

Fact Sheet: Differences in Rates of Below-Guideline Sentences Arise from Many Legitimate Sources, and Do Not Reflect Unwarranted Disparity.

In recent congressional testimony, the Sentencing Commission called for legislation to give the guidelines substantial weight and to enforce the guidelines more strictly on appeal. The Commission based its request, in part, on what it said was a “troubling” increase in sentencing disparity among districts.¹ As evidence, the Commission provided statistics regarding non-government-sponsored, below-range sentences for certain types of offenses, and a district-by-district list of non-government-sponsored, below-range sentences in 2010.²

The Commission’s proposal is not warranted by the data it presented. As the Commission itself has previously warned,³ and as practitioners and judges well know,⁴ comparing rates of below-guideline sentences tells us nothing about whether there is unwarranted disparity. There are a host of factors that cause differences among districts in below-guideline sentencing rates, including local conditions, varying case types, prosecutorial decisions, judicial decisions, and community norms.⁵ Meanwhile, research performed by others shows that variation in sentence *length* among districts has decreased since *Booker*.⁶

Prosecutorial decisions remain the primary driver of differences in below-guideline sentencing rates. Indeed, Commission data shows that the variation between the districts with the highest and lowest government-sponsored below-guideline sentencing is 12.4 percentage points *higher* than the variation between the districts with the highest and lowest non-government sponsored rates.⁷ The variation in government-sponsored sentencing rates is unsurprising: the Attorney General has adopted a policy of “district-wide” consistency, one that accounts for “district-specific policies, priorities, and practices,” and “the needs of the communities we serve.”⁸ Moreover, local government-sponsored sentencing practices can have a strong inverse correlation with non-government-sponsored sentencing practices, for the simple reason that when local prosecutors appropriately seek lower sentences, local judges feel less need to impose lower sentences on their own initiative.⁹ Similarly, when prosecutors aggressively use the harsh penalties available in federal court to punish relatively minor offenses, judges appropriately vary downward to prevent unwarranted disparities.¹⁰ Several examples are provided in the Appendix.

There is nothing illegitimate about sentencing differences among districts; to the contrary, the SRA directed the Commission to consider such differences in promulgating offense guidelines,¹¹ and 18 U.S.C. § 3553(a) requires judges to consider factors which necessarily take local factors into account, in considering the need for deterrence, just punishment, promoting respect for law, and protection of the public.¹² As one former police commissioner, U.S. Attorney, and federal judge explained: “Local [sentencing] variations are important because of the wide spectrum of conditions, attitudes and expectations spanning the nation. Overcentralization can produce a rigidity engendering hostility and causing diminution of respect for the national government.”¹³

In sum, while the guidelines do not account for local conditions, judges and prosecutors do take account of such differences, and always have. The current advisory guideline system allows all parties to have input into which cases appropriately merit non-guideline sentences, taking into account the communities in which the cases arise. Legislation that would restrict this appropriate tailoring would at best be ineffective, and at worst would fail to achieve the SRA’s fundamental requirement that the guidelines “maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”¹⁴

¹ Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 1 (Oct. 12, 2011) (hereafter Commission Testimony).

² Commission Testimony at 26, 28, 31, 33, 36, 38, 41, 43, 46, 48, 50, 53; Appendix D

³ U.S. SENTENCING COMM’N, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 111 (2004) (hereafter *Fifteen Year Report*) (“The causes of variation in the rates of departure, and their potential effect on unwarranted sentencing disparity cannot be resolved through simple examination of reported rates. . . . When assessing the role of departures in creating unwarranted sentencing disparity . . . caution is advisable and caveats are unavoidable.”).

⁴ See Samuel A. Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 FED. SENT’G REP. 166 (1992); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 656 n.66 (2008). See also, e.g., Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Comm’n (Feb. 11, 2009); Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, Hearing before the U.S. Sentencing. Comm’n, at 7-11 (July 9, 2009); Tr. of Public Hearing before the U.S. Sentencing Comm’n, Chicago, Ill., at 99-100 (Sept. 9-10, 2009) (remarks of the Hon. Karen K. Caldwell, Eastern District of Kentucky); Statement of Nicholas T. Drees Before the U.S. Sentencing Comm’n, Denver, Colo., at 6-9 (Oct. 21, 2009); Twentieth Annual National Seminar on the Federal Sentencing Guidelines, Orlando, Florida (May 4-6, 2011) (remarks of the Hon. John Gleeson, Eastern District of New York); Letter to the Hon. Patti B. Saris from Thomas W. Hillier, II, Public Comment on Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012, at 59, 65-68 (Sept. 7, 2011).

