

Fact Sheet: The 2012 USSC Booker Report Inter-Judge Differences in Federal Sentencing

The Supreme Court’s decision in *United States v Booker*, 543 U.S. 220 (2005), solved a Sixth Amendment constitutional violation with the federal sentencing guidelines.

- The Court made the sentencing guidelines “effectively advisory” by striking portions of the Sentencing Reform Act of 1984 that had made the guidelines mandatory in practice.
- Subsequent decisions, such as *Rita*, *Gall*, *Kimbrough*, and *Pepper*¹ reaffirmed the importance of judicial discretion in implementing the statutory directives of 18 U.S.C. § 3553(a).
- In a 2012 report, the U.S. Sentencing Commission found that the guidelines “have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time.”² (USSC Report, Part A, at 3)
- Nonetheless, the Commission has proposed several statutory changes that would restore a mandatory guidelines system. (USSC Report, Part A, at 111-114)³
- The “Key Findings” of the 2012 report include: “Variation in the rates of non-government sponsored below range sentences among judges within the same district has increased in most districts since *Booker*, indicating that sentencing outcomes increasingly depend upon the judge to whom the case is assigned.” (USSC Report, Part A, p. 8.) The report noted elsewhere, however, that “[t]he average extent of the reduction below the guideline minimum varied broadly during each period, and did not appear to have been affected by legislation [the PROTECT Act] or Supreme Court decisions.” (USSC Report, Part D, at 1, 7).

The Commission presents data that does not separate disparity caused by judges from disparity arising from other sources. Gaps among judges in the Commission’s graphs overstate the disparity caused by judges.

- Part D of the USSC Report contains graphs displaying the rates of “Non-Government Sponsored Below Range Sentences” [NGS below-range] for individual federal judges, in each circuit and district, and in four time periods labeled “Koon,” “PROTECT,” “Booker,” and “Gall.” Readers must inspect the numerous graphs and draw their own conclusions.
- In Part E of the USSC Report, the Commission criticizes “simplistic” analyses of aggregate data, because without the use of control variables in a regression analysis it is difficult to assess the sources of differences in sentencing, or changes over time. No such analyses are performed in Part D with data on inter-judge differences, however. It is therefore impossible to know how much of the gaps among judges are due to judges themselves, or due to differences in caseloads, or differences in prosecutorial practices before different judges or in different cities within a district or circuit.

¹ *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

² U.S. Sentencing Commission, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012) [hereinafter USSC Report].

³ Amy Baron-Evans & Thomas W. Hillier, II, *The Commission’s Legislative Agenda to Restore Mandatory Guidelines*, (forthcoming) 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252105>

- Research outside the Commission shows that at least some of the gap among judges in NGS below-range rates is due to judges themselves,⁴ and research in one district showed a modest increase in gaps over time due to judges.⁵ The graphs in the Commission’s report, however, exaggerate the variation due to judges themselves, because the data are not limited to judges in the same random caseload assignment pool.
- The Commission states that “[t]he majority of districts (N=64) showed a contraction in the spread from the *Koon* to the PROTECT Act periods.” However, much of this change is due to data collection changes and cannot be attributed to the PROTECT Act. As noted elsewhere in the report (USSC Report, Part C, p. 2), in the *Koon* period *all* below-range sentences for reasons other than defendants’ substantial assistance were classified as NGS below-range sentences. Approximately 40 percent of these sentences were actually government sponsored, under plea agreements benefiting the government, primarily in informal “fast track” programs in drug and immigration cases on the border.

Differences in below-range rates among judges are generally modest; the causes of and solutions to these variations are very different today from the pre-guidelines era; and “the uniformity that Congress originally sought to secure . . . is no longer an open choice.” *Booker*, 543 U.S. 263.

- While most districts showed an increase in the spread of NGS below-range rates in the *Booker* period, 14 districts showed either a contraction or no discernible change. The rate of increase in the spread slowed in the *Gall* period (USSC Report, Part D, p. 6), suggesting a system moving toward stability.
- Unlike the pre-guidelines era, judicial discretion today is guided by the advisory guidelines, the purposes of sentencing, and the other factors set forth in 18 U.S.C. § 3553(a). The advisory guidelines serve as a starting point and benchmark and exert a gravitational pull, which helps reduce disparity compared to the purely discretionary pre-Guidelines era.
- In the pre-guidelines era, inter-judge disparity was due largely to philosophical differences among judges. Today, variation in NGS below-range rates arises in part due to differences in judges’ willingness to scrutinize whether a guideline rests on sound empirical evidence. The Supreme Court expected that judicial scrutiny and rejection of unsound guidelines would improve the system by encouraging the Commission to fix the guidelines, and it already has, at least with respect to crack cocaine sentencing. But many problematic guidelines remain.
- Differences among judges in the rates of below-range sentences can be reduced by the Commission. Feedback from judges provides valuable information about which guidelines are out of line with judicial experience with individual defendants.
- As the Supreme Court said, “[A]dvisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” But “[t]hese measures will not eliminate variations between district courts,” for “some departures from uniformity were a necessary cost of the remedy we adopted.” *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

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⁴ Transactional Records Access Records Clearinghouse, *Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges*, 25 Fed Sent Rep. (2012); but see Paul J. Hofer *Data, Disparity, and Sentencing Debates: Lessons from the TRAC Report on Inter-Judge Disparity*, 25 Fed. Sent. Rep. (2012).

⁵ Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 Stan. L. Rev. 1 (2010). The author noted that “the effect of the judge remains relatively modest.”