Statement of Senator Kennedy on S. 151

Mr. President, I would like to address the question of a judge's authority to depart from the guidelines.

While this legislation alters the grounds on which a judge may depart in certain child-related cases, it does not alter the basic legal authority of a district court to depart from the guidelines under 18 U.S.C. 3553 in other cases. Judges retain ultimate authority to impose a just sentence within statutory limits, and today we reaffirm that departures are an important and necessary part of that authority.

As one of the authors of the Sentencing Reform Act, I can say that Congress did not intend to eliminate judicial discretion. We recognized that the circumstances that may warrant departure from the guideline range cannot, by their very nature, be comprehensively listed or analyzed in advance. In interpreting the Act, both the Supreme Court and the Sentencing Commission have emphasized this point. This is not a partisan position. Judicial authority to exercise discretion when imposing a sentence was and is an integral part of the structure of the federal sentencing guidelines and indeed of every guideline system in use today. In the eloquent words of Justice Kennedy, when he wrote for a unanimous Supreme Court to uphold the district court's authority to depart downward in *Koon*:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge.

Koon v. United States, 518 U.S. 81, 113 (1996).

In *Koon*, the Supreme Court held that a sentencing judge may depart based on a factor identified by the Sentencing Commission, or even based upon a factor discouraged by the Commission, as long as the discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way. Similarly, a

sentencing judge may always depart when a factor, unmentioned in the Guidelines, takes the case outside the heartland of cases covered by the guidelines.

I do not agree that there is an epidemic of leniency in the federal criminal justice system. I do not regard the current rate of non-substantial assistance departures as excessive. There is no such thing as an excessive departure rate – the question is whether any particular departure is warranted or unwarranted. That is a question for appellate courts, not Congress. One of the reforms embodied in the Sentencing Reform Act was the appealability of sentences. The government was given the power to appeal downward departures under the Act. Were downward departures "excessive" presumably the government would have brought more appeals than it has.

The Sentencing Reform Act recognized that departures are a healthy and necessary component of a just guideline system. In 2001, when we exclude those districts with departure policies designed to address the high volume of immigration caseloads, the non-substantial assistance departure rate is merely 10.2 percent. This reflects the proper exercise of judicial discretion by Article III judges, who have been appointed by presidents of the United States and confirmed by the Senate, in conformance with the mandate that Congress gave them in 18 U.S.C. § 3553(b).

Indeed, the vast majority of downward departures granted by judges today are those sought by the government, most to reward substantial assistance in the prosecution of crime. And, while departures have increased somewhat of late, government initiated departures lead the rising departure rate.

I am gratified that the concerns voiced by the Federal Judicial Conference, the American Bar Association, and others concerning the high rate of downward departures requested by prosecutors have been recognized in the version of the Feeney Amendment approved by the conference committee. The bill now requires that the Sentencing Commission "review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and promulgate, pursuant to section 994 of title 28, United States Code – (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced." I welcome this call for a thorough and impartial review of all downward departures, whether requested by the prosecution or the defense. Only a review embracing all downward departures will provide the Commission the information necessary to fulfill the mandate of this legislation.

A district court may depart from a guideline range whenever the unusual circumstances or combination of circumstance of a case take it outside of the "heartland" of cases covered by the relevant guideline. Other 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. It also is not intended to transfer authority over sentencing decisions to prosecutors.

In that light, I must express my deep concern for the provision of the legislation that requires the Commission to report to the Judiciary Committees of the Congress and even to the Attorney General confidential court records and even "the identity of the sentencing judge." I do not believe that this provision serves any legitimate interests of the Congress. I do not believe that authorizing disclosure of this information to the executive branch is warranted. I have deep concerns that this provision lacks the respect owed by the Congress to a co-equal branch.

I remain convinced that this legislation is flawed and results from a hasty and unreliable process that ill serves us. It is my view that the directive to the Commission "to promulgate ... amendments ... to ensure that the incidence of downward departures are substantially reduced" is inappropriate. It puts the cart before the horse and is based on faulty numbers of the incidence of departures that have been relied upon by some proponents of the legislation. The better course would be for the Commission to study and report on the question. Because the Feeney amendment was presented without discussion or debate and at the last possible moment, Congress was deprived of balanced and full information concerning the issue of whether departure decisions are made in inappropriate instances. Even without the opportunity to respond in detail to the amendment, the Commission did produce statistics and information that refute the reliability and credibility of the information used in promoting the notion that departure decisions are being made too frequently or inappropriately. Indeed, a fact that was withheld by proponents of the amendment, close to 90% of departure decisions are made at the request of or with the support of the government and that number may be even higher.

For these reasons, I hope and expect that this legislation will not unduly restrict departures or impede the appropriate development of guideline departure common law. And we need to review the entire system in light of these changes to make sure that we are letting judges carry out their responsibility to impose just and responsible sentences.