



Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing



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ONLINE CONTENT

(www.ussc.gov)

PART B: Appellate Review

This Part contains additional Supreme Court and Circuit Court case law, discussion of viewpoints on appellate procedure as expressed in public hearings, case law, and the 2010 survey of district judges, and an analysis of data on sentencing appeals.

PART C: Methodology and Statistical Analysis of Federal Sentencing Data

Following a description of the Commission's methodology, each sub-section in Part C includes an overview of fiscal year 2011 data, and trend data covering four periods – PROTECT Act, *Koon*, *Booker*, and *Gall*, – as well as Appendices with additional tables.

- ❖ Federal Offenses in the Aggregate
- ❖ Drug Trafficking
 - ❖ Powder Cocaine Trafficking
 - ❖ Crack Cocaine Trafficking
 - ❖ Heroin Trafficking
 - ❖ Marijuana Trafficking
 - ❖ Methamphetamine Trafficking
- ❖ Immigration Offenses
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 - ❖ Illegal Entry Offenses
- ❖ Firearms Offenses
- ❖ Fraud Offenses
- ❖ Child Pornography Offenses
 - ❖ Production Offenses
 - ❖ Non-Production Offenses (Trafficking, Receipt, and Possession)
- ❖ Career Offenders

PART D: Spread of Non-Government Sponsored Below Range Sentences by Circuit and District.....

After a brief introduction and explanation of the Commission's methodology, this Part analyzes non-government sponsored below range rates by judge within each of the 94 judicial districts, illustrating the spread in the rates among judges within the same district, and the spread in the extent of the reductions below the guideline minimum. Plots depicting the spread in the rates and the extent of the reductions for each of the 94 districts follow.

PART E: Demographic Differences in Sentencing

In this Part, the Commission updates its multivariate regression analysis on demographic differences in sentencing, last published in March 2010, and also presents additional multivariate analyses. Appendices to this part contain additional data and variables used in the analyses.

PART F: Summary of Stakeholder Views on Sentencing Reform.....

In this Part, the Commission describes other proposals for sentencing reform and summarizes public hearing testimony related to post-*Booker* sentencing as well as a survey of district judges conducted in 2010.

Overview

WHAT THE COMMISSION STUDIED

The United States Sentencing Commission (“the Commission”) submits this report to Congress¹ on the impact of *United States v. Booker*² on federal sentencing in order to assist Congress in its efforts to ensure certain and fair sentencing that avoids unwarranted sentencing disparities while maintaining sufficient flexibility,³ as envisioned in the Sentencing Reform Act of 1984 (“SRA”). In preparing this report, the Commission reviewed case law, analyzed sentencing data,⁴ and studied scholarly literature.

¹ The Commission submits this report pursuant to its general authority under 28 U.S.C. §§ 994-995, and its specific authority under 28 U.S.C. § 995(a)(2), which provides that the Commission shall have authority to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.”

² 543 U.S. 220 (2005).

³ See 28 U.S.C. § 991(b)(1)(B) (“The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices[.]”).

⁴ The Commission maintains a comprehensive, computerized data collection system and acts as the clearinghouse for federal sentencing information pursuant to 28 U.S.C. §§ 995(a)(14), (15). The Commission relies on this database for its ongoing monitoring and evaluation of

The Commission also sought the views of stakeholders in the federal criminal justice system in a variety of ways, including conducting seven regional public hearings,⁵ an additional hearing on post-*Booker*

the guidelines, many of its reports and research projects, and for responding to hundreds of data requests received from Congress and other criminal justice entities each year. Pursuant to 28 U.S.C. § 994(w), within 30 days of entry of judgment in every felony and class A misdemeanor case, the Commission receives: (1) the judgment and commitment order; (2) the statement of reasons; (3) the plea agreement, if any; (4) the indictment or other charging information; and (5) the presentence report (unless waived by the court). For each case, the Commission routinely collects hundreds of pieces of information, including defendant demographics, statute(s) of conviction, application of (or relief from) any statutory mandatory minimum penalty, sentencing guideline applications, sentences imposed, and the reasons for any sentence that departs or varies from the guidelines range. A detailed description of the methodologies the Commission used to analyze the data for this report is in Part C, available online.

⁵ The Commission held seven regional public hearings coinciding with the 25th anniversary of the enactment of the Sentencing Reform Act of 1984 to solicit the views of judges, prosecutors, defense attorneys, probation officers, academics, and others on a variety of federal sentencing and criminal justice topics. These hearings were held in Atlanta, GA (Feb. 10-11, 2009), Stanford, CA (May 27-28, 2009), New York, NY (July 9-10, 2009), Chicago, IL (Sept. 9-10, 2009), Denver, CO (Oct. 20-21, 2009), Austin, TX (Nov. 19-20, 2009), and Phoenix, AZ (Jan. 20-21, 2010). Witness statements and transcripts for the public hearings are available online at http://www.ussc.gov/Legislative_and_Public_Affairs/. Summaries of the testimony relating specifically to post-*Booker* sentencing issues can be found in Part F of this report, available online.

sentencing held in February 2012,⁶ a survey of federal district judges,⁷ and considering comments from its advisory groups⁸ as well as representatives from all three branches of government.

