On April 10, 2003, Congress overwhelmingly passed a new statute containing the most far-reaching changes to the federal sentencing laws since the creation of the Sentencing Guidelines. These changes are contained in a new statute, entitled the “Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003,” or “PROTECT Act.” The statute is focused primarily on strengthening the laws and procedures for detecting, investigating and prosecuting child kidnapping and sexual abuse crimes. However, the sentencing reforms—all of which are contained in a single section of this legislation—will make it more difficult for defendants in all cases to obtain downward departures from district judges and to sustain those downward departures on appeal.

Equally noteworthy are the far more radical changes proposed in the initial version of this legislation. When first introduced in Congress, the bill sought to all but abolish downward departures entirely and to establish unprecedented Congressional monitoring of judicial downward departure decisions. This article will discuss the initial version of the statute, the process by which it was narrowed considerably, and the final version of the new law. It also will critically assess the proffered justification for these reforms and the process by which they became law.

The Feeney Amendment

Last September, the Senate passed a bill that sought to strengthen federal and state procedures and penalties for investigating and prosecuting the kidnapping and sexual exploitation of children. It was known as the “AMBER (America’s Missing Broadcast Emergency Response) Alert” bill, in honor of Amber Hagerman, a 9-year-old girl who was kidnapped and murdered in Arlington, Texas in 1996. The bill was widely supported and provoked little controversy.

The House of Representatives, however, had grander plans. On March 27, Representative Tom Feeney of Florida introduced an amendment to the House version of the “AMBER Alert” bill. This amendment—which soon came to be known as the Feeney Amendment—proposed a far-reaching set of sentencing reforms. A primary justification for the amendment was the perception that sentences in child pornography cases were too low because of a disproportionately high incidence of downward departures. As a result, the amendment sought in various ways to increase the guidelines for these offenses. However, the amendment went further and proposed drastic changes in sentencing law for all criminal cases. These changes fell into seven categories:

1. Eliminating Specific Grounds for Departure. The statute called for the elimination of nine specified grounds for downward departure set forth in the Guidelines, including some of the most frequently relied-upon grounds. One guideline that would have been eliminated entirely was § 5K2.20, which authorizes downward departures based on aberrant behavior. Eight other downward departures would have been effectively abolished through a one-word change to the guideline provisions. Under § 5H1.6, family ties and responsibilities and community ties are not “ordinarily” relevant to the decision whether to depart. Likewise, under § 5H1.11, military, civic, charitable or public service, employment-related contributions or similar good works are not “ordinarily” relevant to the departure decision. However, under both provisions, downward departures remain available if any of these factors is present to an extraordinary degree. The Feeney Amendment called for the removal of the word “ordinarily” from both of these provisions, thus making downward departures on these grounds unavailable under any circumstances.

2. Prohibiting Downward Departures on Non-Specified Grounds. In addition to the downward departure grounds that are specified in the Guidelines, courts have the authority under § 5K2.0 to downwardly depart if they find any other mitigating factor “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. . . .” This residual authority to downwardly depart was explicitly approved by the Supreme Court in Koon v. United States. In Koon, the district court downwardly departed on four separate grounds in sentencing the police officers convicted of violating the federal civil
rights of Rodney King. In upholding two of those grounds and rejecting the others, the Supreme Court held that a district court may downwardly depart based on a mitigating factor that is “sufficiently unusual to take the case out of the Guideline’s heartland.” The Court recognized that the Guidelines were intended not only to ensure consistency in federal sentencing but also to allow district judges to “retain much of their traditional sentencing discretion.”

This residual departure authority has been the source of many downward departures, both before and after Koon. The United States Court of Appeals for the Second Circuit, for example, has authorized downward departures in at least 16 reported cases in which the ground for departure was not specifically set forth in a guideline provision. These departures include 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, super-minimal 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. Other federal appeals courts have, in like fashion, endorsed numerous other downward departure grounds in reliance on § 5K2.0 and Koon.

