Just two weeks ago, a little-noticed amendment to a piece of child abduction legislation was introduced by Representative Tom Feeney of Florida and passed by the House of Representatives. This legislation, Section 109 of H.R. 1104, is in fact the most drastic legislative amendment to the Sentencing Guideline regime since the advent of the guidelines more than 15 years ago.

The legislation, if passed, would drastically curtail the availability of downward departures under the guidelines. It would abolish many grounds for downward departure. It would prohibit district judges from downwardly departing on any ground other than those specifically set forth in the guidelines themselves—thus abolishing “out of the heartland” departures expressly authorized by the U.S. Supreme Court in *Koon v. United States*.

It would empower appellate courts to second-guess departure decisions without paying deference to the decisions of sentencing judges. And it would forbid the Sentencing Commission from promulgating new downward departure guidelines for the next two years.

**Limits Imposed**

These proposed reforms are striking in their own right. What makes them all the more remarkable is that, thus far, this legislation has proceeded through Congress without the benefit of input from the federal judiciary, members of the bar, sentencing experts, or even the Sentencing Commission. Over the last several days, mounting opposition to this proposal has surfaced from many corners of the legal community—including the Judicial Conference of the United States, past and present members of the Sentencing Commission, and numerous bar organizations throughout the country. As of this writing, a House-Senate conference on the bill had been scheduled for today. What follows is a summary of some of the principal changes proposed by the Feeney Amendment.

The Feeney Amendment is a bold effort to greatly restrict the availability of downward departures under the Sentencing Guidelines.

**Specific Grounds for Departure.** The proposal would eliminate nine specific grounds for downward departure, including some of those most frequently-invoked. The one section removed entirely would be 5K2.20, which permits a downward departure based on aberrant behavior. The amendment would effectively abolish departures based on family ties and responsibilities or community ties (5H1.6), military, civic, charitable or public service, employment-related contributions or similar good works (5H1.11). Presently, the guidelines provide that these factors are not “ordinarily” relevant to a decision whether to depart but do not prohibit departures on these grounds. Consistent with these provisions, case law establishes that departures on these grounds are authorized if they are present to an “extraordinary” degree. The proposed legislation would remove these grounds from future consideration by removing the word “ordinarily” from the above-cited guideline provisions.

**Downward Departures on Grounds Not Specified in the Guidelines.** Another significant change would be to forbid a sentencing judge from downwardly departing from the guidelines for any reason not specifically set forth in an individual guideline section. Authority for such departures has existed ever since the guidelines were created. Under 5K2.0, a district judge is authorized to depart, either upwardly or downwardly, if there exists a factor “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines…” Although the guidelines contain specified grounds for downward departure, courts retain the authority to
depart on other grounds so long as those grounds satisfy the 5K2.0 standard.

This residual authority to depart was endorsed in Koon. In that case, the district judge downwardly departed on four grounds in sentencing the police officers who violated the civil rights of Rodney King. In the course of upholding two of the four grounds for departure, the Court held that a district court may downwardly depart based on a factor that is “sufficiently unusual to take the case out of the Guideline’s heartland.” The Court recognized that this authority was consistent with Congressional intent to have sentencing guidelines that not only promoted consistency in sentencing but also allowed district judges to “retain much of their traditional sentencing discretion.”

Numerous grounds for downward departure have been adopted in reliance on 5K2.0 or Koon. The U.S. Court of Appeals for the Second Circuit alone has authorized downward departures for a multitude of reasons, including presentence conditions of confinement, attempted compliance with the IRS’ voluntary disclosure policy, consent to deportation, uncredited time served in state custody on an INS detainer, cooperation with state authorities, overstatement of harm, extraordinary collateral consequences of alienage, culpability relative to a government agent, drug rehabilitation, extraordinary acceptance of responsibility, lack of evidence that a money launderer concealed a serious crime or promoted narcotics trafficking, superminimal role, assisting the administration of justice by breaking the “log-jam” in a multi-defendant case, saving the life of a government informant, lack of sophistication, and vulnerability to abuse in prison due to physical appearance.

The Feeney Amendment would legislatively overrule all of these grounds for departure through two separate provisions. First, it would prohibit the imposition of any downward departure unless it is based on a factor that has been “affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements.” Second, it would expressly limit 5K2.0 to upward departures.

Remand. The amendment would restrict a judge’s authority to downwardly depart in re-sentencing a defendant after a remand from the Court of Appeals. Under the bill, a judge could downwardly depart only if the ground for departure was specifically included in the written statement of reasons for the original sentence and that specific ground was held by the Court of Appeals, in remanding the case, to be a permissible ground for departure. Thus, judges would retain no authority to downwardly depart for any reason not already sanctioned by the appeals court, even, it seems, based on new circumstances that did not even exist at the time of the original sentence.

