sup> USSC 1991 Report, *supra* note 1, at 10 (citing Nat’l Comm’n on Reform of Federal Criminal Laws, Final Report, 271–318 (1971)). The concerns regarding sentencing raised by the Brown Commission would be echoed repeatedly throughout the history of sentencing reform. See, e.g., S. REP. NO. 97-307, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 6 (1981) (“The sentencing structure of present Federal criminal law [] cannot escape criticism. Indeed, it is riddled with irrationality and inconsistency . . . . Grading of offenses is []erratic. Similar conduct is often treated with gross disparity.”).

<sup>11</sup> Wilkins, Newton, & Steer, *supra* note 8, at 362.

<sup>12</sup> S. REP. NO. 95-605, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 882 (1977).

mid-1960s continued under the leadership of Senator John L. McClellan during the 92<sup>nd</sup> Congress,<sup>13</sup> and in 1973 the first legislation aimed at comprehensive reform of the federal criminal code was introduced.<sup>14</sup> None of the bills introduced during the 93<sup>rd</sup> Congress, however, contained provisions for either a sentencing commission or sentencing guidelines system.<sup>15</sup>

In 1975, Senator Edward Kennedy introduced the first piece of substantive sentencing reform legislation, S. 2966. That legislation was based on extensive research by the American Law Institute and the criticisms of the federal sentencing system set forth by federal Judge Marvin E. Frankel.<sup>16</sup> Senator Kennedy's reform legislation called for the creation of a sentencing commission that would put into place a guideline system to govern Federal sentencing,<sup>17</sup> "to reduce unwarranted disparity among sentences imposed by different judges and to provide more rationality and certainty in sentencing."<sup>18</sup>

Senator Kennedy's proposed sentencing reform legislation provided the foundation for debating a new federal sentencing system over the next several years.<sup>19</sup> Despite Senator

---

<sup>13</sup> USSC 1991 Report, *supra* note 1, at 10–11. Senator McClellan chaired the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee and took the lead in examining the Brown Commission's recommendations, including those regarding sentencing reform. Senator McClellan's subcommittee held hearings throughout the 92<sup>nd</sup> Congress in preparation for the introduction of legislation in the following Congress. *Id.*

<sup>14</sup> S. REP. NO. 97-307, *supra* note 10, at 2; H.R. REP. NO. 98-1017, *supra* note 2, at 33. Early efforts to revise the criminal code were spearheaded in the Senate by then-Senators McClellan, Ervin, and Hruska.

<sup>15</sup> USSC 1991 Report, *supra* note 1, at 11. None of the bills proposed in the 93<sup>rd</sup> Congress moved out of committee. H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>16</sup> Stith & Yoh, *supra* note 1, at 225. In 1972, Judge Frankel authored a piece entitled *Criminal Sentences: Law without Order* that, along with his series of lectures at the University of Cincinnati Law School, sharply criticized the disparity in sentencing created not only by the federal parole system, but the discretion exercised by judges. Stith & Yoh, at 229; USSC 1991 Report, *supra* note 1, at 11.

<sup>17</sup> Stith & Yoh, *supra* note 1, at 225.

<sup>18</sup> S. REP. NO. 95-605, *supra* note 12, at 883.

<sup>19</sup> Feinberg, *supra* note 1, at 294–95. At the same time debate was underway over Senator Kennedy's proposed guidelines system, the U.S. Parole Commission was undertaking its own guidelines study as a pilot project. The program was expanded to all parole decisions in 1974, and Congress ultimately codified the Parole Commission's guidelines system in 1976. *See* USSC 1991 Report, *supra* note 1, at 12 (citing 38 Fed. Reg. 31,942 (1973); 39 Fed. Reg. 20,028 (1974), and Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976)). The implementation of this guideline system led to suggestions that a similar system be put into place for sentencing and a number of states, including Minnesota, began their own sentencing guidelines system of reform. USSC 1991 Report, *supra* note 1, at 12.

Kennedy's and others' efforts, reform legislation ultimately died in the 94<sup>th</sup> Congress. The concept of a judicial commission "to promulgate guidelines for federal courts as 'the beginning of a concerted legislative effort to deal with sentencing disparity'" continued to garner widespread support.<sup>20</sup>

Efforts to revise the criminal code and sentencing system continued during the 95<sup>th</sup> Congress. In 1977, Senator McClellan and Senator Kennedy worked with then Attorney General Griffin Bell to draft compromise sentencing reform legislation.<sup>21</sup> The Senate's legislation, S. 1437, not only included Senator Kennedy's earlier sentencing commission initiative, but also a comprehensive plan to replace indeterminate sentencing in the federal criminal system.<sup>22</sup>

The Senate's Subcommittee on Criminal Justice conducted public hearings on the McClellan-Kennedy compromise (S. 1437) as well as on a House version of the bill introduced by then-Representative Robert Kastenmaier.<sup>23</sup> The House Judiciary Committee held numerous hearings and received extensive testimony on S. 1437 and other recodification efforts.<sup>24</sup> By the end of the 95<sup>th</sup> Congress, however, the House Judiciary Committee had concluded that an omnibus approach to criminal code reform as proposed in S. 1437 was not feasible.<sup>25</sup> Instead, it preferred the incremental approach demonstrated by H.R. 13959.<sup>26</sup> This difference in approach caused sentencing reform to stall in the 95<sup>th</sup> Congress. The Senate's version of criminal code

---

<sup>20</sup> Wilkins, Newton, & Steer, *supra* note 8, at 362 (citing 121 CONG. REC. 37,562 (1975)). Senator Kennedy's sentencing reform proposal was further bolstered by the recommendations that resulted from a workshop on sentencing reform held at Yale University in the 1970s. S. REP. NO. 95-605, *supra* note 12, at 1159. Those recommendations from a prominent group of law professors and scholars included the creation of a sentencing commission and sentencing guidelines system, a mandatory statement of the purposes of sentencing, abolishment of parole, and appellate review of sentences. USSC 1991 Report, *supra* note 1, at 12; S. REP. NO. 95-605, *supra* note 12, at 1159.

<sup>21</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>22</sup> Feinberg, *supra* note 1, at 298.

<sup>23</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>24</sup> H.R. REP. NO. 95-29, 96<sup>th</sup> Cong., 2d Sess. 2-3 (1979).

<sup>25</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33; H.R. REP. NO. 95-29, *supra* note 24, at 2. The House Judiciary Committee was particularly concerned with the "untested" guidelines system that it feared would "virtually deprive" the sentencing judges of the ability to tailor criminal sentences to the individual being sentenced. H.R. REP. NO. 95-29, *supra* note 24, at 3.

<sup>26</sup> H.R. REP. NO. 95-29, *supra* note 24, at 4-5; H.R. REP. NO. 98-1017, *supra* note 2, at 33. This "incremental approach" would have broken criminal code and sentencing reform initiatives into separate pieces of legislation to cure the most glaring defects with the federal criminal system rather than undertake an omnibus reform effort that House members felt had not been addressed adequately by the Senate. H.R. REP. NO. 98-1017, *supra* note 2, at 33

reform legislation passed the Senate by a 72-15 vote on January 30, 1978,<sup>27</sup> but failed to move in the House of Representatives.

## **B. THE BEGINNING OF THE ROLE OF DEPARTURES IN SENTENCING REFORM**

By the early 1980s, sentencing reform was reaching its final draft form. Both chambers of Congress had acknowledged that a guidelines system was the optimal choice reducing sentencing disparity and uncertainty. The extent to which judges would be required to comply with the guidelines, however, continued to be defined in the final years of debate. What emerged from the failed sentencing reform efforts of the 95<sup>th</sup> Congress was a new provision that would permit a judge to depart from the proposed guidelines system when a particular case so warranted because it did not fit within the applicable guideline range.<sup>28</sup> This provision, added to S. 1437 during the Senate's debate of the bill during the 95<sup>th</sup> Congress,<sup>29</sup> specifically granted the sentencing judge discretion to depart from the relevant guideline sentence, as long as the sentence imposed was not "clearly unreasonable" from the sentencing guidelines.<sup>30</sup>

While requiring general conformity to the guideline ranges, the provision was intended to provide "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines."<sup>31</sup> In adopting this provision, the Senate Committee expressly rejected an amendment offered by Senator Mathias that would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in

---

<sup>27</sup> *Id.*

<sup>28</sup> S. REP. NO. 95-605, 95<sup>th</sup> Cong., *supra* note 12, at 892 (proposed 18 U.S.C. 3553(b)).

<sup>29</sup> S. REP. NO. 98-225, *supra* note 1, at 3261 (citing 124 CONG. REC. S289 (daily ed. Jan. 23, 1978)).

<sup>30</sup> Stith & Yoh, *supra* note 1, at 244. The House did not take the same approach to sentencing reform. In fact, it flatly rejected the Senate notion that sentencing judges should be restricted to selecting a sentence within a narrowly defined guideline. Whereas the Senate had proposed a mandatory guidelines system, a new departure provision, and appeals of right for sentences outside the guidelines, H.R. 6915 sought to retain parole terms, reduce maximum statutory sentence lengths by one-third, and to empower the Judicial Conference with authority to promulgate non-binding guidelines to assist judges in sentencing. Because the guidelines were not mandatory, there was no need for a departure provision. H.R. 6915 also did not address appellate review. See Marc L. Miller & Ronald F. Wright, *Your Cheatin Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 725, 739 (1999) (discussing legislative history of appellate review); see also H. REP. NO. 98-1017, *supra* note 2, at 32–33 (discussing history of House attempts at sentencing reform).

