"At Some Point, You Have to Take a Stand": A United States District Judge Responds to the Feeney Amendment's Restrictions on Judicial Sentencing Discretion

THE HONORABLE STERLING JOHNSON, JR.*

Let me address the issue of sentencing in the federal courts. Prior to the 1980s—in other words, for hundreds of years—judges in federal court had unfettered discretion. A convicted defendant could be sentenced to anything, from probation to the maximum allowable by statute. The indeterminate system created significant problems. Civil rights activities and others complained that African-Americans received higher sentences for their crimes than whites convicted of the exact same crimes. There was also a disparity in sentencing geographically, with certain circuits issuing significantly higher sentences than others.

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* United States District Judge, Eastern District of New York; B.A., Brooklyn College, 1963; J.D., Brooklyn School of Law, 1966. The text printed here is an edited version of Judge Johnson's remarks as delivered at the Symposium, April 7, 2017. The phrase that forms the first part of the title of these remarks was taken from a quotation from Judge Johnson in 2003: "At some point, you have to take a stand. If Congress wants to make a deck of cards for the judges like they did for the bad guys in Iraq, then make me the ace of spades." Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, NEW YORK TIMES (Dec. 8, 2003), http://www.nytimes.com/2003/12/08/nyregion/new-york-s-federal-judges-protest-sentencing-procedures.htm.

To address this problem, Congress passed the Sentencing Reform Act of 1984.[1] This legislation, among other things, created the United States Sentencing Commission. The Commission was composed of seven members, at least three of whom were required to be federal judges. These seven individuals were charged with the duties of:

A. establishing sentencing policies for federal courts including sentencing guidelines;
B. advising and assisting Congress and the Executive Branch in developing policies regarding crime; and
C. collecting, analyzing, researching and distributing information on federal crime and sentencing issues.

Even after the Sentencing Reform Act was passed, disparities in sentencing existed. Courts could sentence above or below the guidelines if there was a good reason and the sentence imposed was reasonable.

Some of you might have heard of the *Koon* case. Stacey Koon was one of the Los Angeles Police Officers caught on video brutally beating Rodney King, a motorist who was pulled over on suspicion of driving under the influence. The officers were tried in state court for their actions and acquitted. They were subsequently indicted by a federal grand jury, tried and convicted. Pursuant to the United States Sentencing Guidelines, Koon's conduct fell within "a prescribed range of 70 to 87 months."[2] The assigned judge, taking into consideration both the aggravating and mitigating circumstances, downwardly departed from the guidelines, sentencing Koon to 30 months imprisonment. On appeal, the Ninth Circuit Court of Appeals, after performing a *de novo* review, reversed the district court's sentence, and found that the district court improperly downwardly departed.[3] The Supreme Court granted certiorari and reversed the Ninth Circuit.[4] The Court held that the Circuit should not have reviewed the sentence *de novo*. The standard to

1. The Sentencing Reform Act of 1984 was part of the Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1976, S. 1762; the statute was enacted in October 1984 and is codified at 18 U.S.C. ch. 1 § 1 et seq.

2. United States v. Koon, 833 F. Supp. 769, 785 (C.D. Cal. 1993).

3. United States v. Koon, 34 F.3d 1416 (9th Cir. 1994).

4. Koon v. United States, 518 U.S. 81 (1996).

be used, rather, was abuse of discretion.[5] Therefore, Koon's 30-month sentence stood, and he was released in 2005. He went on to obtain a Bachelor's degree and Master's degree in criminal justice, and a Master's degree in public administration.

Then came the PROTECT Act of 2003.[6] This was a very popular law originally proposed by Senator Orrin Hatch and then-Senator Mike Pence, designed to protect children by strengthening laws for detection of kidnaping by, among other things, authorizing wiretapping and monitoring in all cases related to child abuse or kidnaping; eliminating statutes of limitation for child abduction and child abuse; establishing the "Amber Alert" system to search for missing children; and permitting life sentences in certain sex abuse cases.

