Legal Backgrounder

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FUTURE OF THE "FEENEY AMENDMENT" AFTER HIGH COURT'S SENTENCING RULINGS

by

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Since its enactment in April 2003, the so-called Feeney Amendment has been soundly criticized by judges and legal scholars alike for significantly restricting the judiciary's ability to exercise its discretion to depart from the United States Sentencing Guidelines.[1] It is with veritable glee, then, that many commentators are proclaiming: "Feeney is dead," slain by the Supreme Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *See, e.g.,* Dan Christensen, *The Short Life of the Feeney Amendment*, DAILY BUS. REV., Vol. 46, No. 31 (Jan. 24, 2005). While this statement may be true in part, there are also provisions of the Feeney Amendment that remain very much alive following the *Booker* decision — provisions which, if left unchecked, risk perpetuating the very separation of powers concerns that the Supreme Court sought to remedy in *Booker*.

The Feeney Amendment. In April 2003, the United States Congress passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act of 2003, and it was signed into law by President Bush on April 30, 2003. *See* Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in various sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.). Most of the Act's provisions stayed true to the legislative mission suggested by its title — addressing "the investigation, prosecution and punishment of offenses, particularly sexual offenses, against children." *See* Katherine M. Menendez, *De Novo Review of Sentencing Departures: The End of Koon v. United States*, 27 HAMLINE L. REV. 457, 464 (2004). However, tacked on to this high-profile piece of legislation was an amendment that in large part was wholly unrelated to the stated purpose of the Act — the Feeney Amendment. The Amendment, opposed by virtually all corners of the criminal justice system, including United States Supreme Court Justices, the United States Judicial Conference, the American Bar Association, and the National Association of Criminal Defense Lawyers, *(see Handcuffing Our Federal Judges, supra* note 1, at 556-557), made wide-ranging changes to the basic provision of the Sentencing Reform Act, including: (1) drastically reducing the authority of courts to depart from the sentencing guidelines in specified child abduction and sex offense cases; (2) directing the Sentencing Commission to "drastically reduce" the incidence of downward departures in all cases; (3) modifying the standard of review to require *de novo* appellate review under certain circumstances; and (4) making other guidelines and procedural changes, including removing the requirement that Article III judges be present on the Sentencing Commission and requiring sentencing courts to submit a detailed report, including a statement of the facts supporting *any* departure, to the Sentencing Commission in every criminal case. *See* Pub. L. No. 408-21, § 401(h). Because the Feeney Amendment also provided that the identity of a sentencing judge who granted a downward departure could be provided to Congress under certain

[1] *See, e.g., United States v. Detwiler,* 338 F. Supp. 2d 1166 (D. Or. 2004); Bruce Moyer, *FBA Urges Repeal of Sentencing Restrictions*, 51 FED. LAW. 10 (2004); Evelyn Schneider, *The Feeney Amendment: Handcuffing Our Federal Judges*, 27 HAMLINE L. REV. 535 (2004) (hereinafter "*Handcuffing Our Federal Judges*"); Jamie Escuder, *Congressional Lack of Discretion: Why the Feeney Amendment is Unwise (and Perhaps Unconstitutional)*, 16 FED. SENT. REP. 276 (Vol. 4 2004).

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circumstances, some courts observed that "the day of the downward departure is past." *United States v. Kirsch*, 287 F. Supp. 2d. 1005, 1006 (D. Minn. 2003).

United States v. Detwiler: A Glimpse at the Post-Booker Future of the Feeney Amendment? Not all judges, however, acquiesced to the policies instituted by Congress and the Attorney General designed to intimidate the judiciary and prevent downward departures. *Id.* Rather, some courts returned to the notion first advanced by this Country's Founding Fathers, that the separation of powers is vital to the system of checks and balances between the executive, legislative and judicial branches of the United States Government. *See* Erwin Chemerinsky, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, § 1.1, at p 1-6 (2d Ed. 2002). Time and again, most recently in *U.S. v. Booker, see infra,* this concern has been shared by the Supreme Court, which has repeatedly stated that it is the "encroachment or aggrandizement [of one branch at the expense of the other] that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta v. United States,* 488 U.S. 361, 382 (1989) (citations omitted).