<sup>31</sup> See S. REP. NO. 98-225, *supra* note 1, at 3261 (discussing legislative history of each section of the Sentencing Reform Act).

a particular case,<sup>32</sup> as well as an amendment by Senator Gary Hart that would not have permitted judicial departures at all.<sup>33</sup>

While the Senate bill allowed departures under prescribed circumstances, it also required the sentencing judge to set forth a statement of reasons justifying any deviation from the guidelines,<sup>34</sup> and it required that all such sentences be subject to appellate review.<sup>35</sup> S. 1437 permitted appellate courts to overturn a sentence if the sentencing judge misapplied the guidelines, or if the sentence was “outside the guidelines” *and* the resulting sentence was unreasonable.<sup>36</sup> Under the Senate bill, an appeal of right was not available for correctly determined sentences that fell within the requisite guideline sentence.<sup>37</sup> These provisions, particularly the availability of appellate review, were intended to act as checks against “clearly unreasonable” sentences.<sup>38</sup>

The legislative maneuvering surrounding this amendment illustrates that Senate reformers intended for typical cases to be sentenced within the guideline range.<sup>39</sup> “The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it

---

<sup>32</sup> S. REP. NO. 98-225, *supra* note 1, at 3262. “The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender” or the offense warranted deviation, “whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines.” *Id.*

<sup>33</sup> Stith & Yoh, *supra* note 1, at 240, 245.

<sup>34</sup> A statement of reasons actually was expected for all sentencing, not just in cases of departures, but Congress expected the nondeparture statements to “be brief.” S. REP. NO. 95-605, *supra* note 12, at 893. By contrast, with respect to departures, reformers expected *specific* reasons to be articulated setting forth all the reasons why the judge “felt the guidelines did not adequately take into account all the pertinent circumstances of the case at hand.” *Id.* at 892. Senator Kennedy explained the relationship between the written requirement and departures this way: “A judge would be required to impose a penalty within the established [guideline] range unless it could be demonstrated *in writing* that a justification existed for sentencing the offender to a different term.” Stith & Yoh, *supra* note 1, at 244 n.126 (citing Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 373 (1979)) (emphasis added).

<sup>35</sup> S. REP. NO. 95-605, *supra* note 12, at 883.

<sup>36</sup> Miller & Wright, *supra* note 30, at 737.

<sup>37</sup> *Id.*

<sup>38</sup> S. REP. NO. 95-605, *supra* note 12, at 883.

<sup>39</sup> *Id.* at 892–93.

would have promulgated a different range.”<sup>40</sup> The Senate Judiciary Committee did not leave judges without recourse in dealing with the guidelines, however: “A judge who disagrees with a guideline, may of course, make his views known to the Sentencing Commission, and may recommend such changes as he deems appropriate.”<sup>41</sup>

Following the Senate Judiciary Committee’s report of S. 1437, two additional changes related to departures were made to the legislation that together would seem to further restrict the use of departures. First, the Senate adopted an amendment by Senator Mathias to remove the “clearly” modifier so that appellate courts were directed to vacate sentences outside the guidelines that were “unreasonable” as opposed to “clearly unreasonable.”<sup>42</sup> Second, the Senate agreed to an amendment by Senator Hart that added a new directive to the sentencing judge. “In addition to ‘considering’ a variety of factors and specifying the reasons for a particular sentence, the sentencing judge was directed to ‘impose a sentence within the range specified by the Commission’s guidelines unless 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 different sentence.”<sup>43</sup>

By the 96<sup>th</sup> Congress, the House had modified its piecemeal legislative approach, and again embraced the concept of broad reform legislation in certain areas of federal criminal law and sentencing.<sup>44</sup> During the 96<sup>th</sup> Congress, the Senate continued its omnibus approach. In 1979, S. 1732 was introduced and after fifty Committee meetings, ten days of hearings, and 69 additional meetings, the Senate passed it on January 7, 1980.<sup>45</sup> In the 96<sup>th</sup> Congress, both the Senate and the House Committees on the Judiciary reported criminal code bills; however, insufficient time remained in the press of the election year to complete the process.”<sup>46</sup>

### C. THE 1981 EFFORTS: THE FINAL STAGES OF SENTENCING REFORM LEGISLATION

Both the House and Senate continued to work on criminal code reform legislation during the 97<sup>th</sup> Congress. The House Judiciary Committee held twenty-two days of hearings on five different bills aimed at reforming the Federal criminal justice system, including one by

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 893.

<sup>42</sup> Stith & Yoh, *supra* note 1, at 245 (citing 124 CONG. REC. 18 (daily ed. Jan. 23,1978)).

<sup>43</sup> S. REP. NO. 98-225, *supra* note 1, at 3261; Stith & Yoh, *supra* note 1, at 245 (citing 124 CONG. REC. 382-83 (daily ed. Jan. 23, 1978)) (emphasis added).

<sup>44</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 33.

<sup>45</sup> *Id.* at 34.

<sup>46</sup> *Id.*; S. REP. NO. 97-307, *supra* note 10, at 2 .

Representative Conyers that dealt exclusively with sentencing reform.<sup>47</sup> The Senate again took up the reform effort and passed its own version of a criminal code reform bill, S. 1630,<sup>48</sup> one part of which would ultimately become the Sentencing Reform Act of 1984.<sup>49</sup> A completely revamped sentencing system was proposed in S. 1630; it expanded upon Senator Kennedy’s earlier efforts and set out the final legislative parameters of a proposed Federal sentencing guideline system.<sup>50</sup>

By the 97<sup>th</sup> Congress, there was an emerging consensus in Congress that the Federal sentencing system was failing.<sup>51</sup> Some of the harshest criticisms of the pre-guidelines sentencing system were directed at the discretion of federal judges.<sup>52</sup> The Committee report stated that “each judge is left to apply his own notions of the purposes of sentencing . . . and [a]s a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes.”<sup>53</sup> The “glaring disparities” in federal sentencing “can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any meaningful statutory guidance or review procedures to which courts and parole boards might look.”<sup>54</sup>

The Senate Judiciary Committee, therefore, set forth to address five major sentencing-related problems:

- (1) lack of comprehensiveness and consistency in federal sentencing law;
- (2) unfairness and inconsistency in sentencing practices;
- (3) uncertainty in release date;
- (4) limited availability of sentencing options; and
- (5) apparent inconsistency of purpose.<sup>55</sup>

---

<sup>47</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 34.

<sup>48</sup> *Id.*

<sup>49</sup> S. REP. NO. 97-307, *supra* note 10, at 955.

<sup>50</sup> *Id.* at 10 (“The sentencing provisions of the Code represent a complete revision and reformation of sentencing law to assure that sentences are fair both to defendants and to the public. The provisions are designed to achieve a rationality, uniformity and fairness that simply have not existed before.”).

<sup>51</sup> *See* S. REP. NO. 97-307, *supra* note 10, at 955 (discussing problems with rehabilitative sentencing model); S. REP. NO. 98-225, *supra* note 1, at 3223 (discussing inappropriateness of rehabilitative sentencing model).

<sup>52</sup> S. REP. NO. 97-307, *supra* note 10, at 5.

<sup>53</sup> *Id.* at 955.

<sup>54</sup> *Id.* at 956.

<sup>55</sup> *See id.* at 957–67 (outlining and discussing problems with current Federal sentencing system).



S. 1630 followed the outline of its predecessor legislation and proposed establishing a sentencing commission within the judicial branch. The commission would be charged with developing “sentencing guidelines to govern the imposition of sentences for all Federal offenses”<sup>56</sup> taking into consideration “factors relating to the purposes of sentencing, the characteristics of offenders, and the aggravating and mitigating circumstances under which specific offenses may be committed.”<sup>57</sup>

The Senate also addressed the level of compliance with the guidelines it expected to occur in the new system. The Senate Judiciary Committee explained:

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that *the sentencing judge has an obligation to consider all the factors in a case and to impose sentences outside the guidelines in an appropriate case*. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender as compared to similarly situated offenders, not to eliminate the imposition of thoughtful individualized sentences.”<sup>58</sup>

Although the judge was expected to sentence a defendant within the range specified in the guideline, “if he considers the guideline range inappropriate because of factors not taken into consideration by the Sentencing Commission, he is free to sentence the defendant above or below the guideline range as long as he explains his reasons for so doing.”<sup>59</sup> For instance, a judge “may either decide that the guideline recommendation reflects the offense and offender characteristics, that should affect the sentence and impose sentence according to the guidelines recommendation,

---

<sup>56</sup> *See id.* at 967 (“One of the main benefits of the sentencing guidelines system . . . is that it can achieve the purpose of eliminating disparity in sentences that is not justified by differences among offenses and offenders.”).

<sup>57</sup> *Id.* at 10; *see also* S. REP. NO. 95-605, *supra* note 12, at 1161. S. 1630 was crafted to ensure that the “chaotic variety of existing terms of imprisonment and penalties is replaced with a modern system under which offenses are classified into nine categories for sentencing purposes, and under which the range of penalties more accurately reflects the range of conduct covered by the offenses. The uncertainty and inequity of the current sentencing parole process is supplanted by a carefully interrelated sentencing package incorporating guidelines, determinate sentences, and appellate review. As a result, existing anomalies can be obviated and penal sanctions can appropriately reflect the seriousness of the offense according to contemporary standards.” *Id.* at 8.

<sup>58</sup> S. REP. NO. 97-307, *supra* note 10, at 969 (emphasis added); *see also* S. REP. NO. 98-225, *supra* note 1, at 3235 (reiterating language contained in S. REP. NO. 97-307).

