The High Court Should Strike Down Laws Effecting a Power Grab by the Attorney General

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PRESIDENT'S MESSAGE

About what do Justice William Rehnquist and criminal defense lawyers agree? That the recent Department of Justice (DOJ) effort to control and affect the sentencing decisions of federal judges is ill conceived and a threat to judicial independence.[1] Justice Kennedy also blasted the PROTECT ACT's Feeney Amendment[2] for interfering with judges' sentencing discretion. And Justice Scalia's prophetic dissenting opinion when the high Court approved the United States Sentencing Guidelines bears repeating.

> "Thus, however well established may be the 'independent agencies' of the Executive Branch, here we have an anomaly beyond equal: an independent agency exercising governmental power on behalf of [the Judicial] Branch where all governmental power is supposed to be exercised personally by the judges of courts.
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> Today's decision may aptly be described as the *Humphrey's Executor* of the Judicial Branch, and I think we will live to regret it. Henceforth there may be agencies 'within the Judicial Branch' (whatever that means), exercising governmental powers, that are neither courts nor controlled by courts, nor even controlled by judges. If an 'independent agency' such as this can be given the power to fix sentences previously exercised by district courts, I must assume that a similar agency can be given the powers to adopt rules of procedure and rules of evidence previously exercised by this Court. The bases for distinction would be thin indeed." *Mistretta v. U.S.*, 488 U.S. 361 (1989).

The PROTECT ACT and Attorney General Ashcroft's enforcement of it place too much sentencing discretion in prosecutors' hands. And if Ashcroft's practice of second guessing and overruling seasoned prosecutors' decisions in the death penalty arena is an indication of things to come, it places too much power in one man's hands. General Ashcroft has overruled the decisions of federal prosecutors to forego the death penalty for select cooperating defendants. Regarding which conduct Mary Jo White, the former lead federal prosecutor in Manhattan, remarked: "It's very, very dangerous on its face, and it's troubling, because it doesn't make sense from a law-enforcement perspective."[3]

Federal judges are nominated by the President, approved by the Senate and appointed by the President thereafter. The care taken in their selection and approval is indicative of their important function as part of one of the three separate branches of our government. They apply laws, determine whether they are Constitutional and resolve cases and controversies. Their role should not be relegated to that of a bean counter, tallying up points to place individuals on a grid which determines how these individuals will spend the remainder of their lives. It is the judiciary which has, as a group, the credentials and authority to decide what is an appropriate sentence in any given set of circumstances. And it is inappropriate for federal prosecutors, or Attorney General Ashcroft alone, to decide a case for the Courts. Nor

is it proper for General Ashcroft, by keeping track of judges' downward departure records, to intimidate or chill judges in the exercise of their independent professional judgement. However, this is precisely what the DOJ under the leadership of General Ashcroft has set out to do.

The first salvo in the DOJ's effort to eviscerate the power of federal judges came packaged in the PATRIOT ACT. It allows sneak and peak searches, roving wiretaps and the subpoena of tangible items without a showing of particularized probable cause that a crime is being committed or traditional judicial review. Next came the excoriation of Judge Rosenbaum, the Chief federal judge in the District of Minnesota, in Congress where the House Committee on the Judiciary entertained a resolution to subpoena his and his colleagues' records concerning lawfully granted sentencing downward departures. And then came the PROTECT ACT with its Feeney Amendment. On each occasion, the action taken has been unexpected and has not been subjected to full legislative processes. The PATRIOT ACT was passed without submission to committee review and without copies of the measure being made available to all members of Congress. The Feeney Amendment was tacked onto a popular law intended to protect children from criminal offenders.

Laws and the component parts of our democratic form of government must not be impaired by the "by hook or by crook" actions of an unpopular senate candidate[4], even if he did promise to uphold both the laws and the Constitution of the United States. Judicial independence is crucial to the continued strength and viability of the rule of law. Judges temper popular but wrong sentiments and halt abuses of power. They also act as a check on the power of the executive and legislative branches so that none is all powerful. Thus, the current attempts to, in some instances, eliminate judicial review and, with the PROTECT ACT, intimidate and chill the exercise of judicial discretion threaten the balance of power and invade the province of an independent judiciary.

These actions should be revealed for what they are, a dangerous and unconstitutional power grab[5], and they should be stopped by the very branch of government which they threaten. In a public speech Justice Breyer assured us that the high Court would protect civil rights when it ultimately reviews the PATRIOT ACT. Similarly, in speeches before the American Bar Association, Justices Rehnquist[6] and Kennedy have criticized the PROTECT ACT.[7] But the Court cannot stop at public criticisms. When provided the opportunity, the Court should rule to preserve democracy and the balance of power and strike down these unconstitutional laws.

Endnotes

1 Congress had too weak a resolve to resist Attorney General Ashcroft's actions for fear of being called soft on crime. "Ashcroft called the war on terrorism 'the cause of our times' and, in a thinly veiled jab at Otter, warned that those who want to restrict the law 'would tip off the terrorists that we're on to them.'" Ashcroft Taking Fire From GOP Stalwarts, More Wish to Curb Anti-Terrorism Powers By Dan Eggen and Jim VandeHei, *Washington Post*, Friday, August 29, 2003; Page A01.

2 The PROTECT ACT contained the Amber Alert Law and other provisions intended to aid the investigation, prosecution and punishment of persons who commit crimes against children. PROTECT stands for Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today. However, a Republican Senator from Florida, Tom Feeney introduced an amendment drafted by Department of Justice staff members that allows Government Appeals of downward departures given by federal judges and keeps track of those departures.

3 Ashcroft spurns staff, insists on death penalty, *The Grand Rapids Press* (Aug. 28, 2003).

4 John Ashcroft was defeated in his bid for a senate seat by his deceased opponent.

5 Apparently, it is not sufficient to satisfy Attorney General Ashcroft that one in one hundred and forty-three persons is imprisoned in the United States. General Ashcroft wants to discourage judges from granting downward departures when sentencing offenders that deserve lower sentences. Sentencing modification gains some unlikely allies, Commentary by Cokie Roberts and Steven Roberts, August 29, 2003, *Nashville City Paper.*

6 Rehnquist stated that Ashcroft's efforts with respect to the Feeney Amendment "could amount to an unwarranted and ill-considered effort to intimidate individual judges." Sentencing modification gains some unlikely allies, Commentary by Cokie Roberts and Steven Roberts, August 29, 2003, *Nashville City Paper.*

7 Justice Kennedy also noted that mandatory minimum sentences have resulted in the lengthy imprisonment of non-violent petty drug offenders while, through downward departures granted through the exercise of prosecutorial discretion, more serious and seasoned offenders receive lower sentences.
"Our resources are misspent, our punishments too severe, our sentences too long."
"In too many cases, mandatory minimum sentences are unwise or unjust". Justice Kennedy quoted in Sentencing modification gains some unlikely allies, Commentary by Cokie Roberts and Steven Roberts, August 29, 2003, *Nashville City Paper.* The existence of mandatory minimums is entirely and properly within the province of the legislature to decide. But, the attempt to limit the exercise of judicial discretion in granting lawful downward departures by intimidation is not.