The Feeney Amendment would have legislatively abolished all of these judicially-endorsed grounds for downward departure. Two separate provisions of the amendment would have accomplished this. First, the amendment would have prohibited a downward departure unless it was based on a factor that was “affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements.” (Section 109(a)). The amendment further provided that the “sole grounds” that have been “affirmatively and specified identified” as grounds for downward departure are those contained in Part K of Chapter 5 of the Guidelines. (Section 109(b)(1)). Thus, under the Feeney Amendment, the only downward departure guidelines that would have survived were §§ 5K2.10–13 and § 5K2.16. Second, the amendment would have made § 5K2.20, the Guidelines’ residual departure provision, applicable only to upward departures. (Section 109(b)(1)).

This change—perhaps the most radical one of all—was not contained in the initial House version of the bill. Rather, at a March 11, 2003 House subcommittee hearing on a precursor to the Feeney Amendment, the Justice Department specifically urged the House to add this provision to the bill.

3. Congressional Oversight of Downward Departures.

The amendment’s restriction of departures would not have been limited to constraining the authority of district courts at sentencing. A series of “procedural” reforms would have further discouraged downward departures.

These measures included two new reporting provisions. The first was relatively content-neutral. It would require the Chief Judge of every district to ensure 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 reports and recommending legislation that the Commission believed was warranted as a result of its analysis. It also would require the Commission to provide Congress with an “accounting of those districts that the Commission believes have not submitted” the required information. (Section 109(h)).

The second reporting requirement, however, was far more controversial. It would have required the Attorney General to report each and every downward departure decision (other than those based on cooperation) to both the House and Senate Judiciary Committees, within 15 days of the grant of the departure. The report, moreover, would not be limited to basic information about the sentencing. Rather, it would include the “identity of the district court judge” who granted the departure, whether the judge gave the government prior notice of intent to downwardly depart, whether the government opposed the departure, and whether the government filed (or intended to file) a motion for reconsideration or notice of appeal. Thereafter, the Attorney General would be required to further report, to the Judiciary Committees, whether or not the Solicitor General authorized an appeal of the downward departure, as well as the basis for the Solicitor General’s decision, within five days of the decision. (Section 109(i)).

The combination of virtually “real time” reporting of departure decisions to Congress, the limitation of this reporting obligation to downward departures, and the focus on both the district judge’s identity and the government’s litigation intentions make it plain that, in proposing these provisions, the amendment’s proponents had two motivations in mind. The first was to give members of Congress an opportunity to lobby the Justice Department to appeal downward departure decisions while it was still timely to do so. The second was to allow Congress to target individual judges for scrutiny for their downward departure decisions. Taken together, these provisions would have brought about an unprecedented level of Congressional scrutiny of downward departure decisions of individual judges. Indeed, even the Justice Department, which generally
supported the Feeney Amendment, objected to this provision on the ground that it “runs counter to longstanding and important traditions that counsel against legislative interjection into individual criminal cases.”

4. Increased Appellate Review of Departures. In addition to added Congressional scrutiny of downward departures, the Feeney Amendment called for increased appellate scrutiny of departure decisions. It sought to accomplish this goal in two ways: by expanding the grounds upon which an appeals court can reverse a departure decision, and by empowering an appellate court to review such a decision under a more exacting standard of review.

Under then-existing law, a departure decision could be reversed only if the sentence was “outside the applicable guideline range and [was] unreasonable.” Moreover, Congress explicitly provided that, in making that determination, an appeals court was required to “give due deference to the district court's application of the guidelines to the facts.” This standard is consistent with the Supreme Court's decision in Koon. There, all nine Justices agreed that a district judge's application of the Guidelines to the facts of a particular case was entitled to due deference on appeal and reviewable only for abuse of discretion. In rejecting the government's argument that a de novo standard of review should apply, the Court emphasized that a sentencing judge “must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and the day-to-day experience in criminal sentencing.” The Court went on to observe that district judges “have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.”

The Feeney Amendment called for a significant expansion of an appellate court's authority to reverse departure decisions. Under the amendment, a departure decision could be reversed if it was based on a factor that (i) does not advance the largely-punitive sentencing purposes set forth in the federal sentencing statute, (ii) was not authorized under the new federal sentencing statute, which, as described above, would limit downward departures to a finite number of specified grounds, or (iii) was not “justified by the facts of the case.” (Sections 109(d)(1)(C) and 109(b)). What is more, the statute called for replacing the “due deference” standard with the de novo standard of review, thus empowering appellate courts to review departure decisions without regard for the district court's institutional advantage in making these fact-sensitive determinations. (Section 109(d)(2)). Taken together, these provisions would allow appellate courts to reverse downward departures with which they simply disagreed—a sharp departure from the historical deference that appellate courts have paid to district judges’ sentencing decisions, both before and after the Guidelines were created.