⁵ *Fifteen Year Report* at 93 (“Analyzing sources of . . . regional disparity is complicated because the potential sources are so many, varied, and interacting.”).

⁶ Jeffery T. Ulmer, Michael T. Light, & John Kramer, *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, Justice Quarterly, 28:6, 799, 816 (Dec. 2011).

⁷ In 2010, prosecutors sought downward departures and variances in 60.4% of cases in the Southern District of California and in 3.7% of cases in the District of South Dakota, a difference of 56.7 percentage points. Judges imposed downward departures and variances in 49% of cases in the Southern District of New York and in 4.7% of cases in the Middle District of Georgia, a difference of 44.3 percentage points. See USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbl. 26.

⁸ Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1, 3 (May 19, 2010).

⁹ For example, Arizona has a 4.2% non-government sponsored rate for immigration cases, while the Southern District of New York has a rate of 63.9%. But the government-sponsored rate in Arizona is 64.7% (primarily due to a “fast-track” program), compared to Southern New York, which has a government-sponsored rate of 2.5% (with no fast-track). The overall sentence length for immigration cases in Arizona is 20 months; in Southern New York, it is 23.5 months. See USSC, *2010 Statistical Information Packet, Arizona, New York Southern*, tbls. 7, 10.

¹⁰ For example, the District of Massachusetts has the second highest percentage of total caseload in the nation of “career offenders.” See USSC 2010 Monitoring Dataset. This anomaly results from a quirk in state law, and an aggressive prosecution policy: Massachusetts misdemeanors are included as “felonies” under the career offender guideline, and it is the practice of the U.S. Attorney’s Office to bring crack cases involving small amounts if the career offender guideline applies. It is little surprise that, given these local factors, Massachusetts district judges varied from the career offender guideline 43.4% of the time in 2010, thus reducing unwarranted disparity. *Id.*

¹¹ See 28 U.S.C. § 994(c)(4), (5), (7) (directing Commission to consider, among other things, “the community view of the gravity of the offense,” “the public concern generated by the offense,” and “the current incidence of the offense in the community”).

¹² See *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc) (affirming above-guideline sentence in firearms-trafficking case based on considerations specific to New York City).

¹³ Vincent L. Broderick, *Local Factors In Sentencing*, 5 FED. SENT’G REP. 314, 314 (1993); see also Michael O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 821–22 (2004) (discussing the distortion of drug policy by federalization and justifying regional differences).

¹⁴ 28 U.S.C. § 991(b)(1)(B).

APPENDIX

1) A witness for the majority at the congressional hearing on October 12, 2011 pointed to the different rates of non-government sponsored below-range sentences in the neighboring Northern District of New York (17.2%) and Southern District of New York (49%) as evidence of unwarranted disparity. But these two districts are quite different, even as shown by average sentence lengths. The national average sentence length was 51.1 months, but 54.1 months in the Southern District of New York, and only 44.4 months in the Northern District of New York.¹

2) The Commission states that for illegal entry cases post-*Gall* period, “the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 66.7 percent in the district with the highest rate of non-government sponsored below range sentences to a low of 1.1 percent in the district with the lowest rate, representing a range of 65.6 percentage points.”²

While the Commission does not reveal which districts those were, the lowest rate must be either New Mexico, which has a 3.5% non-government sponsored rate for all immigration cases (not just illegal entry cases), or Arizona, which has a 4.2% non-government sponsored rate for all immigration cases. In Arizona, which has a “fast track” program, the government-sponsored rate is 64.7%.³ In New Mexico, which also has a “fast track” program, the government sponsored rate is 29%,⁴ and many defendants who do not receive “fast track” departures are prosecuted under 8 U.S.C. § 1326(a) and receive time served.⁵ Thus, in most cases in Arizona and New Mexico, there is no need or even opportunity for judges to depart or vary because the government’s actions produce low sentences.