The Commission also undertook statistical analyses of federal sentencing data for five offense types (drug trafficking, firearms, immigration, fraud, and child pornography) and one commonly applied guideline (career offender). In fiscal year 2011, four of these offenses (immigration, drug trafficking, firearms, and fraud) constituted over three quarters of federal offenses. The offense types studied in this report comprised nearly 80 percent of federal criminal cases in fiscal year 2011.

The Commission commonly analyzes sentences by comparing the sentence imposed in a case with the applicable guideline range provided in the *Guidelines Manual* for that case. Through this analysis, the Commission routinely groups sentences into one of four categories: (1) sentences that fall within the guideline range; (2) sentences that are above the top of the guideline range; (3) sentences that are below the bottom of the guideline range attributable at least in part to a request from the government; and (4) sentences that are below the bottom of the guideline range but are not attributable to a request from the government.⁹ In this report,

sentencing trends are discussed using these four broad categories: “within range;” “above range;” “government sponsored below range;” and “non-government sponsored below range.”

In some analyses in this report, the Commission further divides government sponsored below range sentences into three subgroups. First, “substantial assistance departures” are those sentences where the government requested a sentence below the guideline range on account of the defendant’s substantial assistance to the government in connection with the investigation or prosecution of another person. Second, “Early Disposition Program (or EDP) departures” are sentences where the government sought a sentence below the guideline range because the defendant participated in the government’s Early Disposition Program, through which cases are resolved in an expedited manner. Both substantial assistance and EDP departures are specifically authorized by statute and are incorporated into the *Guidelines Manual* through specific policy statements. “Other government sponsored below range” sentences are all other below range sentences imposed at the request of the government for a reason other than substantial assistance or EDP. “Other government sponsored below range” sentences are not specifically authorized by any statute, and are not incorporated into the *Guidelines Manual* through any guideline or policy statement.

The Commission also analyzed sentencing data from individual judges in order to determine intra-district sentencing patterns across time, and examined appellate court decisions collected annually since 1994. Finally, the Commission updated and expanded its prior multivariate analysis of demographic differences in federal sentencing outcomes, most recently published in March 2010.¹⁰

The Commission’s sentencing data analyses spanned a broad time frame, from October 1995 through September 2011. In most instances, four periods were examined: the *Koon* period (June 13, 1996 through April 30, 2003), the PROTECT Act

⁶ The Commission held a hearing on federal sentencing options after *Booker* in Washington, DC on February 16, 2012. Witness statements and transcripts for this public hearing are available on the Commission’s webpage at www.ussc.gov. Summaries of the testimony can be found in Part F of this report, available online.

⁷ In early 2010, the Commission conducted a survey of federal district judges to solicit their views on a variety of sentencing topics. See U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010) [hereinafter 2010 JUDGES’ SURVEY], available on the Commission’s webpage at www.ussc.gov. A summary of the survey responses related to post-*Booker* sentencing issues can be found in Part F of this report, available online.

⁸ The Commission has three standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, and the Victims Advisory Group. Information on each of these advisory groups can be found on the Commission’s webpage at www.ussc.gov.

⁹ See Table N, “National Comparison of Sentence Imposed and Position Relative to the Guideline Range,” U.S. SENT’G

COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2011) [hereinafter 2011 SOURCEBOOK].

¹⁰ U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER* REPORT’S MULTIVARIATE REGRESSION ANALYSIS (March 2010) [hereinafter MULTIVARIATE REPORT].

period (May 1, 2003 through June 24, 2004), the *Booker* period (January 12, 2005 through December 10, 2007), and the *Gall* period (December 11, 2007 through September 30, 2011). The Commission selected these periods based on Supreme Court decisions and legislation that influenced federal sentencing in fundamental ways. Specifically, in *United States v. Koon*,¹¹ the Supreme Court defined the level of deference due to district courts' decisions to sentence outside the guideline range and determined that such decisions should be reviewed for abuse of discretion. In passing the PROTECT Act¹² nearly seven years later, Congress restricted district courts' discretion to impose sentences outside the guideline range, and required that courts of appeals review such decisions *de novo*, or without any deference to the district court's decision. In *Booker*, the Supreme Court struck down two statutory provisions in the SRA that made the guidelines mandatory, and also defined the standard of review for sentences on appeal. In *Gall v. United States*,¹³ the Court further defined the appellate standard of review.