A first-term congressman from Florida, Tom Feeney, stealthily attached an amendment to the PROTECT Act that went practically unreviewed. There were no hearings and input was not sought from the Sentencing Commission, the defense bar, American Bar Association, or the Judicial Conference, the very bodies one would expect to be consulted, given the amendment's nature—it required the chief judge of each federal district to issue a monthly report of every sentence imposed in that district, a requirement imposed for the explicit purpose of reducing the incidence of downward departures.

Some called the Amendment a *coup d'état* against the sentencing power of the judiciary. It drastically changed the sentencing landscape by cutting down the number of downward departures. Another serious concern was that it left wide open the possibility that the required reports and other materials—including pre-sentence reports, with their detailed information relating to individual defendants and, in many cases, to third parties—would end up in the hands of Congress, which could simply request that the Commission hand them over. Moreover, the Amendment required appellate review of downward departures (overturning the Supreme Court in *Koon*). Finally,

5. *Id.* at 113–14.

6. PROTECT Act (Prosecution Remedies and Other Tools to end the Exploitation of Children Today Act), P.L. 108-21, 117 Stat. 650 (2003). The provisions amending the sentencing procedures for federal cases, particularly for sexual and other offenses committed against children are located in Title IV of the Act.

the Amendment changed the composition of the Sentencing Commission. While the Commission originally had at least three judges on its board, it would now have *no more than three* judges on its board.

Zero judges complied with this new version of the PROTECT Act. Twenty-six judges throughout the country, including the Chief Judge of the Second Circuit, signed a letter calling for its repeal. Nevertheless, the former Chief Judge of the Eastern District of New York was removed from a case by a Circuit panel because of his refusal to follow the Guidelines mandated by the new law, which, as stated, served primarily to eliminate downward departures.

I was so concerned by this statute that I had to do something when the issue came before me. I issued an order[7] sealing any relevant sentencing documents in the criminal cases over which I presided, absent a request from the Sentencing Commission itself and even in those cases, for the Commission's eyes only. The Commission would also have to seek my order to disclose any such document. The effect of this order was that Congress would now have to seek a hearing to determine the justification for any such request.

However, Congress never sought such a hearing, because shortly after the Feeney Amendment, the Supreme Court decided *United States v. Booker*.[8] In an opinion written by Justice Breyer, a former member of the Sentencing Commission, the Court held that the Sentencing Guidelines were advisory, not mandatory. The Feeney Amendment was thereby effectively (and properly) eviscerated.

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7. Administrative Order 2004-04 (Amended), In the Matter of the Sealing of all Pre-Sentence Reports, Plea Agreements and All Other Relevant Sentencing Documents for all Criminal Cases Pending Before the Honorable Sterling Johnson, Jr. (E.D.N.Y. Apr. 7, 2004). The order is reproduced below, at the conclusion of this text.

8. 543 U.S. 220 (2005).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN THE MATTER OF THE SEALING OF ALL PRE SENTENCE REPORTS, PLEA AGREEMENTS AND ALL OTHER RELEVANT SENTENCING DOCUMENTS FOR ALL CRIMINAL CASES PENDING BEFORE THE HONORABLE STERLING JOHNSON, JR.

ADMINISTRATIVE ORDER 2004-04

AMENDED ORDER

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JOHNSON, Senior United States District Judge:

After required internal processing, United States Probation is directed to seal all Pre Sentence Reports, plea agreements and all other relevant sentencing documents for all current and future criminal cases pending before the Honorable Sterling Johnson, Jr., Senior United States District Judge. These documents shall not be unsealed except by the United States Sentencing Commission, for its eyes only, and shall not be transmitted or otherwise opened except upon application and by order of this Court.

IT IS SO ORDERED.

Dated: Brooklyn, New York
April 7, 2004

Sterling Johnson, Jr.
Senior United States District Judge

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