<sup>59</sup> S. REP. NO. 97-307, *supra* note 10, at 11. *See also* S. REP. NO. 98-225, *supra* note 1, at 3236 (noting that “[r]ecent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges.”).

or conclude that the guidelines fail to adequately reflect an aggravating or mitigating circumstance that should affect the sentence and impose sentence outside the guideline.”<sup>60</sup> A sentence outside the guidelines would be appealable, with the appellate court directed to determine whether the sentence is reasonable.<sup>61</sup>

The Committee report also stated that “the majority of cases will result in sentences within the guidelines range, while a sentence outside the guidelines will be imposed only in appropriate cases.”<sup>62</sup> This sentencing reform legislation maintained broad bipartisan support in the Senate, but the crime control legislation that ultimately passed did not include sentencing reform measures, and for reasons unrelated to sentencing policy, ultimately was vetoed by President Reagan.<sup>63</sup> Yet, the concept of a judicial commission that would work to curb unwarranted disparities in sentencing by providing guidance for judges to ensure consistency and certainty in sentencing was the hallmark of sentencing reform efforts in the 97<sup>th</sup> Congress.<sup>64</sup>

#### **D. SENTENCING REFORM LEGISLATION BECOMES LAW**

Sentencing reform legislation finally became law in the 98<sup>th</sup> Congress.<sup>65</sup> In 1983, Senators Thurmond and Laxalt introduced the Reagan Administration’s version of comprehensive crime control legislation, which contained sentencing reform provisions as Title II.<sup>66</sup> After holding hearings on the legislation, the Senate Judiciary Committee divided the legislation into several parts, one of which was S. 1762, the Comprehensive Crime Control Act of 1983, which contained the sentencing reform provisions of the Thurmond-Laxalt bill.<sup>67</sup> Simultaneously, Senator Kennedy introduced a stand-alone version of the Title II sentencing reform provisions (S. 668), and both pieces of legislation were forwarded to the House in February 1984.<sup>68</sup>

Meanwhile, the House Judiciary Subcommittee on Criminal Justice held nine days of hearings on criminal code reform as presented in a number of measures and reported out, through

---

<sup>60</sup> S. REP. NO. 97-307, *supra* note 10, at 969.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 34.

<sup>64</sup> Wilkins, Newton and Steer, *supra* note 8, at 364.

<sup>65</sup> USSC 1991 Report, *supra* note 1, at 13.

<sup>66</sup> S. REP. NO. 98-225, *supra* note 1.

<sup>67</sup> USSC 1991 Report, *supra* note 1, at 13.

<sup>68</sup> *Id.* (citations to the CONGRESSIONAL RECORD omitted).

the full committee, its own sentencing reform legislation, H.R. 6012 (the Sentencing Revision Act of 1984).<sup>69</sup> The House concurred with certain fundamentals of the reform measures proposed by the Senate, but H.R. 6012 differed in many ways from the Senate's version.<sup>70</sup> Specifically, H.R. 6012 would have provided more latitude for judges to depart from the guideline ranges, allowing departures whenever "because the particular characteristics of offense and offender, the guideline sentence does not fulfill the requirements set forth as the reasons for sentencing."<sup>71</sup> The House bill required a sentencing court to "impose a sentence that accords with the applicable sentencing guidelines," unless the court determined that some other sentence would be the "least severe appropriate measure" that can fulfill the purposes of sentencing as set forth in the statute.<sup>72</sup>

Unlike the Senate version, the House bill contained no presumption that judges would depart only in unusual circumstances not contemplated by the new sentencing commission.<sup>73</sup> The House believed that sentencing simply involved too many factors that could not possibly be encompassed within a particular guideline.<sup>74</sup> The House preferred judges to consider whether the sentence being meted out was "appropriate" in the case at hand, rather than whether the sentencing commission had given "adequate consideration" to the present factors for an entire class of cases.<sup>75</sup> The House also questioned whether limits on judicial discretion would erase unwarranted sentencing disparity because such disparity resulted "from discretion exercised by several participants in the criminal justice system."<sup>76</sup> Although this version of sentencing reform legislation was reported by the House Judiciary Committee, the full House did not consider this version of sentencing reform legislation.<sup>77</sup>

The Senate's bill eventually was included by the House in a continuing appropriations

---

<sup>69</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 34.

<sup>70</sup> *Id.* at 35–36.

<sup>71</sup> *Id.* at 42.

<sup>72</sup> Miller & Wright, *supra* note 30, at 743; *see also* H.R. 6012, § 3522(b), 98<sup>th</sup> Cong., 2d Sess. (1984).

<sup>73</sup> Miller & Wright, *supra* note 30, at 743.

<sup>74</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 41.

<sup>75</sup> Miller & Wright, *supra* note 30, at 743.

<sup>76</sup> H.R. REP. NO. 98-1017, *supra* note 2, at 36 note 41.

<sup>77</sup> USSC 1991 Report, *supra* note 1, at 13. H.R. 6012 was placed on the House calendar for debate on September 14, 1984 but no vote occurred. Miller & Wright, *supra* note 30, at 744.

bill, further amended by the Senate,<sup>78</sup> and signed into law by the President on October 12, 1984.<sup>79</sup>

With regard to departures, new section 3553(b) of title 18, United States Code, as contained in the Act, provided flexibility for judges to depart upward or downward when individual cases contained aggravating or mitigating circumstances not adequately considered by the Sentencing Commission when formulating the applicable guidelines.<sup>80</sup> Section 3553(b), as enacted, read:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [the applicable sentencing guideline range] unless the court finds 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.<sup>81</sup>

## **1. Codification of Appellate Review**

In addition to codifying the departure provisions, the Sentencing Reform Act codified provisions governing the appellate review of sentences at 18 U.S.C. § 3742, an important feature of the guidelines system that had been absent in the pre-guidelines sentencing structure. The House, in a shift from its previous position, in particular viewed appellate review as essential to alleviating sentencing disparity.<sup>82</sup> The Sentencing Reform Act established limited appellate review of sentences in the federal criminal justice system “designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court.”<sup>83</sup> But congressional reformers recognized that “[b]ecause sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that

---

<sup>78</sup> The Senate amendments were, according to Senate reformers, “clarifying in nature” and resulted from final discussions regarding the scope of permissible departures and several other issues. As examined in the next section, Congress revisited the issue of departures in 1987, with the House and Senate restating their positions on departures.

<sup>79</sup> USSC 1991 Report, *supra* note 1, at 13.

<sup>80</sup> *See* 18 U.S.C. 3553(b) (1984).

<sup>81</sup> Pub. L. No. 98-473, 98 Stat. 1837, 1990 (1984).

<sup>82</sup> Miller & Wright, *supra* note 30, at 744.

<sup>83</sup> S. REP. NO. 98-225, *supra* note 1, at 3332–33. The appellate review procedures contained in the Sentencing Reform Act were attributed in large measure to the efforts of then-Senator Roman Hruska. *See id.* at 3332.

some of the sentences outside the guidelines will appear to be too severe or too lenient.”<sup>84</sup>

The Sentencing Reform Act set forth procedures for appeal in four cases: (1) appeal of a sentence imposed in violation of law; (2) appeal of a sentence that reflects an incorrect application of the sentencing guidelines; (3) appeal of a sentence in a case in which there is no guideline applicable to the offense committed; and most relevant to the issues of departures, (4) automatic appellate review for a defendant if a judge upwardly departs, and for the government if the judge downwardly departs.<sup>85</sup>

Senate reformers believed that the appellate review provisions created a “comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.”<sup>86</sup> Hence, the reformist vision of the new sentencing system was one in which the new Sentencing Commission and appellate review would work in tandem to reduce unwarranted sentencing disparity and uncertainty.

#### **E. THE GUIDELINES PERIOD AND THE ROLE OF DEPARTURES**

As repeatedly expressed throughout the legislative history of the various bills leading up to the enactment of the Sentencing Reform Act, Congress considered departures from the guideline system to be an integral part of the sentencing guidelines system. Congress expected that “under [the] guideline sentencing system, the judge should be able to sentence outside the guideline range in *unusual* circumstances, but should . . . give reasons for such a sentence.”<sup>87</sup>

To assist judges in navigating the new guidelines system and obtaining a better understanding of when departures from those guidelines may be appropriate, Congress envisioned that the Sentencing Commission would promulgate a set of “policy statements.”<sup>88</sup>

[T]he Commission is required to issue general policy statements concerning application of the guidelines and other aspects of sentencing that would

---

<sup>84</sup> S. REP. NO. 98-225, *supra* note 1, at 3334.

<sup>85</sup> See 18 U.S.C. § 3742 (Review of a sentence) (1987). Amendments to 18 U.S.C. § 3742 made by the PROTECT Act are discussed *infra*. See also, S. REP. NO. 98-225, *supra* note 1, at 3334–36 (discussing criticisms raised against the appellate review provisions).

<sup>86</sup> S. REP. NO. 98-225, *supra* note 1, at 3338.

<sup>87</sup> STAFF OF SUBCOMMITTEE ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, 97<sup>TH</sup> CONG., FEDERAL CRIMINAL LAW REVISION: HEARINGS ON H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, AND H.R. 5703, 8 (Comm. Print 1983) (emphasis added).

<sup>88</sup> See 28 U.S.C. § 994(a)(2–3) (2003) (setting forth the parameters of policy statements to be promulgated by the Sentencing Commission).

further the ability of the federal criminal justice system to achieve the established purposes of sentencing. These policy statements could address, for example, such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which did not occur sufficiently frequently to be incorporated into the guidelines themselves. . . . One important function of the policy statements might be to alert the federal district judges to existing disparities which have not been adequately cured by the guidelines, while offering recommendations as to how these situations should be treated in the future.<sup>89</sup>

The first set of guidelines and accompanying policy statements were submitted for congressional review in April 1987.<sup>90</sup>

### **1. Further Modifications in the Sentencing Reform Effort: The Sentencing Act of 1987**

Congressional efforts to reform the Federal sentencing system did not end with passage of the Sentencing Reform Act.<sup>91</sup> Congress recognized that the comprehensive systematic overhauls put into place by the Act “would inevitably require refinement.”<sup>92</sup> As the changes mandated in the Sentencing Reform Act were undertaken, Congress received substantial feedback from the newly created Sentencing Commission, the Department of Justice, practitioners, judges, and academics regarding the practical aspects of implementing the federal sentencing guideline system.<sup>93</sup> Of particular concern to many involved in the process was clarifying the scope of the sentencing judge’s authority to depart from the prescribed sentence under the guidelines as set forth in 18 U.S.C. § 3553, the expected role of appellate review of such departures, and as an extension of that query, upon which Sentencing Commission materials it could rely when doing

---

<sup>89</sup> S. REP. NO. 95-605, *supra* note 12, at 1165; *see also*, *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (Oct. 22, 1987) (testimony of Judge Stephen Breyer, Commissioner, USSC) describing the “heartland” concept applied to the guidelines and the role of policy statements and commentary in supporting the guidelines).