WHAT THE COMMISSION FOUND

The sentencing guidelines have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time. The most stable relationship between the guidelines and sentences imposed occurred in some of the most frequently prosecuted offenses, including drug trafficking, immigration, and firearms offenses. In other types of offenses, such as fraud and child pornography, the influence of the guidelines appeared to have diminished over time in several measurable ways, including decreasing rates of sentences imposed within the sentencing guideline ranges, and increasing rates of non-government sponsored below range sentences (those below range sentences imposed at the judges' discretion and not in response to a government motion). Increasing rates of below range sentences sponsored by the government for reasons other than substantial assistance, as well as differences in prosecutorial practices across districts, also have

contributed to decreasing rates of within range sentences and increasing variation in sentencing for some offenses.

Regional disparities have increased, as evidenced by the variation in rates of within range sentences among the circuits and districts. Further, the Commission's analysis of individual judge data showed that the identity of the judge has played an increasingly important role in sentencing outcomes in many districts.

The Commission also found that demographic characteristics are now more strongly correlated with sentencing outcomes than during previous periods, although the Commission does not suggest that this correlation indicates race or gender discrimination on the part of judges. This troubling trend also has been replicated in multivariate analyses performed by other researchers, albeit to different magnitudes.

Finally, the courts of appeals have not promoted uniformity in sentencing to the extent the Supreme Court anticipated in *Booker*. The appellate courts lack adequate standards and uniform procedures in spite of a number of Supreme Court rulings addressing them, and the ultimate outcome of the substantive review of a sentence may depend in part on the circuit in which the appeal is brought. Additionally, only a small percentage of sentences are appealed, and usually only by the defendant.

The trends described in this report have developed gradually since *Booker*. In the aggregate, federal sentences have shown general stability, as seen in the Commission's analysis of sentence lengths and their relation to the minimum of the guideline range over time. Nonetheless, unwarranted disparities in federal sentencing appear to be increasing. Judges are following the dictates of the Supreme Court in *Booker* and subsequent decisions in different ways, with some judges weighing factors such as the characteristics of the offense and the offender differently than other judges in similar cases. Indeed, the role of the guidelines has become less pronounced, in part because of a series of Supreme Court cases emphasizing the advisory nature of the guidelines and the traditional importance of individual offender characteristics in sentencing, and the requirement, as stated by the Court, that judges independently consider the characteristics of the offense and the offender under 18 U.S.C. § 3553(a). The Commission's recommendations are aimed at strengthening the guideline system so that the sentencing guidelines can help move sentencing in the direction Congress

¹¹ 518 U.S. 81 (1996).

¹² Pub. L. No. 108-21 (2003).

¹³ 552 U.S. 38 (2007).

intended in the SRA in a manner consistent with the Constitution and Supreme Court decisions.

ORGANIZATION

This report is submitted in six parts. Part A, available both in print and online, presents a condensed background of major legal events in federal sentencing, describes the results of the Commission's data analyses, and discusses the Commission's proposals for strengthening the federal sentencing guidelines system.

The following additional sections containing more detailed information and supporting data are available only online, on the Commission's website (www.ussc.gov):

Part B of this report features exhibits listing some of the leading Supreme Court and circuit court opinions on key pre- and post-*Booker* sentencing-related issues and summarizes viewpoints on appellate procedure from circuit court opinions, the Commission's training seminar, public hearings, and the 2010 survey of district judges. Part B also provides additional data on sentencing appeals.

Part C explains both the methodology used in many of the report's data analyses and how to interpret the charts and graphs used throughout this report. This part analyzes in detail data from federal courts, focusing on five offense types and one commonly applied guideline: drug trafficking, immigration, fraud, firearms, child pornography, and the career offender guideline. Additional charts and graphs for each offense type and guideline follow.

Part D analyzes non-government sponsored below range sentence rates of individual judges, and intra-district disparity in those rates. Plots depicting the rates of non-government sponsored below range sentences and the extent of the reduction for each judge in each district are in Part D, as well as explanatory notes on how to interpret the plots.

Part E updates the multivariate regression analysis used for the Commission's 2010 report on *Demographic Differences in Federal Sentencing Practices* to determine whether there continues to be a correlation between sentencing outcomes and demographic characteristics. In conducting this analysis the Commission used, as it did in the 2006

Booker Report,¹⁴ a research tool common in the social and behavioral sciences. Multivariate regression analysis is used to examine data where multiple factors may contribute to an observed outcome, such as the sentencing of federal offenders. The principal benefit of this tool is that it accounts, or controls, for the effect of each factor in the analysis. Each factor can then be separately assessed, and the extent to which each factor influences the outcome can be measured. The analysis describes the magnitude of any differences observed, focusing on four separate time periods. This section also presents additional multivariate analyses, including analyses of three major offense types: drug trafficking, firearms, and fraud.

Part F discusses other stakeholders' views on sentencing reform, including testimony from the 2009-2010 regional public hearings on the 25th anniversary of the SRA and the February 2012 public hearing on post-*Booker* sentencing. Summaries of the public hearings and of the Commission's 2010 survey of district judges are also in Part F.