The 66.7% rate must be the Southern District of New York, which has a 63.9% non-government sponsored rate for all immigration cases, but only a 2.5% government sponsored rate.⁶ The Southern District of New York, unlike Arizona and New Mexico, has no “fast track” program and no § 1326(a) cases.

The average *sentence length* for immigration cases is highest in the Southern District of New York at 23.5 months, while in Arizona it is 20 months, and in New Mexico is 6 months.⁷

3) As an example in drug trafficking cases, in the Eastern District of Kentucky, only 6% of drug offenders receive a non-government sponsored below range sentence, but 63.2% of drug offenders receive a government-sponsored departure for cooperation, and average sentence length is 70 months.⁸ In the Southern District of West Virginia, only 10.7% of drug offenders receive a government sponsored departure for cooperation, but 35.1% receive a non-government sponsored below range sentence, and average sentence length is 75 months.⁹

4) The Commission states that for fraud cases in the post-*Gall* period, “the rate at which courts imposed a non-government sponsored below range sentence varied from a high of 46.8 percent in the district with the highest rate to a low of 1.4 percent in the district with the lowest rate, representing a range of 45.4 percentage points.”¹⁰ Again, we do not know which districts these are but the district with the highest non-government sponsored rate in 2010 was Delaware, with a 59% non-government sponsored rate, a 13.7% government sponsored rate, and average sentence length of 36.7 months.¹¹ The district with the highest number of fraud cases, the Southern

District of New York, had a non-government sponsored below-range rate of 44.4%, a government sponsored rate of 20.6%, and average sentence length of 40.1 months.¹² Arizona had the lowest non-government sponsored rate at 3.5%, a 5% government sponsored rate, and average sentence length of 4 months.¹³

5) A recurring question at the congressional hearing was why the rate of non-government sponsored sentences in the District of Massachusetts was 35.7% but only 4.4% in the Middle District of Georgia in 2010. Some of the reasons are as follows:

- Average sentence length was higher in the District of Massachusetts (69.4 months) than in the Middle District of Georgia (68.8 months), and well above the national average of 51.1 months.¹⁴ Average sentence length was higher in the District of Massachusetts than the national average for each major category of offense.¹⁵
- The rate of below-guideline sentences in the District of Massachusetts has dropped by seven percentage points, from 35.7% in FY 2010 to 28.7% during the first three quarters of FY 2011, concurrent with the FSA amendments; the rate for the Middle District of Georgia has increased from 4.7% in 2010 to 5.7% thus far in 2011.¹⁶
- Career Offender Guideline. The District of Massachusetts has the second highest percentage of total caseload in the nation of defendants categorized as “career offenders.”¹⁷ Massachusetts provides a statutory maximum of two or two and one half years for misdemeanors such as including possession with intent to distribute marijuana, resisting arrest, and assault and battery, and the Commission includes such misdemeanors as “felonies” under the career offender guideline. Further, it is the practice of the U.S. Attorney’s Office in the District of Massachusetts to bring crack cases involving small amounts if the career offender guideline applies. The career offender guideline is therefore applicable to a large number of offenders with minor records in the District of Massachusetts, while similarly situated offenders in other districts are prosecuted in state court or, if prosecuted in federal court, are not career offenders. As the Commission has found, the severe punishment recommended by the career offender guideline, as applied to those who qualify based on prior drug convictions, vastly overstates the risk of recidivism, serves no deterrent purpose, and has a racially disparate impact.¹⁸ Judges in the District of Massachusetts varied from the career offender guideline 43.4% of the time in 2010.¹⁹ Given all of the above, this represents a *reduction* in unwarranted disparity.
- Charge bargaining. Prosecutors in the Middle District of Georgia charged a violation of 21 U.S.C. § 843(b) (a “telephone count”) as the instant offense in 15.8% of the career offender cases, rather than a drug trafficking violation under 21 U.S.C. § 841, reducing the career offender guideline range from 210-262 months or more to at most 51-63 months.
- Driving offenses. The Middle District of Georgia has an unusually large number and percentage of “miscellaneous offenses,” comprising 31% of its caseload, compared to 3.1% nationally, and 1.8% in the District of Massachusetts.²⁰ The vast majority of “miscellaneous” offenses in the Middle District of Georgia are traffic offenses on a nearby military base. Most are sentenced within the guideline range, which is so low that over 90% were sentenced to probation and the average sentence for those sentenced to prison was 6.9 months.²¹ The District of Massachusetts may get one traffic offense a year.