5. Limiting Downward Departures on Remand. The amendment would limit a district judge's authority to downwardly depart in re-sentencing a defendant after a remand from the Court of Appeals. Under the amendment, a judge could downwardly depart only if the basis for departure was (i) specifically included in the written statement of reasons for the original sentence and (ii) explicitly found by the Court of Appeals to be a permissible basis for departure. (Section 109(e)). Thus, a district judge, on remand, would have no authority to downwardly depart for any reason unless it had been authorized in advance by the Court of Appeals. This provision, then, would eliminate a district judge's ability to downwardly depart based on any new circumstance that arose after the initial sentencing but before re-sentencing—a period that could easily exceed a year—even for the most compelling of reasons.

6. Moratorium on New Downward Departure Guidelines. In a final effort to restrict downward departures, the Feeney Amendment prohibited the Sentencing Commission from promulgating any new downward departure guidelines at any time before May 1, 2005. It accomplished this by explicitly directing that the Sentencing Commission not promulgate any amendment that either “adds any new grounds of downward departure” or is otherwise inconsistent with the amendment's other limitations of downward departures. (Section 109(j)(2)). As with the limitations on specified and unspecified departure authority, this provision would have operated in only one direction—to limit downward departures, but not upward departures.

7. Increased Authority to Prosecutors. The amendment also gave prosecutors increased control over two aspects of sentencing leniency. First, the bill proposed the creation of a new guideline—§ 5k2.23— for “early disposition” programs. (Section 109(b)(2)). (Curiously, rather than direct the Sentencing Commission to formulate such a guideline, the bill would have created the entire guideline through direct legislation.) This guideline would have legislated a downward departure practice frequently relied upon by courts in Southwest border districts with a high volume of immigration cases. However, it would have explicitly conditioned the availability of such a departure on a government motion. (Section 109(b)(2)).

The amendment also restricted a defendant’s ability to receive the three-level downward adjustment for acceptance of responsibility. A defendant is entitled, under § 3E1.1(a), to a two-level reduction in offense level if he or she “clearly demonstrates acceptance of
Revisions to the Feeney Amendment

Up until this time, the Feeney Amendment had attracted little attention. Within days of its passage, however, a storm of protest emerged from virtually every segment of the criminal justice community. Letters to Congress were submitted by present and former members of the Sentencing Commission, the Judicial Conference of the United States, numerous bar organizations, a group of 70 law professors, former United States Attorneys, and various trade organizations. (Many of these letters can be found at www.nacdl.org/departures.) Two major criticisms emerged: first, that the reforms were unjustified and unnecessary, and second, that they were introduced and adopted without any meaningful opportunity for careful consideration and debate by Congress or input from other interested members of the criminal justice community.

These criticisms were aptly summarized in an extraordinary letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy, a member of the conference committee. In the letter, Chief Justice Rehnquist warned that the legislation, “if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and reasonable sentences.” The Chief Justice went on to urge that “there should, at least, be a thorough and dispassionate inquiry into the consequences of such action” before the legislation is enacted.

These objections produced some last-minute, important changes to the Feeney Amendment. First, the elimination of specified downward departure grounds was limited to a discrete category of child-victim, sexual abuse and obscenity offenses. As a result, downward departures based on aberrant behavior, family ties and responsibilities, community ties, military, civic, charitable or public service, employment-related contributions or similar good works remain available in all other cases.

Second, the abolition of all § 5K2.0 downward departures was removed from the bill. This restriction, too, was instead limited to child-victim, sexual abuse and obscenity cases, with judges free to impose downward departures in all other cases so long as they satisfy § 5K2.0’s standard for departure. As Senator Edward Kennedy observed, “[o]ther than in certain child-related cases, this legislation does not limit or lessen the myriad potential grounds for departure currently available to district courts in making sentencing decisions nor is it intended to discourage departure decisions when the unusual circumstances of a case justify a sentence outside the recommended range.”