Appendices containing additional data and more detailed descriptions of the methodologies used in the analyses follow the relevant sections in the online content.

SUMMARY OF KEY FINDINGS

In light of the extensive data analyses, the review of case law, and other relevant information presented in this report, the Commission makes the following findings:

The number of federal offenders has substantially increased, and most federal offenders have continued to receive substantial sentences of imprisonment.

The number of federal offenders has increased substantially over the 16 years studied in this report, and most have continued to receive substantial sentences of imprisonment. In fiscal year 1996, 37,091 federal offenders were sentenced, compared to 76,216 in fiscal year 2011.¹⁵ The percentage of federal

¹⁴ U.S. SENT'G COMM'N, REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006) [hereinafter 2006 *BOOKER* REPORT].

¹⁵ The dataset used for this report differs from that used in the Commission's 2011 SOURCEBOOK. An explanation of

offenders sentenced to serve a term of imprisonment without any alternative to incarceration as a part of the sentence also has increased over this period from 76.9 percent in fiscal year 1996, to 87.8 percent in fiscal year 2011. In fiscal year 1996, 10.9 percent of federal offenders were sentenced to probation only, 7.4 percent were sentenced to a combination of probation and some form of confinement (e.g., home detention or other confinement), and 4.8 percent were sentenced to a combination of incarceration and community confinement. In fiscal year 2011, 5.8 percent of federal offenders received a sentence of probation only, and 6.4 percent received either a combination of probation and some form of confinement, or a combination of incarceration and community confinement.

For offenses in the aggregate, the average length of the sentence imposed during the *Gall* period was 49 months, the same as during the *Koon* period, but a few months shorter than during the PROTECT Act period (53 months) and the *Booker* period (54 months). The decrease from the *Booker* period was due in part to the increasing prevalence of immigration offenses, which generally resulted in lower sentences than other offenses. During the PROTECT Act period, for example, immigration offenses were 18.9 percent of the federal caseload, whereas in the *Gall* period, immigration offenses were 29.0 percent. Average sentences for illegal entry offenders have decreased over time due in part to guideline amendments lowering penalties and in part to increasing rates of EDP departures.

Average sentences for drug trafficking offenders were shorter during the *Gall* period (75 months) than during the *Booker* period (83 months), due largely to reduced penalties for crack cocaine trafficking offenders. From the *Koon* period to the *Gall* period, sentences for child pornography non-production offenders (including trafficking, receipt, and possession) increased nearly three-fold, from 34 months to 93 months. Sentences for fraud offenders nearly doubled, from 13 months in the *Koon* period, to 25 months in the *Gall* period. In child pornography and fraud offenses, these increases were due to both increased seriousness of offenses over time, and statutory and guideline increases. Sentences for

firearms offenders were also highest during the *Gall* period, at 59 months, compared to 56 months in the *Koon* period.

The guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.

The Supreme Court has held that courts must begin the sentencing process by properly determining the applicable guideline range.¹⁶ During the *Gall* period, 80.7 percent of federal sentences were either within the guideline range (53.9% of sentences) or below the range pursuant to a government motion (26.8% of sentences). Less than one-quarter (17.4%) of sentences were non-government sponsored below range sentences. Average sentences for almost every offense type analyzed in this report were lower than average guideline minimums due to both government sponsored and non-government sponsored below range sentences.

Nonetheless, trends in average sentences generally have followed average guideline minimums over time. For offenses in the aggregate, when the average guideline minimum has increased or decreased due to changes in the seriousness of the offense, the criminal history of the offenders, or amendments to the guidelines, the average sentence also has increased or decreased in like proportion.

The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, has generally remained stable in drug trafficking, firearms, and immigration offenses, but has diminished in fraud and child pornography offenses.

Although trends in average sentences for all offenses generally have followed average guideline minimums over time, there have been noticeable differences by offense type. In drug trafficking, firearms, and immigration, three offense types which comprised more than two-thirds of federal offenses in fiscal year 2011, the influence of the guidelines has remained stable over time. For these offenses, average sentences have increased or decreased in response to

the criteria used to define the dataset in this report is in the Methodology section of Part A, *infra* at 52, and in the Methodology section of Part C, available online.

¹⁶ See *Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall*, 552 U.S. at 49–50.

increases and decreases in average guideline minimums, resulting in a consistent parallel relationship over time. In drug trafficking offenses, although average sentences have been lower than average guideline minimums, much of the difference between the average guideline minimum and the average sentence has been due to the prevalence of government sponsored below range sentences for substantial assistance.

In contrast, in fraud and child pornography offenses, the average guideline minimum and the average sentence have diverged, and the divergence has grown over time. For both offense types, as the average guideline minimum has increased, the average sentence has remained flat by comparison. In these cases, the difference between the average guideline minimum and the average sentence has been largely due to increasing rates of non-government sponsored below range sentences, leading to the conclusion that the influence of the guidelines has diminished for fraud and child pornography offenses.

