



Department of Justice

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FACT SHEET: THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING

The Federal Sentencing Guidelines were adopted after passage of the bipartisan Sentencing Reform Act of 1984 (SRA) to emphasize fairness, consistency, punishment, incapacitation and deterrence in sentencing. The 1984 reforms were successful in promoting fairness and uniformity in sentencing and increasing the safety of law-abiding Americans. Under the Guidelines established by the U.S. Sentencing Commission (USSC), criminals with similar backgrounds who commit similar crimes receive similar sentences, irrespective of race, socio-economic status, or geographic location.

Yesterday, the USSC released its report on the impact of *United States v. Booker* on federal sentencing. This report shows that the fairness, consistency and accountability that were the hallmarks of the SRA are in serious jeopardy.

In 2003, Congress passed the PROTECT Act, which was an attempt to reassert the principles of consistency and fairness in federal sentencing policy, particularly in cases involving the sexual exploitation of children. The USSC data are troubling because they indicate that Congress' statutory goals are being undermined as a result of *Booker*. After the Supreme Court's decisions in *United States v. Blakely*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), which converted the mandatory sentencing regime that had been in place since 1984 to an advisory one, many observers became concerned about the possible emergence of three problematic trends: 1) an increase in judge-made sentences imposed outside the ranges established by the Sentencing Guidelines; 2) shorter sentences for certain types of offenses; and 3) increased geographic and racial disparity in sentencing.

Based upon the most recent data released by the USSC, these post-*Booker* concerns appear to be well-founded. The fairness, consistency, predictability and accountability that were the hallmarks of the federal sentencing guidelines and a key objective of the PROTECT Act are in serious jeopardy.

Decreasing compliance with the Federal Sentencing Guidelines

There has been a decline in compliance with the Federal Sentencing Guidelines. Specifically:

- After passage of the PROTECT Act in 2003, the percentage of sentences imposed within the ranges set forth by the Federal Sentencing Guidelines increased from 65 percent in FY 2002, to 72.2 percent in FY 2004. However, within only one year of the *Booker* decision, the number of sentences imposed within the Guidelines has dropped to 62.2 percent. This is largely attributable to judges exercising their increased discretion under *Booker*, although there has been a small increase in government sponsored departures as well.
- As shown in the USSC's report, "other downward departures" and sentences "otherwise below the range" – lower sentences that did not result from a government request – jumped from 5.2 percent in FY 2004 (pre-*Blakely*) to 12.5 percent in FY 2005-2006 (post-*Booker*). These trends are significant because they occurred over a relatively short period of time. These trends are contrary to what Congress intended – fewer departures below the guideline ranges – when it passed the PROTECT Act in 2003.

Lower prison sentences for criminals for whom Congress sought higher sentences when it passed the PROTECT Act

Although post-*Booker* the average length of federal sentences has increased incrementally from 57 months to 58 months, the average sentence imposed upon career offenders – defendants who have the most serious criminal records – has decreased.

- The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased after *Booker*. What this means in practical terms is that post-*Booker* defendants convicted of abusive sexual contact are getting sentences below the recommended guidelines at an increased rate – negating the improvements that had been made in this area following the passage of the PROTECT Act.
- The rate of imposition of below-range sentences for cases involving sexual abuse of a minor decreased following the PROTECT Act (from 16.1 percent to 2.1 percent) but increased following the *Booker* decision to 12.3 percent.
- Rates of below-range sentences for offenses involving production of child pornography decreased following the PROTECT Act (from 3.8 percent to 2.5 percent), and then increased post-*Booker* to a rate (11.3 percent) nearly three times the pre-PROTECT Act rate.
- Rates of below-range sentences for trafficking in child pornography show a steady increase across the three time periods from 13.7 percent pre-PROTECT Act, to 16.9 percent post-PROTECT Act, to 19.1 percent post-*Booker*.
- Rates of imposition of non-government sponsored, below-range sentences for possession of child pornography offenses decreased following the PROTECT Act (25 percent to 16.6 percent), but increased after *Booker* to 26.3 percent.

- USSC data also show that judges are increasingly granting below-range sentences based upon a defendant's substantial assistance with the government, but without a government motion requesting a downward departure. This practice reduces incentives for defendants to cooperate with the government because defendants can request and obtain the same benefit from the court even in the absence of full cooperation with the government.

Increasing sentencing disparities based upon race and geography

There are indications that the "race effect" has begun to reappear in federal sentencing. Specifically:

- Analysis conducted by the USSC on post-*Booker* data reveal that black offenders are receiving sentences that are 4.9 percent higher than white offenders. Although the race effect has fluctuated from year-to-year, its reemergence over the past year suggests the need to return to a system of colorblind sentencing guidelines. The "race effect" did not appear in analysis of data during the post-PROTECT Act, pre-*Booker* period.
- The data also point to widening inter-circuit, inter-district and intra-district disparities, which highlights another dimension of sentencing disparities among similarly situated defendants. For example, in the Northern District of Iowa, 68.7 percent of defendants received sentences within the guideline ranges, while in the Southern District of Iowa, 48.0 percent of defendants received sentences within the guideline range.
- These trends are apparent in the USSC data which indicated that there has been a measurable amount of post-*Booker* decline in the rate of within guidelines sentences, combined with increases in the rates of court-initiated, below-range and above-range sentences. The USSC noted that the uniformity that was the hallmark of mandatory sentencing guidelines is "not readily apparent following *Booker*."
- Judges overwhelmingly use their new authority under *Booker* to impose sentences below the range suggested by the guidelines. Only rarely do they sentence higher than what the guidelines recommend. In the year since *Booker* was decided, over government objection, judges have sentenced more than 8,100 defendants to sentences lower than what the guidelines called for; over a defendant's objection, they have sentenced higher than what the guidelines call for about 1,000 times (totaling up the "departures above and below" and the "otherwise above and below").
- In response to these troubling trends in sentencing practices, the Attorney General has decided to recommend the implementation of a minimum guideline system. The Attorney General's proposal will address this problem by restricting a judge's ability to sentence defendants below the guidelines range. This is consistent with *Booker*, which found a constitutional problem only in the fact that the high end of the guidelines range was mandatory, rather than advisory.

- The Department's proposal therefore combines the elements of sentencing from before *Booker* – such as mandatory guidelines to establish the minimum sentence – with elements of the Court's decision in *Booker*, making the maximum's advisory. This approach will return sentencing to the sound constitutional foundation it enjoyed before *Booker*, while also insuring consistency, firmness and fairness

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