<sup>90</sup> USSC 1991 Report, *supra* note 1, at 8.

<sup>91</sup> Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192 (Summer 1993).

<sup>92</sup> *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (Oct. 22, 1987) (testimony of Judge Stephen Breyer, Commissioner, USSC), (statement of Sen. Kennedy); *accord id.* (statement of Sen. Thurmond). *See also id.* at 23 (testimony of Judge William J. Wilkins, Jr., Chairman, USSC).

<sup>93</sup> *See* 130 CONG. REC. S16646–47 (daily ed. Nov. 20, 1987) (joint statement of Sens. Biden, Thurmond, Kennedy, and Hatch on S. 1822).

so.<sup>94</sup> Debate over clarifying the standard for departure in section 3553 reignited the differing positions of the House and Senate Judiciary Committees with regard to sentencing reform. The House Committee argued for more discretion for judges, as present under former law, and the Senate advocated for strict adherence to the new guidelines approach and departures only in limited circumstances.

Throughout the summer and fall of 1987, Congress conducted hearings on these issues and about the guidelines submitted by the Commission in April. To address a number of gaps in the 1984 law and clarify various provisions, Congress ultimately passed the Sentencing Act of 1987.<sup>95</sup> Although making a modest change in the statutory departure standard, Congress confirmed the expectation that judges would depart from the sentencing guidelines in rare instances, proclaimed that the only statutory provision governing departures was section 3553(b), reaffirmed the role of appellate review with regard to departures, and clarified the categories of Sentencing Commission documents and actions courts could consult in making departure determinations.

**a. Legislative Debate Leading Up to the Sentencing Act of 1987**

The legislative debate that culminated in the Sentencing Act of 1987 was extensive, as both chambers of Congress digested the first set of guidelines promulgated by the Sentencing Commission.<sup>96</sup> Over the summer of 1987, the House held hearings on the sentencing guidelines that addressed a number of topics, including the extent to which courts were permitted to depart below the guidelines.<sup>97</sup> A House package of amendments to the Sentencing Reform Act was embodied in H.R. 3483, which the House passed on October 27, 1987 (four days before the first set of sentencing guidelines were to take effect) and referred to the Senate the same day.<sup>98</sup>

After monitoring the activities of the House, the Senate undertook its own review of the guidelines system and needed statutory clarifications.<sup>99</sup> The Senate Judiciary Committee held an oversight hearing in October 22, 1987 to hear from the first set of Sentencing Commissioners regarding their experience with drafting the initial set of guidelines, expectations for their application, and problems that were being encountered by the Commission during its work.

---

<sup>94</sup> 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>95</sup> Pub. L. No. 100-182, 101 Stat. 1271 (1987).

<sup>96</sup> The first set of guidelines was submitted to Congress April 13, 1987. USSC 1991 Report, *supra* note 1, at 8.

<sup>97</sup> *See* 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers); *see* Oct. 22, 1987 Senate Hearings, *supra* note 92, at 9 (statement of Sen. Kennedy).

<sup>98</sup> 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>99</sup> Oct. 22, 1987 Senate Hearings, *supra* note 92, at 9 (statement of Sen. Kennedy).

On October 27, 1987, Senator Biden, along with Senators Thurmond, Hatch, and Kennedy, introduced the Senate’s version of sentencing reform refinements, S. 1822.<sup>100</sup> The Senate passed the bill on October 28, 1987 by unanimous consent.<sup>101</sup> In order to ensure that S. 1822 would be considered in the House in an expeditious manner to meet the deadline of the new sentencing guidelines taking effect, the Senate agreed to a House request to add language to S. 1822 that would clarify the standard for departure from the guidelines embodied in 18 U.S.C. § 3553(b).<sup>102</sup> The Senate amendment added the words, “of a kind, or to a degree” as modifiers to the aggravating or mitigating circumstances upon which a judge could base a departure from the prescribed guidelines.<sup>103</sup> This language clarified that a judge could depart based on a circumstance, even if the Sentencing Commission had considered it adequately for *some* types of cases, so long as the factor was present to an unusual degree in the instant case.<sup>104</sup>

The House passed the agreed upon bill on November 16, 1987, and included a detailed section-by-section analysis in the Congressional Record. The Senate principals, however, disagreed with a key part of that analysis regarding the House interpretation of the statutory departure provisions in 18 U.S.C. § 3553. According to the House interpretation, 18 U.S.C. § 3553 authorized departures in two places. First, it explicitly provided for departures in section 3553(b) and second, it implicitly provided for departures under section 3553(a). Representative Conyers explained:

Section 3553(a) as enacted by the Sentencing Reform Act of 1984 requires that the court (1) consider several factors, including the purposes of sentencing, and (2) “*impose a sentence sufficient, but not greater than necessary, to comply with*” the purposes of sentencing. Thus, if the court finds that the sentence called for by the

---

<sup>100</sup> 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>101</sup> *Id.*

<sup>102</sup> 133 CONG. REC. S16646–47 (daily ed. Nov. 20, 1987) (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch on S. 1822); *see also* 133 CONG. REC. H10016 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers) (discussing negotiations agreed to among Senate, House, Sentencing Commission and Department of Justice regarding how to proceed with sentencing legislation).

<sup>103</sup> 133 CONG. REC. H10014 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

<sup>104</sup> Miller & Wright, *supra* note 30, at 747–48 (emphasis added). Moreover, it was anticipated that the role of departures would be refined routinely, thus enhancing the ability of judges to craft individualized sentences where appropriate rather than stripping them of that flexibility. *See* Judge Breyer’s written answers to Sen. Biden’s questions, *reprinted in Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 38 (1987) at 79; *accord* Oct. 22, 1987 Senate Hearings, *supra* note 92, at 2 (statement of Sen. Kennedy explaining that sentencing decisions of judges, including departures, provide record for Commission’s review).



applicable sentencing guidelines is greater than necessary to comply with the purposes of sentencing, section 3553(a) *would seem to require the court to impose a more lenient sentence.*<sup>105</sup>

In sum, Representative Conyers concluded that the Sentencing Reform Act provided for departures whenever a judge determined that the guideline range was too severe.<sup>106</sup>

The Senate strongly disagreed. According to Senate reformers, the House analysis was the very approach to the sentencing guidelines and departures that senators specifically rejected when they passed the Sentencing Reform Act. In fact, during the 1984 Senate floor debate surrounding the Senate amendment, Senator Hatch contended that the addition of the phrase “impose a sentence sufficient, but not greater than necessary, to comply with” the purposes of sentencing was simply a “clarifying measure” and not an attempt to broaden the scope of sentencing authority already contained in the Sentencing Reform Act.<sup>107</sup>

In 1987, the Senate discounted not only the broader approach to departures from the guidelines advocated by the House, but also the suggestion that any section other than 3553(b) provided courts the authority to depart.<sup>108</sup> Senate reformers claimed that the House analysis disregarded the intent of the Sentencing Reform Act that departures were to occur in *limited* cases, and only under section 3553(b).<sup>109</sup> Senator Hatch summarized the Senate’s position as follows:

The standard for departure is vital to the proper functioning of the guidelines system. It tells judges when, under the law, they are permitted to impose a sentence outside the guidelines promulgated by the Sentencing Commission. If the standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines and the underlying statute, which is to reduce disparity in sentencing and restore fairness and predictability to the sentencing

---

<sup>105</sup> 133 Cong. Rec. H10014 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers) (emphasis added).

<sup>106</sup> *Id.* The language at issue in section 3553(a) derived from an amendment (S. Amdt. 7043) sought by Senator Mathias and offered on the Senate floor during final debate of the Sentencing Reform Act of 1984 by Senator Thurmond in his role as Manager of the bill. 130 CONG. REC. S29870 (daily ed. Oct. 4, 1984).

<sup>107</sup> 130 CONG. REC. S29685 (daily ed. Oct. 4, 1984) (statement of Sen. Hatch); *see also* 133 CONG. REC. S16644 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch reiterating that language added to 3553(a) was clarifying in nature and not intended to “provide an additional basis for departure.”).

<sup>108</sup> 133 CONG. REC. S16644 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch); *see also* 133 CONG. REC. S16646–7 (daily ed. Nov. 20, 1987).

<sup>109</sup> 133 CONG. REC. S16644 (daily ed. Nov. 20, 1987) (statement of Sen. Hatch).

process. Adherence to the guidelines is therefore properly required under the law except in those rare and particularly unusual instances in which the court concludes that there is present in the case an aggravating or mitigating circumstance of a kind or to a degree not included in the guidelines, and that the presence of this circumstance should result in a sentence different from that described.<sup>110</sup>

Despite the disagreement between the two chambers regarding the statutory authority for departures, what is clear is that Congress consistently refrained from offering a “magic number” for the rate of departures, upward or downward, that it expected to occur within the guidelines system.<sup>111</sup> In his 1987 testimony before the Senate Judiciary Committee, then federal Judge Stephen Breyer, one of the original Commissioners, explained that the Minnesota sentencing guidelines system, which had served as a model upon which the Federal sentencing guidelines system was drafted, experienced “quite a few departures, maybe 17-18 percent” during the first couple years after the system was implemented.<sup>112</sup> “Over time, the number of departures diminished radically, until you ha[d] maybe 7 to 11 percent departures at the moment.”<sup>113</sup> However, he was careful to note that “[n]o one at this point can predict accurately how often sentencing courts will depart from the Guidelines or how often the courts of appeal will permit them to do so.”<sup>114</sup> Instead of using any of these varying rates of departures as a benchmark when drafting sentencing reform legislation Congress stuck to more general descriptive terms such as “unusual” or “very limited” in referring to the frequency with which departures would occur and repeatedly stated that it expected the “majority” of cases to fall within applicable sentencing guideline ranges.