Similarly, in career offender cases, of which 94.7 percent were drug trafficking, robbery or firearms offenses in fiscal year 2011, the average sentence diverged from the average guideline minimum during the *Gall* period. The percentage difference between the average guideline minimum and the average sentence was greatest in fiscal year 2011, at 24.9 percent. The increasing difference has been attributable to increases in the rates of both government sponsored and non-government sponsored below range sentences.

For most offense types, the rate of within range sentences has decreased while the rate of below range sentences (both government sponsored and non-government sponsored) has increased over time.

For most offense types, the rate of within range sentences has decreased because of increases in the rates of both government sponsored and non-government sponsored below range sentences. In drug trafficking and firearms offenses, the rates of both government sponsored and non-government sponsored below range sentences have increased. In immigration offenses (illegal entry in particular) the decrease in within range rates has been primarily attributable to government sponsored EDP departures. These programs were formally authorized by the PROTECT

Act but had been informally used before then in a number of districts, and had generally been reported by the Commission as “other downward departures,” and not attributed to the government. In child pornography non-production offenses (including trafficking, receipt, and possession offenses) where the average guideline minimum and the average sentence have noticeably diverged, the rates of non-government sponsored below range sentences now exceed those of within range sentences.

The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, and as measured by within range rates, has varied by circuit.

For all offense types studied, the degree of influence of the guidelines has varied by circuit. For offense types in the aggregate, the average sentence has largely paralleled the guideline minimum in the majority of circuits, but in several circuits, the average sentence and average guideline minimum have diverged, most notably during the *Gall* period. Even in drug trafficking and firearms offenses, where the influence of the guideline has remained most stable at a national level, the degree of parallelism has varied by circuit. The circuit-level variation has been more pronounced for child pornography and fraud offenses.

Within range rates have varied by circuit, as well as by offense. The decrease in within range rates has been driven by different factors, depending on the circuit and the type of offense. For example, the rates of government sponsored below range sentences have been highest in the Ninth Circuit because of EDP departures in both immigration and marijuana trafficking offenses. In fraud and child pornography offenses, within range rates have decreased in every circuit, but more in some circuits than in others. For example, for fraud offenses in the Second Circuit, rates of non-government sponsored below range sentences have been higher than the rates of within range sentences. This pattern has not occurred for fraud offenses in any other circuit.

The rates of non-government sponsored below range sentences have increased in most districts and the variation in such rates across districts for most offenses was greatest in the Gall period, indicating that sentencing outcomes increasingly depend upon the district in which the defendant is sentenced.

For most offense types, the rates of non-government sponsored below range sentences were highest and more varied during the *Gall* period than during any previous periods. For drug trafficking, firearms, fraud, immigration (illegal entry) and child pornography (non-production) offenses, both the rates of non-government sponsored below range sentences and the variation in rates across the districts increased in the *Booker* period compared to the PROTECT Act period, and again in the *Gall* period compared to the *Booker* period. The difference in rates was greatest for child pornography non-production offenses (including trafficking, receipt, and possession) and was smallest in drug trafficking and firearms offenses. Therefore, for most offenses, the district in which the defendant was sentenced played a greater role in the sentencing outcome during the *Gall* period than during any previous periods.

For offenses in the aggregate, the average extent of the reduction for non-government sponsored below range sentences has been approximately 40 percent below the guideline minimum during all periods (amounting to average reductions of 17 to 21 months); however, the extent of the reduction has varied by offense type.

For offenses in the aggregate, the extent of non-government sponsored below range reductions has remained relatively constant over time, hovering near 40 percent below the guideline minimum during all four periods. Average guideline minimums have changed over time; therefore, the 40 percent reduction below the guideline minimum represented reductions of between 17 and 21 months below the guideline minimum depending on the period.

The extent of the reduction below the guideline minimum has varied by offense type. For example, in child pornography non-production offenses (including receipt, trafficking, and possession offenses) the average guideline minimum more than

tripled, from 36 months in the *Koon* period to 115 months in the *Gall* period. In terms of months, the reduction from the guideline minimum nearly tripled from 15 months below the guideline minimum in the *Koon* period to 44 months below the guideline minimum in the *Gall* period. As a percentage of the guideline minimum, however, the extent of the reduction decreased over time, from 55.7 percent below the guideline minimum in the *Koon* period, to 40.4 percent below the guideline minimum in the *Gall* period. In contrast, the reductions in illegal entry offenses have held steady at 12 months below the guideline minimum in the PROTECT Act, *Booker*, and *Gall* periods.

Prosecutorial practices have contributed to disparities in federal sentencing.