Both of these revisions, however, came with an important qualification. The conference committee inserted a provision in the bill that requires the Sentencing Commission, within 180 days of the statute’s enactment, to review all downward departures authorized by the Guidelines and to promulgate guideline amendments “to ensure that the incidence of downward departures are [sic] substantially reduced.” (Section 401(m)(2)(A)). Although many other provisions of the bill dictate sentencing policy in very specific ways, Congress provided no guidance to the Commission on how to effectuate this important change in sentencing practice.

A third significant change was in the Attorney General’s reporting obligations. Although the obligation to report downward departures to Congress within 15 days remained in the statute, an exception was created that may eliminate this reporting requirement altogether. Under the exception, the 15-day reporting requirement will not take effect so long as the Attorney General submits a detailed report to the House and Senate Judiciary Committees, within 90 days of the statute’s enactment, setting forth procedures by which the Justice Department will ensure that prosecutors oppose unsupported downward departures as well as ensure the “vigorous pursuit of appropriate and meritorious appeals.” (Section 401(l)). Given the Justice Department’s own opposition to the 15-day reporting requirement, it would seem likely that the Attorney General will comply with the statutory exception instead.

One additional change reflected a slight recognition of the Sentencing Commission’s primacy in the formulation of sentencing guidelines. Rather than create the new “early disposition” guideline through direct legislation, the statute was revised to direct the Sentencing Commission to promulgate such a guideline—with the proviso that it be conditioned on a
government motion and limited to a four-level departure. (Section 401(m)(2)(B)).

In other respects, however, the Feeney Amendment remained unaltered. Thus, the revised statute (1) eliminated numerous grounds for downward departure in child-victim, sexual abuse and obscenity cases, (2) expanded the grounds for appellate reversal of downward departures, (3) granted appellate courts the authority to review departure decisions under a de novo standard of review, (4) limited district courts’ ability to downwardly depart on remand, (5) prohibited the Commission from creating new downward departure guidelines for the next two years, and (6) conditioned the “early disposition” departure and three-level acceptance of responsibility adjustment on a government motion.

Moreover, in one respect, the revised version of the bill was more far-reaching than the Feeney Amendment—it limited judicial representation on the Sentencing Commission. Under then-current law, the Sentencing Commission was comprised of seven voting members, “[a]t least three” of whom had to be federal judges. In a discrete but unmistakable slap at the federal judiciary, the amendment called for the Commission to be comprised of “[n]ot more than 3” federal judges, thus turning the three-judge minimum into a three-judge maximum. (Section 109(m)(i)). Indeed, under this provision, once the current judges’ terms on the Sentencing Commission expire, the Commission could conceivably have no judicial representation at all.

On April 10, 2003, the revised sentencing reforms were debated and then adopted by both the House and the Senate. Although by that time considerable opposition had grown within Congress, with a number of Representatives and Senators voicing their objections on the floor of their respective chambers, few actually voted against this otherwise-popular bill. The statute was passed by a margin of 400-25 in the House and 98-0 in the Senate. The President signed it into law on April 30, 2003.

Critique of the New Law
The final version of the new sentencing law, even though less extreme than the original Feeney Amendment, is deeply troubling nevertheless. To be sure, the law is an unwelcome development for the criminal defense bar for understandable and obvious reasons. However, the concerns raised by this legislation far transcend these adversarial concerns. At least five areas of criticism come to mind.

1. Lack of Justification. First and foremost is the lack of justification for the across-the-board restriction of downward departures, certainly of the scope proposed in the bill’s original form and even as enacted. Proponents of the amendment relied on the sizeable increase in non-cooperation downward departures since Koon—from 4,201 non-cooperation downward departures in 1996 to 10,026 such departures in 2001. However, 70% of the increase was attributable to so-called “fast track” downward departures granted in five Southwest border districts with an unusually high volume of immigration cases. These departures—granted to encourage the prompt disposition of these cases and thus avoid crushing burdens on prosecutors and district courts—are generally supported by the Justice Department and even resulted in Congress directing the Commission to memorialize this practice in a new downward departure guideline. Section §5K1.1 downward departures for a defendant’s cooperation, which require a government motion, also account for a considerable part of the total number of downward departures—18% of all such departures in the year ended September 30, 2001, for example. In addition, even some non-cooperation/fast track departures are granted with the government’s consent. In short, the vast majority of downward departures are granted with the full support of prosecutors, if not at their specific request.