---

<sup>110</sup> *Id.* Interestingly, in a later 1993 law review article, Senator Hatch raised the debate over the compulsory nature of the guidelines and seemed to suggest that the more flexible approach taken by the House during the 1987 debates should not be ruled out of hand. In the article, Senator Hatch suggested that “many of the guidelines problems, including their perceived rigidity and . . . facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature.” Senator Hatch further suggested that “Congress may need to examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.” Hatch, *supra* note 91, at 197.

<sup>111</sup> Departures from the parole guidelines system that Congress enacted in 1976 as an interim response to sentencing reform, were estimated at the time to occur in about 20 percent of cases, including both upward (12%) and downward (8%) departures. *See* S. REP. NO. 98-225, *supra* note 1, at 3235 n.83; *see also* Wilkins, Newton and Steer, *supra* note 8, at 362 (citing S. REP. NO. 94-369, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18 (1975)).

<sup>112</sup> Oct. 22, 1987 Senate Hearings, *supra* note 92, at 38 (testimony of Judge Breyer).

<sup>113</sup> *Id.* at 38. Judge Breyer also noted that the departure rate in Washington state, another sentencing guidelines system, had “experienced a somewhat lower departure rate” than that of Minnesota. *Id.* at 49 (written statement of Judge Stephen Breyer).

<sup>114</sup> *Id.*

## **b. Appellate Review**

With regard to the appellate review process, in 1987 Congress received testimony on its role in the new guidelines system, and reaffirmed the belief that appellate review was to act in tandem with the guidelines promulgated by the Sentencing Commission to ensure the proper functioning of the federal sentencing system.

In his 1987 testimony before the Senate Judiciary Committee, Judge Breyer explained the role of appellate review of departures, noting that the system was designed so that appellate courts would review departure decisions for reasonableness and if, “over time, the courts of appeals and the judges are departing too often, or for bad reasons, the [Sentencing] Commission can promulgate further guidelines – and it will – that will limit those departures to make them more rational.”<sup>115</sup> The role of departures, therefore, was to “provide judges with the sufficient leeway to individualize sentences as appropriate,”<sup>116</sup> while the role of appellate review of such departures would aid in the development of a form of common law based on the new guidelines system.<sup>117</sup>

The result of the 1987 discussions on appellate review was that district courts were to remain the “hands-on” formulators of sentences and, as such, their decisions would receive deferential treatment by the appellate courts. In turn, the appellate courts, with the assistance of the Sentencing Commission, were to monitor carefully those sentences that deviated from the guidelines and ensure that sentencing in the lower courts was meeting the goals of sentencing.<sup>118</sup>

## **c. Sentencing Commission’s Suggested Legislative Proposals**

In addition to submitting its first set of guidelines to Congress, the Sentencing Commission submitted legislative proposals it considered necessary to ensure the effectiveness of the guideline system. One of these amendments was to the departure provision of section 3553(b). The Commission sought to amend the phrase “not adequately considered by the Commission” with “language which focuses the inquiry not on the sufficiency to which the Commission may have debated a given factor . . . but, more properly, . . . on whether such factor was or was not taken into account or included within the calculus of factors built into a particular Sentencing Guideline.”<sup>119</sup> The Sentencing Commission deemed this change essential because the existing language required a judicial determination “which is literally impossible to determine

---

<sup>115</sup> *Id.* at 2 (testimony of Judge Breyer).

<sup>116</sup> *Id.* at 89 (providing Judge Breyer’s written answers to Sen. Biden’s questions).

<sup>117</sup> *Id.* at 2, 79.

<sup>118</sup> *Id.* at 199.

<sup>119</sup> *Id.* at 86.

without objective criteria.”<sup>120</sup>

The Sentencing Commission’s proposal also contained guidance to district courts, when making a determination under 18 U.S.C. 3553(b), “to limit their consideration to the ‘four corners’ of the Commission’s published Guidelines, policy statements, and commentary.”<sup>121</sup> The proposed changes to the departure provision had the acquiescence of the Department of Justice and furthered the expectation that courts would depart only for compelling reasons, in limited circumstances, as a result of a case falling outside the “heartland” of cases considered by the Sentencing Commission.<sup>122</sup> The “four corners” recommendation was accepted by Congress and included in amendments to section 3553(b) made by S. 1822, but the “not adequately taken into consideration” language was left untouched.<sup>123</sup>

The President signed S. 1822 into law on December 7, 1987. The President commented favorably on the change to the departure language admonishing, however, that it was not intended to “expand the extremely limited basis for sentencing outside the applicable sentencing guidelines.”<sup>124</sup> “A narrow reading of the departure standard is *vital* to the proper implementation of the Sentencing Reform Act.”<sup>125</sup> While the 1987 discussions about the statutory standards amounted, in many respects, to merely post-enactment re-interpretation of the Sentencing Reform Act’s legislative history and is thus limited in its authoritative value, it made clear that the Senate’s view of limited availability and use of departures from the guidelines was the prevailing intent in Congress. The Sentencing Act of 1987 and its legislative history confirmed that the only authority for courts to depart was embodied in 18 U.S.C. 3553(b), the power to do so was limited, and it was expected that appellate courts and the Sentencing Commission would act together to

---

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See id.* at 85, 143. In addition to reflecting the “heartland concept,” the proposed amendment sought to curtail attempts to subpoena members or records of the Sentencing Commission in order to determine whether it had “adequately taken into consideration” a particular aggravating or mitigating factor. “Rather, the amendment makes clear, as we believe was Congress’s original intent, that only the official published writings of the Commission are to be” considered. *See id.* at 143.

<sup>123</sup> *See* 18 U.S.C. 3553(b) (West Supp. 2003) (“In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission”). This “four corners” language was modified by the PROTECT Act to include the phrase “together with any amendments thereto by act of Congress” for certain sex crime offenses, the sentencing guidelines for which were directly amended by Congress in the PROTECT Act. *See* Pub. L. No. 108-21, § 401(a), 117 Stat. 650 (2003).

<sup>124</sup> Statement of the President Ronald S. Reagan Upon Signing S. 1822, 23 WKLY COMP. PRES. DOC. 1452 (Dec. 14, 1987), *reprinted in* U.S.C.C.A.N. 2135, 2135-36 (1987).

<sup>125</sup> *Id.*

monitor and regulate such departures.

#### **F. GUIDELINE EFFECTIVENESS AND THE RATE OF DEPARTURES**

In 1995, following the first time<sup>126</sup> Congress had rejected a Commission guideline amendment, the Subcommittee on Crime of the House Judiciary Committee held an oversight hearing on the Sentencing Commission and the functioning of the sentencing guidelines. Of particular interest was the role of judicial discretion as evidenced by the rate of guideline departures. Judge Conaboy, then chair of the Sentencing Commission, testified that with regard to departures, the “vast majority of cases between 1989 and 1994” were being sentenced within the guideline range. “In total, only about 20 or 25 percent of the cases involve departures, most of which are departures based on motions submitted by the Government pursuant to what they assure the courts have been substantial assistance offered by defendants.”<sup>127</sup> In fact, taking away the

cases that involved substantial assistance departures, Judge Conaboy indicated “more than 9 out of 10 defendants are sentenced within the guideline range determined by the court.”<sup>128</sup>

Judge Conaboy did raise the issue of possible geographic disparity that the Sentencing Commission intended to review in the coming years because of its potential impact on achieving the goals of sentencing reform. During questioning by Representative Conyers regarding prosecutorial discretion under the guidelines system, Judge Conaboy explained that the tools

---

<sup>126</sup> *U.S. Sentencing Commission: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary*, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2 (Dec. 14, 1995) (statement of Rep. McCollum). Under 28 U.S.C. § 994(p), amendments, policy statements, and official commentary promulgated by the Sentencing Commission usually take effect 180 days after being submitted to Congress, and no later than the first day of November of the year the amendments have been submitted, unless the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

Although the rejection of the Commission’s 1995 amendment of the crack and powder cocaine penalties marked the first time Congress directly had disapproved a Commission amendment, Congress did take action against another set of Commission amendments in 1991. On May 1, 1991, the Sentencing Commission submitted amendments to some of the sex offense guidelines (2G2.2, 2G2.4 and 2G3.1). Congress did not disapprove the amendments directly, it included language in Pub. L. No. 102-141 (the Treasury, Postal Service and General Government Appropriations Act of 1991) that specifically directed the Sentencing Commission to revise the guidelines in such a way as to reverse the amendments the Sentencing Commission had submitted in the spring of 1991. *See* Pub. L. No. 102-141, § 632 (1991) (setting forth directive to Sentencing Commission).

<sup>127</sup> Dec. 14, 1995 Senate Hearings, *supra* note 126, at 6 (statement of Judge Richard P. Conaboy, Chairman, USSC).

<sup>128</sup> Dec. 14, 1995 Senate Hearings, *supra* note 126, at 16.

available to prosecutors under the system, namely the various motions for departures, were being used “in very diverse ways around the country and very differently in different places,” which the Sentencing Commission hoped to review because such practices could eventually lead to increased disparity in sentencing.<sup>129</sup>

By 2000, some in Congress appeared concerned with the rising rate of downward departures.<sup>130</sup> In October 2000, the Senate Judiciary’s Subcommittee on Criminal Justice Oversight held an oversight hearing of the Sentencing Commission. Witnesses that testified before the Subcommittee included the newly installed Chair and a Vice Chair of the Sentencing Commission,<sup>131</sup> the Department of Justice’s *ex officio* member of the Sentencing Commission, the U.S. Attorney for the Western District of New York, a representative of the National Association of Criminal Defense Lawyers, and a former federal prosecutor.