With respect to the Feeney Amendment, one of the most cogent analyses of the importance of the separation of powers came in an October 4, 2004, decision by the United States District Court for the District of Oregon in *United States v. Detwiler*. At issue in *Detwiler* was whether the Feeney Amendment constituted an unconstitutional aggrandizement of power in the executive branch at the expense of the judiciary. In finding that it did, the court not only struck a blow to the continuing viability of the Guidelines — a blow later delivered with finality by the Supreme Court in *Booker*, but also called into question the existence of the Sentencing Commission itself.

In reaching its conclusion, the *Detwiler* court relied heavily on the Supreme Court's decision in *Mistretta*. The court correctly noted that the issues decided in *Mistretta* were that Congress had not delegated excessive legislative discretion to the Sentencing Commission and that Congress had not violated the separation of powers doctrine by placing the Commission within the Judicial Branch and by requiring federal judges to serve as members of the Commission. *Detwiler*, 338 F. Supp. 2d at 1169. In light of the Feeney Amendment, perhaps more important to the court than what *Mistretta* addressed was what it did not address; namely, whether the sentencing guidelines violated "the separation of powers doctrine by aggrandizing the Executive Branch at the expense of the Judicial Branch." *Id.* at 1169-70. While *Mistretta* did not consider this issue, that decision was premised on the fact that the tasks performed by the Sentencing Commission had historically been performed by the Judicial Branch, and thus, by "placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the authority of that Branch or to have deprived the Executive Branch of a power it once possessed." *Id.* at 1170 (quoting *Mistretta*).

In a footnote, however, the *Mistretta* Court stated:

> [H]ad Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch.

Mistretta, 488 U.S. at 391 n.17. According to the *Detwiler* court, the Feeney Amendment forced it to confront these very questions.

In holding that the Feeney Amendment violated the separation of powers doctrine by vesting authority in the executive branch at the expense of the judiciary, the *Detwiler* court attacked both the manner in which Congress passed the Amendment and the content of the Amendment itself. With regard to the former, the court did not hide its disgust for the "stealth route" employed by sponsors of the Amendment in guiding it through Congress; according to the court, "[n]o advance notice was given, no hearings were held, and there was no opportunity for meaningful debate or to refute the arguments (and allegedly, misinformation) that were cited as justification for the Amendment." *Detwiler*, 338 F. Supp. 2d at 1171. With regard to the latter, the court took umbrage with the fact that the Amendment requires that the House and Senate Judiciary Committees, as well as the Attorney General, "be notified each time a judge departs

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downward, unless that departure was requested by the prosecutor … [and also be notified of] the 'identity of the sentencing judge.'" *Id.*

The *Detwiler* court further noted that prior to the Feeney Amendment,

> no less than three of the Commission's seven voting members had to be selected from the ranks of federal judges … Post-Feeney, the President need not nominate **any** judges to the Commission … The Feeney Amendment also prohibits judges from ever occupying more than three seats on the Commission, thus ensuring that judges will never again comprise a majority of the voting membership of the Commission. When selecting Commission members, the President need not consider the views of the Judicial Conference unless he voluntarily chooses to nominate federal judges

Id. at 1173. According to the *Detwiler* court, post-Feeney Amendment, "[a]ny involvement by the Judicial Branch in the Commission's work is solely by the grace of the Executive Branch." *Id.* at 1174. The court therefore concluded that the Guidelines, as modified by the Feeney Amendment, violate the separation of powers doctrine by uniting the power to prosecute and the power to sentence in the Executive Branch and by aggrandizing the power of the Executive Branch at the expense of the Judicial Branch. *Id.* at 1174-76. Central to the court's holding and, as noted below, untouched by the Supreme Court's decision in *Booker*, was the fact that the Amendment gave the Executive Branch effective control over the Commission in that the President does not have to place any federal judges on the Commission but can "fill every seat … with federal prosecutors, or deputy attorneys general, or political operatives."

Moreover, according to the court, the shift in control to the Executive Branch is exacerbated by other elements of the Feeney Amendment, including: eliminating a trial court's authority to grant a defendant the third downward departure point for acceptance of responsibility absent a prosecutor's request, *id.* at 1177; requiring *de novo* appellate review of most sentencing decisions, *id.* at 1177-78; giving the Attorney General power to create "fast-track" programs authorizing reductions in sentence in exchange for immediate guilty pleas, *id.* at 1178; and requiring prosecutors to report the identity of any judge granting a downward departure not requested by a prosecutor, *id.* As set forth below, many of these elements remain even after the Supreme Court's decision in *Booker*; while not as facially significant as a ban on downward departures or mandatory *de novo* review, each of these remaining provisions has the potential to further the separation of powers violations that the Supreme Court sought to remedy.