Other statistics further belie the notion, advanced by the bill’s sponsors, that downward departures have become routine. Over the last six years, the increase in non-cooperation/fast track downward departures has been incremental at best—from 9.6% (1996) to 10.3% (1997) to 11.1% (1998) to 13.0% (1999) to 13.5% (2000) to 14.7% (2001). On average, since Koon, district judges have downwardly departed in these cases only 12.3% of the time. This low rate of departure is entirely consistent with the original expectation that departures under the Guidelines would be infrequent.

To be sure, some district judges have verbalized their disagreement with the Guidelines and some downward departure decisions may be difficult to defend. However, appellate review has served as a reliable check on such departures. Indeed, the Justice Department has an enviable record of success in reversing unauthorized downward departures on appeal—in the year ended September 30, 2001, for example, they succeeded in 79% of their downward departure appeals.

These statistics support one overall conclusion: non-cooperation/fast track downward departures are infrequent and appellate remedies exist to correct unwarranted departures. This is hardly a state of affairs that warranted sweeping and one-sided sentencing reforms.

2. The Legislative Process. Equally alarming was the process by which these reforms were introduced and considered in Congress. The Feeney Amendment was introduced without input from the federal judiciary, the organized bar, academics, criminal justice experts, probation officers or prison officials. Even the Sentencing Commission itself—the very body charged by
Congress with the responsibility of creating and amending the Guidelines — was not consulted. Indeed, the statutory process for considering guideline amendments — one that calls for the Sentencing Commission to consult with numerous interested parties in the criminal justice process33 — was ignored.

What is more, the proponents of this legislation sought to minimize the opportunity for debate or opposition. The reforms were appended at the eleventh hour to a politically-popular piece of child abduction legislation that no legislator could easily oppose. The first time that Congress gave serious consideration to the changes was in a House-Senate conference, hastily convened just days before Congress’ spring recess. Last-minute revisions to the bill were circulated at 1:00 in the morning on April 9, as a result of a process that Senator Diane Feinstein compared to “rewrit[ing] the criminal code on the back of an envelope.”34 And the only time the full Senate had an opportunity to debate the bill at all was on April 10, the day that it passed.

To be sure, Congress is a political institution, and proponents of legislation generally seek to maximize the prospects for its passage. But this was no pork-barrel legislation. In one section of a bill, Congress sought to eliminate nine separate guideline departure provisions and legislatively overrule dozens of federal court sentencing decisions, not to mention the leading Supreme Court case construing the Guidelines. Surely, nationwide sentencing reforms of the magnitude contained in this statute deserved far more deliberate consideration than this.

3. Disregard for Federal District Judges. The statute evinces, in many ways, extraordinary disrespect for the role that federal district judges play in the sentencing process. Federal district judges have the enormous responsibility of imposing sentences on criminal defendants. They are entrusted with this sensitive task only after nomination by the President and confirmation by the Senate. Statistics show that they have, by and large, discharged this responsibility consistent with the letter and spirit of the Guidelines. And yet this legislation undermines their discretion and authority by (i) curtailing the availability of downward departures, (ii) requiring individualized reporting of their downward departures to Congress, (iii) expanding the authority of appellate courts to reverse their downward departure decisions simply because they disagree with them, (iv) limiting their ability to impose downward departures on remand, and (v) limiting the number of judges on the Sentencing Commission. Senator Orrin Hatch expressed this Congressional disdain for the exercise of sentencing discretion by federal district judges when he said that the bill was Congress’ way of saying “we are sick of this, judges.”35

Certainly, Congress, having created the Sentencing Commission and authorized the promulgation of sentencing guidelines, has the right to oversee the implementation of these guidelines. But Congressional efforts to pressure judges not to exercise sentencing leniency could not be more apparent. Even before the Feeney Amendment, Congress was scrutinizing at least one judge — Chief Judge James Rosenbaum of Minnesota (appointed by President Reagan) — for his downward departure decisions and threatening to subpoena him.36 The new sentencing statute is an even broader effort to place district judges under extraordinary scrutiny. The separation of powers implications of this multi-pronged attack on judges deserves attention from academics and the bar.