Senator Strom Thurmond, one of the architects of the Sentencing Reform Act who was then serving as the Subcommittee chair, opened the hearing by expressing concern that “the purpose of the Guidelines is being threatened by the increasing trend of sentencing criminals below the range established in the Guidelines.”<sup>132</sup> “Just in the past 8 years, the number of downward departures has increased steadily from 20 percent to about 35 percent of cases, which is more than 1 out of 3. If the trend continues much longer, we will see more criminals being

---

<sup>129</sup> *Id.* at 50 (statement of Judge Richard P. Conaboy, Chairman, USSC). This differing use of prosecutorial discretion was of particular interest to Representative Coble who was concerned that prosecutors “were using their discretion . . . maybe to get out from mandatory, statutory guideline sentences through practices that at least appear to be undermining the goals of the Sentencing Reform Act.” *Id.* (statement of Rep. Coble). Robert Edmunds, a former prosecutor, responded to Rep. Coble that in his experience Department of Justice attorneys generally were not misusing available sentencing tools because if they did, it would appear in Sentencing Commission data and the Commission would alert the Department of Justice and remedy the situation. Dec. 14, 1995 Senate Hearings, *supra* note 126, at 113–14 (statement of Robert Edmunds).

<sup>130</sup> As discussed in Chapters 1 and 5 of this report, the Supreme Court’s 1996 decision in *Koon v. United States* resulted in a deferential review of district court departures by the appellate courts. The perceived impact of the *Koon* decision on the national downward departure rate was part of the overall congressional concern being expressed by the fall of 2000.

<sup>131</sup> Judge Diana E. Murphy and John R. Steer became Chair and Vice Chair respectively, of the Sentencing Commission on November 15, 1999. Moreover, the Chair and Vice Chair were filling year and a half vacancies at the Sentencing Commission and working on a significant back log of legislative directives at the time of the hearing.

<sup>132</sup> *Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee*, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1 (2000) (statement of Sen. Thurmond).

sentenced below the Guidelines than within them.”<sup>133</sup> Senator Thurmond explained that, downward departures “should be rare because they are permitted only for factors not adequately considered by the Commission.”<sup>134</sup> Senator Jeff Sessions also expressed a similar concern that the trend in downward departures may be indicative of a turning away from the fundamentals of the Sentencing Reform Act.<sup>135</sup>

By contrast, Senator Patrick Leahy, Ranking Member of the Judiciary Committee, stated that the downward departure rate was not a cause for concern.<sup>136</sup> In fact, Senator Leahy posited that the departure rate demonstrated that the guidelines system was operating as intended by the drafters of the Sentencing Reform Act.<sup>137</sup> “Downward departures, like upward departures, are an integral and necessary part of our sentencing scheme. The provision for downward departures which we discuss today was incorporated into the guidelines so that federal judges can make appropriate adjustments where there are circumstances of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”<sup>138</sup> “The provision for downward departures recognizes that Congress and the Sentencing Commission . . . cannot possibly anticipate and enact a guideline that accounts for every conceivable set of facts. Even in as comprehensive a framework as the sentencing guidelines, our judges need room for flexibility.”<sup>139</sup>

Senator Leahy also addressed the suggestion, raised by some critics of the downward departure trend, that Congress enact legislation to effectively overrule the Supreme Court decision in *Koon v. United States* and require appellate courts to review departures *de novo*. Senator Leahy stated that this would be a mistake and “[t]o do so, in my view, would unwisely and unnecessarily transfer the ultimate responsibility for sentencing away from the federal judge, who is in the best position to evaluate whether an upward or downward departure is

---

<sup>133</sup> *Id.* at 1 (statement of Sen. Thurmond).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 3–4, 77.

<sup>136</sup> *Id.* at 74 (statement of Sen. Leahy).

<sup>137</sup> *Id.* at 76.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* Moreover, the Senator attributed the increase in the departure rate primarily to exigent circumstances unique to the judicial districts situated along the southwest border of the United States. *Id.* at 74–75 (statement of Sen. Leahy). Senator Thurmond also acknowledged the large role immigration and border related offenses played in the downward departure statistics but insisted that the growing trend of downward departures was “much broader.” *Id.* at 1 (statement of Sen. Thurmond).

appropriate.”<sup>140</sup>

Commissioner testimony on the issue supported the proposition that “most cases will result in sentences within the guideline range” but that departures are an integral part of the guideline system.<sup>141</sup> Judge Murphy explained that data available to the Sentencing Commission during the fall of 2000 demonstrated that after removing substantial assistance and other government sponsored departures, 82% of cases fell within prescribed sentencing guidelines ranges.<sup>142</sup> Thus, the nonsubstantial assistance downward departure rate was eighteen percent.<sup>143</sup>

Excessive or geographically uneven rates of departure, however, could be at odds with the goals of the Sentencing Reform Act.<sup>144</sup> Following the hearing, the Commission specifically examined an issue of geographically uneven departure rates during the 2001 amendment cycle. Concerns had been raised to the Commission by a number of judges, probation officers, and defense attorneys, particularly those situated in the southwest border districts, that application of §2L1.2 (Unlawful Entering or Remaining in the United States) was resulting in disproportionate penalties because of the 16 level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties resulted because of the breadth of the definition of “aggravated felony” provided in 8 U.S.C. § 1101(a)(43) and incorporated into the guideline by reference. Under this definition, a defendant who previously was convicted of murder, for example, was receiving the same 16 level enhancement as a defendant previously convicted for simple assault. The Commission observed that the criminal justice system was addressing this inequity on an *ad hoc* basis by increased use of departures from the guideline.

To address this rise in departure use, the Commission amended section 2L1.2 by deleting an invited departure provision in the guideline<sup>145</sup> and providing for a more graduated sentencing enhancement of between 8 and 16 levels, depending on the seriousness of the prior aggravated

---

<sup>140</sup> *Id.* at 75 (statement of Sen. Leahy).

<sup>141</sup> *Id.* at 19 (statement of John R. Steer, Vice Chair, USSC) (citing S. REP. NO. 225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1983)).

<sup>142</sup> *Id.* at 39 (statement of Judge Diana E. Murphy, Chairman, USSC).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 19 (statement of John R. Steer, Vice Chair, USSC). Commissioner Steer’s testimony regarding the issue of geographical disparity followed up on similar testimony given in 1995 by Chairman Conaboy, *see* discussion *supra* at pp. B-21 to B22.

<sup>145</sup> USSG §2L1.2, former comment. (n.5).



felony and the dangerousness of the defendant.<sup>146</sup> The amendment of section 2L1.2 arguably is an example of the system working as Congress intended: application of a guideline was resulting in an increased use of departures that, in turn, signaled to the Commission that a potential problem existed and prompted a response by the Commission.

## G. CHILD PORNOGRAPHY AND THE PROTECT ACT

On April 16, 2002, the Supreme Court released its decision in *Ashcroft v. Free Speech Coalition*,<sup>147</sup> which struck down certain provisions of the 1996 Child Pornography Prevention Act that defined “child pornography.” As a result of that decision, bills were introduced in both the House and Senate during the 107<sup>th</sup> Congress, focusing on the issues of child pornography, child abduction and child sexual offenses. As these various bills progressed through Congress, additional sentencing provisions were added to tighten the penalties for these types of offenses.

In April 2002, Representative Lamar Smith introduced the Department of Justice’s legislation, H.R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002” to address the concerns raised by the Supreme Court in *Ashcroft v. Free Speech Coalition*, including a new, more narrow definition of child pornography.<sup>148</sup> This bill included increased penalties for certain repeat sex offenders but did not include directives to the Sentencing Commission, or other sentencing revisions. The House Subcommittee on Crime, Terrorism, and Homeland Security held two days of hearings on H.R. 4623,<sup>149</sup> and the House passed the bill on June 25, 2002 by a vote of 413-8, with one Member voting “present.”<sup>150</sup>

In September 2002, Representative James Sensenbrenner introduced H.R. 5422, the “Child Abduction Prevention Act”. The Act sought to improve the national response to child abductions<sup>151</sup> and also included a number of increased mandatory minimum and other penalties

---

<sup>146</sup> See USSG App. C, amend. 632 (effective Nov. 1, 2001).

<sup>147</sup> \_\_\_ U.S. \_\_\_, 122 S. Ct. 1389 (2002).

<sup>148</sup> *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision in Ashcroft v. Free Speech Coalition: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee*, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 2 (2002).

<sup>149</sup> H.R. REP. NO. 107-526, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 14 (2002). In addition to addressing the issues of child pornography raised in H.R. 4623, the hearings also addressed H.R. 4477, the “Sex Tourism Prohibition Improvement Act of 2002”. H.R. 4477 prohibited, among other activity, interstate travel for the purpose of engaging in illicit sexual conduct. The House passed H.R. 4477 on June 26, 2002 and incorporated its provisions in the PROTECT Act of 2003.

<sup>150</sup> 148 CONG. REC. H2876–78 (2002).

<sup>151</sup> The enhanced AMBER Alert provisions of H.R. 5422 mirrored those contained in a Senate bill, S. 2896, the “National AMBER Alert Act of 2002,” that passed the Senate by unanimous consent on

for offenses involving child pornography, sexual abuse, and commercial sexual exploitation.<sup>152</sup> The Act also contained directives to the Sentencing Commission to increase offense levels for kidnapping offenses.<sup>153</sup>

On October 1, 2002, the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee held a hearing on the bill and received testimony from the Department of Justice. During that testimony, the Department of Justice lauded the increased mandatory minimums contained in the bill but stated they did not go “far enough” to address what the Department of Justice deemed the overly frequent imposition of sentences more lenient than those prescribed by the sentencing guidelines in cases under chapter 117.<sup>154</sup> The Department of Justice testified that “departures should be rare occurrences,” but the “leniency [in sentencing of sex offense cases] is much more marked than even the base leniency that characterizes the system.”<sup>155</sup> For example, in “20 percent of all cases sentenced nationwide for sexual abuse, judges are departing from the sentencing guidelines.”<sup>156</sup>

The Department of Justice further suggested that the Subcommittee consider, as a possible amendment to 18 U.S.C. § 3553(b), “a general prohibition of sentencing below the range specified by the sentencing guidelines in child abduction and sex offense cases, except on ground of substantial assistance to authorities.”<sup>157</sup> The Department of Justice believed a “reform of this type would help to ensure the efficacy of the sentencing guidelines system in promoting adequate penalties and protecting the public from child abductors and sexual predators is not undermined in practice.”<sup>158</sup> The Department of Justice’s sentencing recommendations for H.R. 5422 had not been included in the draft legislation that became H.R. 4623, passed by the House earlier in 2002.