Differences in charging and plea agreement practices at the district level have contributed to sentencing disparities. For example, in its 2011 report to Congress on mandatory minimum penalties,¹⁷ the Commission reported wide variations in prosecutorial practices surrounding the filing of notices of enhanced mandatory minimum penalties in drug trafficking offenses, the charging of multiple violations of 18 U.S.C. § 924(c) which requires mandatory minimum sentences to be served consecutive to underlying drug trafficking offenses or crimes of violence, and the use of binding plea agreements to specify the sentence.¹⁸ Differences in these practices may not be evident in the documents provided to the Commission, but they influence the resulting sentence and reduce both uniformity and transparency in the sentencing process. One inconsistency in prosecutorial charging decisions occurred in child pornography offenses, where interviews conducted with federal prosecutors and a review of sentencing documents revealed that prosecutors inconsistently charged possession of child pornography, which does not carry a mandatory minimum penalty, and receipt of child pornography, which carries a 5-year mandatory minimum penalty.¹⁹

¹⁷ U.S. SENT'G COMM'N, REPORT ON MANDATORY MINIMUM PENALTIES IN FEDERAL SENTENCING (Oct. 2011) [hereinafter 2011 MANDATORY MINIMUM REPORT].

¹⁸ *Id.* at 109-10, 111-14.

¹⁹ *Id.* at 114.

Moreover, differences in the way government sponsored departures and variances have been applied, specifically with respect to EDP and other government sponsored below range sentences, have contributed to unwarranted disparity. Of the three types of government sponsored below range sentences (substantial assistance, EDP, and other government sponsored), substantial assistance departures have been the most common and typically have led to the greatest reductions in sentence length (more than 40 months below the guideline minimum for offenses in the aggregate during every period studied). Substantial assistance departure rates have generally decreased over time. However, the rate of EDP departures has increased substantially over time, as such programs have become more prevalent and have applied to more offense types. A recent policy change in the Justice Department in which all districts were required to create an EDP program for illegal entry offenses suggests that such departures will become even more common in the future. Compared to substantial assistance departures, EDP departures have resulted in relatively modest reductions in sentence length (10 months below the guideline minimum during the *Gall* period) consistent with the fact that USSG §5K3.1 (Early Disposition Programs (Policy Statement)) limits EDP departures to no more than a 4-level reduction. The rates of other government sponsored below range sentences have increased but have remained low compared to the rates of both substantial assistance and non-government sponsored below range sentences.

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.

The Commission reviewed the rates of non-government sponsored below range sentences of individual judges and found great variation even within the same district. Although trends differed depending on the district, in two-thirds of districts, the variation in non-government sponsored below range rates among judges was smallest during the PROTECT Act period and largest during the *Gall* period. In some districts, the rates of non-government sponsored below range sentences of judges with similar size caseloads

differed by 30 percent or more. Although the analysis did not compare judges within a specific division or courthouse within each district, the rates of non-government sponsored below range sentences were sufficiently varied within each district to cause concern that similar offenders committing similar crimes were sentenced differently depending upon the judge. Generally, the extent of the reduction below the guideline minimum varied during all time periods studied, but did not appear to be influenced by Supreme Court decisions or statutory changes over time.

Appellate review has not promoted uniformity in sentencing to the extent the Supreme Court anticipated in Booker.

In *Booker*, the Supreme Court acknowledged that appellate review of sentences for reasonableness would not “provide the uniformity that Congress originally sought to secure,” but nonetheless anticipated that appellate review “would tend to iron out sentencing differences.”²⁰ The Commission’s review of case law and sentencing appeals data suggests that the current system of appellate review is not an adequate tool to promote uniformity in sentencing. In response to Supreme Court cases following *Booker*, circuit courts have adopted different approaches to reviewing sentences, and panels of judges in different circuits have reached different conclusions regarding the substantive reasonableness of similar sentences. In addition, the infrequency of sentencing appeals, particularly by the government, has limited the influence of the appellate process on sentencing uniformity.

Demographic factors (such as race, gender, and citizenship) have been associated with sentence length at higher rates in the Gall period than in previous periods.

The Commission’s updated multivariate regression analysis showed, among other outcomes, that Black male offenders have continued to receive longer sentences than similarly situated White male offenders, and furthermore that this difference in sentence length was greatest during the *Gall* period. In addition, female offenders have received shorter

²⁰ 543 U.S. at 263.

sentences than similarly situated male offenders. Alternative analyses performed by other researchers have replicated the pattern identified in the Commission's analysis, although to a somewhat lesser degree, that certain demographic differences were least pronounced during the PROTECT Act period and most pronounced during the *Gall* period. Because judges make sentencing decisions based on many legal considerations, such as violence in an offender's past, or an offender's employment history, which are not controlled for in the Commission's multivariate regression analysis, these results should be interpreted with caution and should not be taken to suggest race or gender bias on the part of judges.