U.S. v. Booker: Are We There Yet? Subsequent to the *Detwiler* decision, on January 12, 2005, the Supreme Court held that the United States Sentencing Guidelines are merely advisory and not mandatory. In *United States v. Booker* and *United States v. Fanfan*, the Court applied the Sixth Amendment right to a jury trial in the context of the Guidelines, and held that sentencing judges need not rely upon the Guidelines in determining sentences. The Supreme Court did not invalidate the Guidelines in their entirety, however, noting that "if the Guidelines as currently written could be read as *merely advisory provisions* that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *United States v. Booker*, 125 S. Ct. 738, 750 (2005) (emphasis added).

To remedy the Sixth Amendment violation, the Supreme Court stated:

> we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), *see* 18 U.S.C.A. § 3553(b)(1)(Supp. 2004), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, *see* § 3742(e)(main ed. and Supp. 2004). With these two sections excised

(and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements. [2]

While the Supreme Court has excised from the Guidelines the two provisions set forth above, the Feeney Amendment, in the immortal words of Monty Python, is not dead yet.[3] The Supreme Court itself observed that "[i]n light of today's holding, the *reasons* for the[] [Feeney Amendment] revisions – to make Guidelines sentencing even more mandatory than it had been – have ceased to be relevant." *Id.* at 765 (emphasis added). That the reasons for the enactment of the Feeney Amendment are irrelevant has no bearing on the continuing utility of the Feeney Amendment in the context of the advisory Guidelines.

While the removal of the provisions set forth above may be seen by some as more than just a flesh wound, consider what remains:

- Information and supporting documentation related to departures, including the sentencing judge's name, must still be made available to Congress and the Attorney General, thus leaving open the possibility that the legislative branch, through threats, intimidation, or otherwise, will seek to do politically what it cannot do constitutionally – encroach upon the discretion of the judiciary. *See, e.g. United States v. Mendoza*, 2004 WL 1191118 at *7 (C.D. Cal. Jan. 12, 2004) (Tevrizian, J.) (holding that the chilling effect resulting from the [Feeney Amendment's] reporting requirements is sufficient to violate the separation of powers limitations of the United States Constitution).

- As the *Detwiler* court observed, the Guidelines, as modified by the Feeney Amendment, continue to violate the separation of powers doctrine to the extent that the Feeney Amendment gives the Executive Branch effective control over the Commission in that the President does not have to place any federal judges on the Commission but could "fill every seat … with federal prosecutors, or deputy attorneys general, or political operatives." *Detwiler,* 338 F. Supp. 2d at 1175.

- Under section 401(a) of the PROTECT Act, codified at 18 U.S.C.A. § 3553(b)(2), "the court shall impose a sentence" pursuant to the Guidelines (with narrow exceptions) for child crimes and sexual offenses. The majority opinion does not excise this portion of the statute. To the contrary, as noted above, the Court held that "[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." *Booker*, 125 S. Ct. at 764. Importantly, in § 3553(b)(2), there are no cross-references to § 3553(b)(1) or 3742(e). Thus, at least on its face, it appears that the Supreme Court has both held that Congress could not have intended mandatory guideline sentences with the engrafted Sixth Amendment requirement that a jury decide enhancing factors, while at the same time approving a portion of the Feeney Amendment, which does just that.

These are but three of the Feeney Amendment provisions, still viable after *Booker*, that raise possible constitutional concerns and merit further analysis as courts begin the process of heeding the Supreme Court's pronouncement that "the remainder of the Act" functions without "the 'mandatory' provision," and requires judges to "take account of the Guidelines," including those provisions added by the Feeney Amendment, without being bound by them.

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[2] *Id.* at 764. The Supreme Court also reaffirmed its holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 125 S. Ct. at 756.

[3] Indeed, one court has already held that the Feeney Amendment's provision that district courts state in writing their reasons for departing from the sentencing guidelines, "like all other provisions in the Feeney Amendment, remains in effect after *Booker*." *United States v. Wilson,* 2005 WL 78552 at *5 (D. Utah Jan. 13, 2005) (Cassell, J.).