---

September 10, 2002. 148 CONG. REC. S8436–41 (daily ed. Sept. 10, 2002)). Representative Scott offered an amendment in the nature of a substitute to H.R. 5422 that would have stripped it of all language other than the Amber Alert provisions but that amendment failed during debate in the full Committee. *See* H.R. REP. NO. 107-723, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 42, 45–47 (2002).

<sup>152</sup> H.R. 5422, 107<sup>th</sup> Cong., § 103 (2002).

<sup>153</sup> H.R. 5422, 107<sup>th</sup> Cong. § 104 (2002); *see also* H.R. REP. NO. 107-723, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at (38) (2002) (statement of Rep. Smith).

<sup>154</sup> *Child Abduction Prevention Act: Hearing on H.R. 5422 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee of the Judiciary*, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 13 (Oct. 1, 2002) (written statement of Daniel Collins).

<sup>155</sup> *Id.* at 68–69 (testimony of Daniel Collins).

<sup>156</sup> *Id.* at 69.

<sup>157</sup> *Id.* at 14 (testimony of Daniel Collins).

<sup>158</sup> *Id.* at 14 (written statement of Daniel Collins).

The House Judiciary Committee Report on H.R. 5422 included the Department of Justice's language regarding the "real problems of excessive leniency in sentencing under existing law" in cases involving offenses under chapter 117 of Title 18, United States Code.<sup>159</sup> The Committee also noted a trend in downward departures in child pornography possession offenses under chapter 110 of Title 18, United States Code, and indicated that the new mandatory minimums and other increased penalties contained in H.R. 5422 were designed to curtail this departure trend.<sup>160</sup> The House Committee did not include, however, the Department of Justice's recommendations to amend 18 U.S.C. § 3553(b) and prohibit departures in these types of cases. H.R. 5422 passed the House on October 8, 2002.<sup>161</sup> The Senate received the bill but took no action on it.

Like the House, the Senate pursued the issues of child abduction and pornography during the 107<sup>th</sup> Congress in response to the *Ashcroft v. Free Speech Coalition* decision. On May 14, 2002, Senators Carnahan and Hutchison introduced S. 2511 (the companion bill to H.R. 4623) that included the Department of Justice's initial response to the *Ashcroft* decision.<sup>162</sup> On May 15, 2002, Senator Hatch, for himself and Senators Leahy, Sessions, DeWine, Hutchinson, Edwards and Brownback, introduced S. 2520, the "Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002".<sup>163</sup>

On October 2, 2002, the Senate Judiciary Committee held a hearing on the issue of child pornography and sexual exploitation, as addressed by H.R. 4623, S. 2511 and S. 2520.<sup>164</sup> Daniel Collins, Associate Deputy Attorney General of the Department of Justice, testified at that hearing but did not suggest changes to 18 U.S.C. § 3553(b), as he had in his testimony before the House Judiciary Committee the previous day in relation to H.R. 5422. He did indicate that the Department of Justice fully supported a directive to the Sentencing Commission in S. 2520 that addressed a disparity between sentences for defendants convicted on child pornography charges and those defendants convicted of traveling across state lines to have sex with a minor, in which the former sometimes received longer sentences. He also supported increased penalties and enhancements generally contained in the bill.<sup>165</sup> S. 2520 passed the Senate (with amendment) on

---

<sup>159</sup> H.R. REP. NO. 107-723, *supra* note 151, at 19.

<sup>160</sup> *Id.*

<sup>161</sup> H.R. 5422 passed the House by a vote of 390-24. 148 CONG. REC. H7048-50 (daily ed. Oct. 7, 2002).

<sup>162</sup> 148 CONG. REC. S4389 (daily ed. May 14, 2002).

<sup>163</sup> 148 CONG. REC. S4391-93 (daily ed. May 15, 2002).

<sup>164</sup> *Stopping Child Pornography: Protecting Our Children and the Constitution, Hearing Before the Senate Committee on the Judiciary, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (Oct. 2, 2002).*

<sup>165</sup> *Id.* at 19 (testimony of Daniel Collins).

November 14, 2002.<sup>166</sup> It was received in the House on November 15, but no further action was taken on any of these bills during the 107<sup>th</sup> Congress, and the bills died with the adjournment of the 107<sup>th</sup> Congress.

## 1. The PROTECT Act of 2003

In April 2003, Congress considered and passed a new version of the PROTECT Act.<sup>167</sup> The legislation that became the 2003 PROTECT Act,<sup>168</sup> was re-introduced by Senator Hatch in January 2003 to address sexual exploitation of children, particularly “virtual” child pornography, following up on congressional efforts to address *Ashcroft v. Free Speech Coalition* undertaken during the 107<sup>th</sup> Congress.<sup>169</sup> This version of S. 151 passed the Senate by a vote of 84-0 on February 24, 2003.<sup>170</sup> S. 151 was referred to the House Judiciary Committee on February 25, 2003 and discharged by the Committee on March 27, 2003.<sup>171</sup>

The legislative history of the sentencing provisions that ultimately were included in the 2003 PROTECT Act is somewhat sparse.<sup>172</sup> It appears that the sentencing reform provisions stemmed from continuing congressional concern that the increasing rate of downward departures from the sentencing guidelines, particularly after the Supreme Court’s decision in *Koon*, was hindering the goals of the Sentencing Reform Act.<sup>173</sup> In addition to the overall rise in departure

---

<sup>166</sup> 148 CONG. REC. S11150–53 (daily ed. Nov. 14, 2002).

<sup>167</sup> The full title of the bill is “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003”.

<sup>168</sup> S. 151, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

<sup>169</sup> See S. REP. NO. 108-2, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1–2 (2003). This bill expanded upon S. 2520, which passed the Senate in 2002.

<sup>170</sup> 149 CONG. REC. S2587–90 (daily ed. Feb. 24, 2003).

<sup>171</sup> 149 CONG. REC. H2440–43 (daily ed. Mar. 27, 2003).

<sup>172</sup> The House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, held one hearing in March 2003 that delved into the issues of sentencing reform raised by the Department of Justice during the 2002 hearings, namely those reform measures dealing with sex crimes and abduction offenses. This hearing did not cover, however, the broader sentencing reform provisions that eventually were included in the PROTECT Act. For a general discussion of the sentencing provisions included in the final PROTECT Act, see H.R. REP. NO. 108-66, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 57–58 (2003) (discussing need for sentencing provisions contained in PROTECT Act).

<sup>173</sup> See, e.g., 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch); 149 CONG. REC. S5132 (daily ed. Apr. 10, 2003) (statement of Sen. Sessions) (finding apparent rise in downward departures “disturbing”). This concern seems to have been heightened by the Department of Justice’s October 2002 testimony about departures in child sex crime cases. Senator Hatch’s statements

numbers, some in Congress apparently were concerned with the disparity among different judicial districts that seemed to result from the varying use of downward departures.<sup>174</sup> And some members of Congress seemed particularly troubled by the departure rate in sex crimes and other offenses involving children.<sup>175</sup> Senator Hatch criticized the Sentencing Commission during floor statements for not taking action sooner to restrict the incidence of downward departures, particularly in these areas.<sup>176</sup>

Congress held one hearing on some of the proposed sentencing provisions of the PROTECT Act. In March 2003, Representative Lamar Smith introduced H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003. Section 12 of that bill required *de novo* review of sentences under 18 U.S.C. § 3742 and required the Attorney General, within 15 days of a district judge's grant of a downward departure, to file a report with both the House and Senate

Judiciary Committees setting forth the case and the judge, and indicating whether or not the Department of Justice intended to file an appeal.<sup>177</sup>

On March 11, 2003, the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on H.R.1161 (and H.R.1104, the Child Abduction Prevention

---

about excessive judicial departures seemingly suggest a further shift in his view of the role judges could play in protecting the integrity of the guidelines system. In 1993, Senator Hatch addressed concerns that had been raised throughout the sentencing reform debate that the guidelines system transferred too much discretion from judges to prosecutors. Senator Hatch then stated that it was the responsibility of Congress to ensure that the guidelines protect against undue prosecutorial influence. To that end, he wrote: "Congress should consider all options, including, if necessary, giving judges *greater flexibility* in deciding the appropriate application of, *and departure from*, guidelines sentences." Hatch, *supra* note 113, at 192 (emphasis added).

<sup>174</sup> 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). Senator Hatch noted that in the Fourth Circuit, for example, the documented nonsubstantial assistance downward departure rate was 5.2 percent, in the Tenth Circuit it was 23.3 percent. 149 CONG. REC. S5122 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). The difference in these numbers, according to Senator Hatch, demonstrated an increasing undermining of the sentencing guidelines by some judges. *Id.*

<sup>175</sup> *See* 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) (noting that "in the last five years," trial courts granted downward departures in 19.20 percent of sexual abuse cases, 21.36 percent of pornography and prostitution cases, and 12.8 percent in kidnapping and hostage-taking cases).

<sup>176</sup> *See* 149 CONG. REC. S5122 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). Senator Hatch also criticized the Sentencing Commission for not monitoring the departure rate and for failing to make addressing previously raised concerns regarding the departure rate a priority. *Id.* at S5123.