SUMMARY OF RECOMMENDATIONS

The Commission continues to believe that a strong and effective guidelines system best achieves the purposes of the SRA. Consistent with its October 12, 2011 testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, the Commission believes that Congress should consider the following recommendations to strengthen the guidelines system, provide more effective substantive appellate review, and generally promote the goals of the SRA:

- ❖ Develop more robust substantive appellate review by requiring a presumption of reasonableness on appellate review of within range sentences, greater justification for sentences further outside the guideline range, and heightened review of sentences based on policy disagreements with the guidelines;
- ❖ Reconcile the statutes that restrict the Commission's consideration of certain offender characteristics when promulgating guidelines that meet the purposes of sentencing, with statutory interpretations that require courts to consider more expansively those same offender characteristics at sentencing;
- ❖ Codify the three-step sentencing process, as incorporated in the guidelines and consistent with the process the Supreme Court established in *Gall*, which requires courts to determine properly the applicable guideline range (*see* § 3553(a)(4)), consider guideline departures and policy statements (*see* § 3553(a)(5)), and then consider

the remaining section 3553(a) factors taken as a whole in determining the sentence to be imposed, including whether a variance is warranted; and

- ❖ Resolve the uncertainty about the weight to be given to the federal sentencing guidelines by requiring courts to give substantial weight to the guidelines at sentencing.

The Commission believes these proposals, if adopted, would promote the purposes of the SRA, while respecting the defendant's Sixth Amendment rights. As envisioned by the SRA, the Commission will continue to refine the guidelines in response to feedback and information it receives from the criminal justice community and data it collects from sentencing documents. The Commission also understands that more substantial reforms may be necessary in the future should these reforms fail to reduce existing unwarranted disparities.

History of the Federal Sentencing Guidelines

INTRODUCTION

In 1984, Congress enacted the Sentencing Reform Act of 1984²¹ (“SRA”) in response to widespread sentencing disparity in federal sentencing. The SRA ushered in a new era of federal sentencing through the creation of the Commission and the promulgation of federal sentencing guidelines. For nearly twenty years, courts were required to impose sentences within the applicable guideline range unless the court found the existence of an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Commission in formulating the sentencing guidelines.²²

In 2005, the Supreme Court’s two-part decision in *United States v. Booker*²³ began yet another era of federal sentencing by rendering the federal sentencing guidelines “effectively advisory.”²⁴ In *Booker*, the Court held that enhancing a sentence under the federal sentencing guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the defendant’s Sixth Amendment right to trial by jury.²⁵ The Court remedied the Sixth Amendment violation by excising

the provisions of the SRA that the Court held made the sentencing guidelines “mandatory,” thereby rendering the guidelines advisory in nature.²⁶

Since *Booker* the Supreme Court has issued eight decisions directly related to the operation of the federal sentencing guidelines.²⁷ Together these decisions have not only significantly affected the sentencing practices of the district courts but also have reinstated a deferential standard of review in the appellate courts. Nonetheless, the Commission and the guidelines continue to play an important role in federal sentencing. As the Supreme Court stated in *Booker*:

[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.²⁸

²¹ Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984).

²² 18 U.S.C. § 3553(b)(1), *excised by* *United States v. Booker*, 543 U.S. 220 (2005).

²³ 543 U.S. 220 (2005).

²⁴ *Id.* at 245.

²⁵ *Id.* at 244.

²⁶ *Id.* at 245.

²⁷ *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); *Irizarry v. United States*, 553 U.S. 708 (2008); *Spears v. United States*, 555 U.S. 261 (2009) (per curiam); *Nelson v. United States*, 555 U.S. 350 (2009); *Dillon v. United States*, 130 S. Ct. 2683 (2010); *Pepper v. United States*, 131 S. Ct. 1229 (2011). In addition, the Court recently agreed to resolve a conflict among the circuit courts of appeals regarding whether the Ex Post Facto clause applies to the sentencing guidelines. *Peugh v. United States*, 133 S. Ct. 594 (2012).

²⁸ 543 U.S. at 264.

In light of its continued statutory mandate and the continued importance of the guidelines, the work of the Commission remains significant and has become increasingly complex. The size of the federal docket has grown each year since the *Booker* decision, and the Commission has increased its efforts to provide meaningful guidance to the courts and practitioners and to ensure that the guidelines continue to reflect the statutory purposes of sentencing.

The Commission continues to promulgate sentencing guidelines that courts must properly consider and guideline ranges that courts must properly determine in all federal criminal cases.²⁹ Since *Booker*, the Commission has promulgated 96 amendments to the guidelines, including 44 amendments implementing new legislation. Before promulgating amendments, the Commission carefully considers data, public comment, and other relevant information.³⁰ The Commission continues to collect, analyze, and report sentencing data systematically to detect new criminal trends, to determine whether federal crime policies are achieving their goals, and to serve as a clearinghouse for federal sentencing statistics.³¹ The Commission resolves conflicting judicial interpretations of the guidelines by studying appeals court decisions on sentencing issues and promulgating guideline amendments to ensure uniform interpretation.