4. Disregard for the Sentencing Commission. Even more blatant was the rebuke of the Sentencing Commission inherent in this legislation. In enacting this bill, Congress (i) adopted sentencing reforms without consulting the Commission, (ii) ignored the statutorily-prescribed process for creating guideline amendments, (iii) amended the Guidelines directly through legislation, (iv) required that sentencing data be furnished directly to Congress rather than to the Commission, (v) directed the Commission to reduce the frequency of downward departures regardless of the Commission’s view of the necessity of such a measure, and (vi) prohibited the Commission from promulgating any new downward departure guidelines for the next two years.

All told, the statute is the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress nearly 20 years ago. While one can debate the wisdom of particular guidelines or guideline changes, there has been, at least until now, a predictable structure and reasoned process by which the guidelines have been evaluated, administered and reformed. Whether that will remain the case is unpredictable at best.

5. Additional Sentencing Power to Prosecutors. A final, disturbing consequence of this statute is the accretion of sentencing authority to prosecutors. Until the Guidelines, a prosecutor’s role in sentencing, like a defense lawyer’s, was informational — to provide input into the sentencing process, but not to control it. In the end, responsibility for sentencing rested with judges, with statutory maximums and plea bargains as the only real constraints on their discretion. And until this statute, the only guideline provision over which prosecutors had control was § 5K1.1, the cooperation provision, which requires an evaluation of the nature and significance of a defendant’s assistance to law enforcement authorities — a determination justifying considerable deference to prosecutors. But in now expanding — twice — prosecutorial “veto power” over grants of sentencing
leniency, Congress has continued the gradual but steady shift of sentencing power away from judges—neutral arbiters best equipped to pass judgment on criminal defendants—to prosecutors, who, in the end, are merely one side of an adversarial relationship.

Conclusion

The new sentencing statute is a significant—and, for the reasons discussed, unwelcome—development in federal sentencing law. In the short term, the most significant development has been an effort by some members of Congress to repeal the legislation before the ink was barely dry. On May 20, Senator Edward Kennedy and Congressman John Conyers, Jr., introduced legislation in both Houses of Congress entitled the “Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003,” or “JUDGES Act.” This statute would eliminate all provisions of the new sentencing statute other than those related to child-victim, sexual abuse and obscenity crimes and instead require the Sentencing Commission to perform a comprehensive study of downward departures and report to Congress within 180 days on the results of its work.

In the meantime, other developments to watch for are how prosecutors, sentencing judges, appellate courts and the Sentencing Commission react to this new legislation. Will prosecutors continue to support downward departures in appropriate cases, as many have done before? Will sentencing judges continue to grant downward departures despite increased Congressional scrutiny of these decisions? Will appellate courts exercise their new-found sentencing authority aggressively or cautiously? And will the Sentencing Commission withstand the Congressional pressure to radically reduce the incidence of downward departures and instead promulgate reasoned reforms that preserve judicial discretion?

For the long term, the paramount question is whether the steady erosion in the role that judges have historically played in the sentencing process will continue or abate. Time will tell.

Notes

2 Id. at 96.
3 Id. at 97.
4 United States v. Carty, 264 F.3d 191, 196 (2d Cir. 2001).
5 United States v. Tenzer, 213 F.3d 34, 42–43 (2d Cir. 2000).
7 United States v. Montez-Gaviria, 163 F.3d 697, 701 (2d Cir. 1998).
8 United States v. Kaye, 140 F.3d 86, 87 (2d Cir. 1998).
11 United States v. Speenburgh, 990 F.2d 72, 76 (2d Cir. 1993).
12 United States v. Maier, 975 F.2d 944, 948 (2d Cir. 1992).
19 United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990).
21 See DOJ Statement, supra note 20, at 31.
23 18 U.S.C. § 3742(e), last paragraph.
24 Koon, 518 U.S. at 98.
25 Id.
29 Compare U.S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics (1,871 of 4,201 non-cooperation downward departures were in Southern District of California, Arizona, New Mexico, and Western and Southern Districts of Texas) with U.S. Sentencing Commission, 2001 Sourcebook of Federal Sentencing Statistics (5,928 of 10,026 non-cooperation downward departures were in those five districts) [hereinafter “2001 Sourcebook”].
30 See 2001 Sourcebook, supra note 29, Figure G.
31 See DOJ Statement, supra note 20, at 28.
32 See 2001 Sourcebook, supra note 29, Table 58.
34 S5144 (Apr. 10, 2003).