<sup>177</sup> *See* H.R. 1161, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

Act).<sup>178</sup> Daniel Collins testified on behalf of the Department of Justice that the inclusion of section 12 in H.R. 1161 “would enact long-overdue reforms to address the growing frequency of ‘downward departures’ from the Sentencing Guidelines,” a particular problem in child pornography cases.<sup>179</sup> According to Mr. Collins’ testimony, the increasing rate of downward departures was “traceable to the Supreme Court’s decision in *Koon*” that the Sentencing Reform Act required appellate courts to apply a highly deferential standard of review to departure determinations by sentencing judges.<sup>180</sup> By including the *de novo* review in section 12, this portion of the *Koon* decision effectively would be overturned.<sup>181</sup> Mr. Collins and the Department of Justice also advocated adding language to H.R. 1161 “that would prohibit departures” on “any ground that the Sentencing Commission has not affirmatively specified as a permissible ground for a downward departure.”<sup>182</sup> “In doing so, the bill would effectively overrule *Koon* on this point as well.”<sup>183</sup>

H.R. 1161 lay dormant in the House Judiciary Committee, while H.R.1104, which contained the child abduction provisions<sup>184</sup> passed by the Senate in February as S. 151, was reported from the House Judiciary Committee. H.R. 1104 was scheduled for floor debate on March 27, 2003. On the eve of that debate, Representative Tom Feeney, introduced an amendment that contained significant sentencing reform provisions, reaching far beyond the provisions of H.R. 1161. According to Representative Feeney, his proposed amendment to the 2003 PROTECT Act was necessary because it appeared that the sentencing guidelines were not

---

<sup>178</sup> *Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Mar. 11, 2003). H.R. 1104 and 1161 expanded upon House efforts in the 107<sup>th</sup> Congress to address the issues of child pornography and abduction.

<sup>179</sup> *Id.* at 15 (testimony of Daniel Collins). This was the only hearing held on sentencing reform provisions during the 108<sup>th</sup> Congress.

<sup>180</sup> *Id.* at 17.

<sup>181</sup> *Id.* at 18.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> The issue of child abduction and the creation of a national “Amber Alert” system received a great deal of media attention during the beginning of the 108<sup>th</sup> Congress. A number of child abductions, including the abduction of Elizabeth Smart, had taken place during the summer of 2002, and Elizabeth Smart’s parents attended the October 2002 Senate hearing regarding the Senate’s version of child pornography and abduction prevention legislation. In addition, Elizabeth Smart’s safe return coincided with House consideration of H.R. 1161 and H.R. 1104. In part, as a result of this media attention on the issue of child abduction – attention that had not been present when similar “Amber Alert” bills had been debated in Congress – bills such as H.R. 1104 and S. 151 now were moving rapidly through Congress.

being followed sufficiently by the sentencing courts.<sup>185</sup>

Among some of its changes to the federal sentencing system, the “Feeney amendment” sought to “place strict limits on departures from federal sentencing guidelines by allowing sentences outside the guideline range only upon grounds specifically enumerated by [the Sentencing Commission] as proper for departure,”<sup>186</sup> as suggested by the Department of Justice during the March 11, 2003 hearing. The amendment permitted departures under 18 U.S.C. §3553(b) only for those mitigating circumstances that have: (a) been “affirmatively and specifically identified as permissible grounds for departure in the sentencing guidelines; (b) not been taken into adequate consideration by the Sentencing Commission under the guidelines; and that (c) should result in a sentence different from that described.”<sup>187</sup> The amendment required courts “to give specific and written reasons for any departure from federal sentencing guidelines,” and changed the standard of review for departures to a *de novo* appellate review “to allow appellate courts to more effectively review illegal and inappropriate downward departures from federal sentencing guidelines.”<sup>188</sup> The Feeney amendment also prevented sentencing courts, upon remand, from imposing “the same illegal departure on a different theory” and only permitted the court to grant the third offense level reduction for “acceptance of responsibility” upon motion from the government.<sup>189</sup> The amendment also for the first time directly amended the sentencing guidelines with regard to penalties for possession and trafficking of child pornography, kidnapping, and acceptance of responsibility.

The Feeney amendment passed the House on March 27, 2003, by a vote of 357 to 58, and the entire bill, H.R. 1104, passed by a vote of 410 to 14.<sup>190</sup> H.R. 1104 was then incorporated into S. 151 and the PROTECT Act was sent to a House and Senate conference committee to work out

---

<sup>185</sup> See 149 CONG. REC. H2423 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney) (“Unfortunately, judges in our country all too often are arbitrarily deviating from the sentencing guidelines enacted by the U.S. Congress based on their personal biases and prejudices, resulting in wide disparity in sentencing.”). Senator Hatch later would echo this sentiment during the floor debate of the final conference report version of the PROTECT Act: 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch) (“While the U.S. Sentencing Commission promulgated sentencing guidelines to meet [the] laudable goal [of avoiding unwarranted sentencing disparities,] sentencing courts have strayed further and further from this system of fair and consistent sentencing over the past decade.”).

<sup>186</sup> H. R. REP. NO. 108-48, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (2003).

<sup>187</sup> H.R. 1104, § 401(a), 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

<sup>188</sup> H.R. REP. NO. 108-48, *supra* note 186, at 3.

<sup>189</sup> *Id.*

<sup>190</sup> 149 CONG. REC. S5115 (daily ed. Apr.10, 2003) (statement of Sen. Hatch).

differences between the bills.<sup>191</sup>

The PROTECT Act conferees met on April 8, 2003. The resulting conference bill contained substantial changes to the sweeping sentencing provisions embodied in the Feeney amendment. The conference bill sought to: (1) prohibit certain downward departures, but only for certain crimes against children and sex offenses;<sup>192</sup> (2) change the standard of review of sentencing matters for appellate courts to a *de novo* review, while factual determinations would continue to be subject to a “clearly erroneous standard”; (3) require courts to give specific and written reasons for any departure from the guidelines of the Sentencing Commission; and (4) require judges to report sentencing decisions to the Sentencing Commission.<sup>193</sup> “It is important to note that the compromise restricts downward departures in serious crimes against children and sex crimes and does not broadly apply to other crimes, but because the problem of downward departures is acute across the board, the compromise proposal would direct the Sentencing Commission to conduct a thorough study of these issues, develop concrete measures to prevent this abuse, and report these matters back to Congress.”<sup>194</sup>

---

<sup>191</sup> 149 CONG. REC. H2443 (daily ed. Mar. 27, 2003).

<sup>192</sup> The compromise added a fourth factor for permitting departures in child abduction and child sex offenses, that “the court finds upon motion of the Government that the defendant has provided substantial assistance to the investigation or prosecution of another individual to the kind or degree not adequately taken into consideration” by the Sentencing Commission. *See* Pub. L. No. 108-21, § 401(a), 117 Stat. 650 (2003).

<sup>193</sup> 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). Sentencing courts already submitted data to the Sentencing Commission; however, the PROTECT Act mandated the Chief Judge of each district to ensure that a certain list of materials along with a “written report” of the sentencing decision be forwarded to the Sentencing Commission by the Chief Judge of each district within 30 days of a sentencing decision. Pub. L. No. 108-21, § 401(h). The conference report language also added a new provision to the PROTECT Act, limiting the number of federal judges who may serve on the Sentencing Commission to “no more than three.” In support of this change, Senator Hatch stated it “will, hopefully restore the appearance of balance in the Sentencing Commission and eliminate any conflict between the commissioners’ desire to retain judicial discretion and uniformity in sentencing.” 149 CONG. REC. S5126 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch).

<sup>194</sup> 149 CONG. REC. S5115 (daily ed. Apr. 10, 2003) (statement of Sen. Hatch). The final language of the PROTECT Act actually went beyond merely requiring the Sentencing Commission to “report back to Congress” on downward departures. Section 401(m) of the PROTECT Act directs the Sentencing Commission, within 180 days of enactment, to “review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary, . . . and promulgate . . . appropriate amendments . . . to ensure that the incidence of downward departures are [sic] substantially reduced . . .” Pub. L. No. 108-21, § 401(m), 117 Stat. 650 (2003). Individual conferees offered alternative approaches that were not accepted. For instance, Senator Kennedy proposed legislation directing the Sentencing Commission to review the incidence of downward departures and report back to Congress its findings and recommendations within 180 days. 149 CONG. REC. S5117 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). Senator Richard Durbin asked Senator Hatch for



The 2003 PROTECT Act, with its amended sentencing provisions, passed the House on April 10, 2003, by a vote of 400-25 and the Senate by 98-0.<sup>195</sup> The President signed the bill into law on April 30, 2003.<sup>196</sup> The Sentencing Commission immediately implemented the direct amendments to the guidelines required by the PROTECT Act. At the same time, in response to the directive contained in Section 401(m) of the Act, the Sentencing Commission expanded and expedited its review of the role of departures that had been undertaken as part of its fifteen year review of the guidelines system.<sup>197</sup>

---

additional hearings on the sentencing guidelines generally, and the issue of downward departures specifically, that would go beyond the provisions of the PROTECT Act. 149 CONG. REC. S5125 (daily ed. Apr. 10, 2003) (statement of Sen. Durbin).

<sup>195</sup> Despite ultimately voting for the PROTECT Act, Senator Kennedy passionately voiced his opposition to the sentencing provisions it contained. He noted that taking away the downward departures “pursuant to plea agreement” and “substantial assistance,” both government driven departures, the downward departure rate based on judicial leniency was quite low. 149 CONG. REC. S5134 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy). In his view, there is no “epidemic of leniency in the Federal criminal justice system,” and the “departure rate is not excessive.” *Id.*

<sup>196</sup> *See* Statement of the President George W. Bush Upon Signing S. 151, 39 WKLY COMP. PRES. DOC. 502-04 (April 2003) (2003) (acknowledging various provisions of the 2003 PROTECT Act).

<sup>197</sup> Unsatisfied with the way in which the 2003 PROTECT Act proceeded through Congress, as well as with its content, Senator Kennedy and Representative Conyers, for themselves and others, introduced companion bills (S. 1086 and H.R. 2213, respectively) that would repeal all the provisions contained in the PROTECT Act not related specifically to the prevention of exploitation of children. These bills, titled the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003 or “JUDGES Act”, both introduced in May 2003, also direct the Sentencing Commission, within 180 days after enactment of the JUDGES Act, to submit a report to Congress on the incidence of downward departures from the sentencing guidelines. These bills have been referred to their respective judiciary committees and no further action has been scheduled for them.