Promulgation of New Downward Departure Guidelines. The amendment also would establish a moratorium on any new grounds. It does this by explicit command that the Sentencing Commission not promulgate, at any time before May 1, 2005, any amendment that either “adds any new grounds of downward departure” or is otherwise inconsistent with the amendment’s limitation of downward departures. Like the constriction of 5K2.0 departure authority, this provision would only operate in one direction — limiting departures downward, but not upward.

Each of these changes is significant in its own right. Together, they would drastically reduce the availability of downward departures, both now and for years to come.

Reporting Requirements

The Amendment also proposes new reporting obligations for both chief judges and the Department of Justice. While the first is content-neutral, the second is an obvious effort by Congress to scrutinize more closely the imposition of downward departures.

The chief judge of every district would be responsible for ensuring that the Sentencing Commission receive a detailed report of every sentencing within 30 days of sentence. The commission, in turn, would be required to submit to Congress an annual report analyzing these submissions, as well as any recommendations for legislation that the commission believes is warranted as a result of its analysis and “an accounting of those districts that the Commission believes have not submitted” the required information.

The U.S. Attorney General’s reporting obligations would, in contrast, be confined to downward departures. The attorney general would be required to report, to the House and Senate Judiciary Committees, every case in which a district judge downwardly departed from the guidelines other than a departure based on cooperation pursuant to §5K1.1 (which, by its terms, can only be granted upon the government’s motion).

This report, which would have to be filed 15 days after the downward departure, would include not only the facts of the case and the reasons for the departure, but also the “identity of the district court judge,” whether the judge gave the government prior notice of its intent to depart, the parties’ positions on the departure, and whether the government has filed, or intends to file, a motion for reconsideration or notice of appeal. Moreover, the attorney general would be required to report whether or not the U.S. Solicitor General authorized an appeal of the downward departure, as well as the basis for the solicitor general’s decision, no later than five days after the decision.

The implicit message is unmistakable. If passed, Congress would be closely scrutinizing downward departures on a virtually “real time” basis, giving it the opportunity not only to target individual district judges for scrutiny, as is already occurring with one federal judge in Minnesota, but also to weigh in with the Justice Department on whether or not to appeal such a departure before a decision.

Under the bill, judges would retain no authority to downwardly depart for any reason not already sanctioned by the Court of Appeals.
Under the current “acceptance of responsibility” guideline (3E1.1(a)), a defendant is entitled to a two-level reduction in offense level if he or she “clearly demonstrates acceptance of responsibility” for the offense. Under a 1993 amendment (3E1.1(b)), a defendant is entitled to an additional one-level reduction by either (a) timely providing complete information to the government about his or her crimes, or (b) timely notifying the government of his or her intention to plead guilty. The Feeney Amendment would abolish the first of these two grounds and would expressly condition the second on a government motion at the time of sentencing.

Conclusion

The Feeney Amendment is a bold effort to greatly restrict the availability of downward departures under the guidelines. It seeks to achieve this result by circum-scribing the authority of district judges, expanding the authority of courts of appeal to second-guess their decisions, overruling the leading Supreme Court case in this area, and overriding the Sentencing Commission’s statutorily-mandated role in the development of the guidelines. What is more, it threatens to achieve this goal without any meaningful opportunity for interested parties to be heard or a public vetting of the issues. The next few days may reveal whether the mounting opposition to this legislation is enough to provoke more thorough consideration of the profound changes that would be wrought by its passage.

(2) Section 109(b)(3).
(3) Section 109(b)(4).

(5) The Amendment would establish a new guideline (5K2.23) to regulate the availability of downward departures based on “early disposition programs” such as those currently utilized in so-called “border” districts that handle an unusually high volume of immigration cases (Section 109(b)(2)).
(6) See 5K2.10-13, 5K2.16, 5K2.20; see also 5H1.1-6, 5H1.11 (providing that certain mitigating factors are not “ordinarily” relevant to decision to depart).
(7) 518 U.S. at 96.
(8) Id. at 97.
(9) United States v. Carr, 264 F.3d 191, 196 (2d Cir. 2001).
(10) United States v. Tenzer, 213 F.3d 34, 42-43 (2d Cir. 2000).
(12) United States v. Monater-Gaviria, 163 F.3d 697, 701 (2d Cir. 1998).
(13) United States v. Kaye, 140 F.3d 86, 87 (2d Cir. 1998).
(16) United States v. Speenburgh, 990 F.2d 72, 76 (2d Cir. 1993).
(17) United States v. Maier, 975 F.2d 944, 948 (2d Cir. 1992).
(22) United States v. Khan, 920 F.2d 1100, 1106-07 (2d Cir. 1990).
(24) United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990).
(25) Section 109(a).
(26) Section 109(b).
(27) Section 109(c).
(28) Section 109(j)(2).
(29) Section 109(h).
(30) Section 109(h)(1).
(31) Section 109(h)(2).
(33) 518 U.S. at 98. This standard of review is also reflected in the statute governing sentencing appeals. See 18 U.S.C. §3742(e), last paragraph.
(34) Section 109(d)(2).
(35) Sections 109(b)(1)(C) and 109(f).