- Crack. In 2010, crack cases comprised 16.1% of all cases in the District of Massachusetts, and 12.1% of the cases in the Middle District of Georgia; the national average was 5.6%.²² The overall rate of below-guideline sentences in the District of Massachusetts dropped by seven percentage points, from 35.7% in FY 2010 to 28.7% during the first three quarters of FY 2011, while the overall rate for the Middle District of Georgia increased from 4.7% in 2010 to 5.7% thus far in 2011.²³ It appears that judges in the District of Massachusetts were frequently varying from the crack guideline before the amendments directed by the Fair Sentencing Act effective the first quarter of FY 2011 (and thus reducing *unwarranted* disparity), and are now following the guideline more often, while judges in the Middle District of Georgia followed the crack guideline before and after the FSA amendments.

6) A recent letter from the Defenders in the Western and Southern Districts of Texas, which have low non-government sponsored below-range rates, and the Southern District of New York, which has a high non-government sponsored below-range rate, further reveals that there are extreme differences among districts in types of cases and prosecutorial practices, that prosecutorial practices create unwarranted disparities, and that prosecutorial practices drive judicial sentencing practices. *See* Letter to Lanny A. Breuer, Assistant Attorney General, from Federal Public Defenders Daid Patton, Henry Bemporad and Margy Meyers (Nov. 22, 2011), <http://sentencing.typepad.com/files/letter-to-lanny-breuer-from-defenders.pdf>.

¹ USSC, 2010 Statistical Information Packet, Northern District of New York, Southern District of New York, tbl. 7.

² Commission Testimony at 26. We cannot be certain which districts the Commission has found to have the highest and lowest rates for illegal entry cases alone because the Commission publishes rates by district for all immigration cases together, rather than reporting illegal entry separately.

³ USSC, 2010 Statistical Information Packet, Arizona, tbl. 10.

⁴ USSC, 2010 Statistical Information Packet, New Mexico, tbl. 10.

⁵ The information regarding the high number of § 1326(a) cases comes from the Defender in the District of New Mexico.

⁶ USSC, 2010 Statistical Information Packet, Arizona, New Mexico, Southern District of New York, tbl. 10.

⁷ USSC, 2010 Statistical Information Packet, Arizona, New Mexico, Southern District of New York, tbl. 7.

⁸ USSC, 2010 Statistical Information Packet, Eastern District of Kentucky, tbls. 7, 10.

⁹ USSC, 2010 Statistical Information Packet, Southern District of West Virginia, tbls. 7, 10.

¹⁰ Commission Testimony at 48.

¹¹ USSC, 2010 Statistical Information Packet, Delaware, tbls. 7, 10.

¹² USSC, 2010 Statistical Information Packet, New York Southern, tbls. 7, 10.

¹³ USSC, 2010 Statistical Information Packet, Arizona, tbls. 7, 10.

-
- ¹⁴ USSC, 2010 Statistical Information Packet, District of Massachusetts, Middle District of Georgia, tbl. 7.
- ¹⁵ USSC, 2010 Statistical Information Packet, District of Massachusetts, tbl. 7 (drug trafficking – 78.9 months versus 78.4 months nationally; firearms – 98.9 months versus 90.7 months nationally; fraud – 52 months versus 30.5 months nationally; immigration – 22.7 months versus 18.3 months nationally).
- ¹⁶ USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbl.2.
- ¹⁷ USSC 2010 Monitoring Dataset.
- ¹⁸ USSC, *Fifteen Year Review* at 133-34.
- ¹⁹ USSC 2010 Monitoring Dataset.
- ²⁰ USSC, Statistical Information Packet, Fiscal Year 2010, Middle District of Georgia, District of Massachusetts, tbl. 1.
- ²¹ *Id.*, tpls. 5, 7.
- ²² USSC, 2010 Statistical Information Packet, District of Massachusetts, Middle District of Georgia, fig. A.
- ²³ USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbl. 2.