The Commission's data collection and reporting duties required the Commission to review nearly 400,000 charging and sentencing documents for more than 86,000 cases in fiscal year 2011,³² enabling quarterly dissemination of trend analyses, and specific analyses requested by Congress, the courts, and the Executive branch. The resulting, steadily expanding database is an invaluable source of information for the criminal justice community.³³ Since *Booker*, the

Commission has published research papers on demographic differences in federal sentencing practices, recidivism of crack cocaine offenders released after the Commission's 2007 crack cocaine amendment, a comprehensive survey of federal district court judges, and a report on mandatory minimum penalties.³⁴

Feedback from other parties in the criminal justice system is also part of the evolutionary work of the Commission. The Commission regularly invites and considers written public comment on its priorities and proposed amendments, among other issues. The Commission also actively solicits public input in the form of regular public hearings, the work of its standing advisory groups, and formal surveys, among other approaches.

Finally, the Commission provides specialized training to judges, probation officers, staff attorneys, law clerks, prosecutors, defense attorneys, and other members of the federal criminal justice community on federal sentencing issues, including application of the guidelines.³⁵ During fiscal year 2011 the Commission conducted seminars and programs in most of the 94 judicial districts in the country, training roughly 7,000 individuals.

In addition to fulfilling its core functions, the Commission has been called upon to testify at three congressional hearings on post-*Booker* sentencing.³⁶

³⁴ See U.S. SENT'G COMM'N, MULTIVARIATE REPORT; REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (May 2007); 2010 JUDGES' SURVEY; 2011 MANDATORY MINIMUM REPORT.

³⁵ See 28 U.S.C. § 995(a)(17)–(18).

³⁶ *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. 14–23 (2005) (Statement of Ricardo H. Hinojosa, Chair, U.S. Sent'g Comm'n); *United States v. Booker: One Year Later—Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. 4–23 (2006) (Statement of Ricardo H. Hinojosa, Chair, U.S. Sent'g Comm'n); *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 112th Cong. 10–100 (2011) (Statement of Patti B. Saris, Chair, U.S. Sent'g Comm'n). [hereinafter 2011 Chair Statement to Subcomm. on Crime, Terrorism, & Homeland Security].

²⁹ See generally 28 U.S.C. § 994; 18 U.S.C. § 3553(a)(4).

³⁰ See 28 U.S.C. § 994(o).

³¹ See 28 U.S.C. § 995(a)(12)–(16). See also, *Mistretta v. United States*, 488 U.S. 361, 369 (1989).

³² See U.S. SENTENCING COMM'N, 2011 SOURCEBOOK, at 3.

³³ See William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 65 (1993).

Against a backdrop of renewed interest in federal sentencing, the Commission submits this report as a continuation of its efforts to inform all three branches of government and other interested parties on the impact of *Booker* and its progeny on federal sentencing.

CREATION OF THE COMMISSION AND DEVELOPMENT OF THE GUIDELINES

The SRA responded to an emerging consensus that the federal sentencing system resulted in such “glaring disparities” that it was in need of major reform.³⁷ Prior to the SRA, judges possessed almost unlimited and unguided authority to fashion an appropriate sentence. Criminal statutes set broad ranges of minimum and maximum punishments, but no statute listed the purposes of sentencing. As a result, each judge was left to decide the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which those factors would be combined in determining a specific sentence. Neither party had any meaningful right of appellate review because sentences were limited only by statutory minimums and maximums.³⁸

Studies at the time revealed that judges at different ends of the spectrum held widely divergent views on the purposes of sentencing, with some judges emphasizing rehabilitation and others emphasizing “just deserts.”³⁹ Not surprisingly, because each judge was “left to apply his own notions of the purposes of sentencing,” the federal sentencing system exhibited “an unjustifiably wide range of sentences to offenders convicted of similar crimes.”⁴⁰ Average sentences

varied across the nation for many federal offenses, sometimes by a number of years.⁴¹ A study of district court judges in the Second Circuit given identical files based on actual cases and asked how they would sentence the defendants revealed “astounding” variations in the sentences imposed.⁴²

Sentencing prior to the SRA also lacked transparency and certainty. No statute required judges to explain the reasons for the sentence, and the time defendants would actually serve in prison was not announced in open court.⁴³ Instead, after the defendant began serving the sentence, the United States Parole Commission decided when the defendant would be released based largely on its judgment about when an offender’s rehabilitation was complete.⁴⁴ The release of offenders based on inconsistent ideas among parole hearing officers regarding the potential for rehabilitation exacerbated the lack of uniformity in sentencing.⁴⁵ In addition, this system of indeterminate sentencing by its nature did not allow public access to the reasons underlying the court’s sentencing decision or the United States Parole Commission’s decision about when to release an offender.⁴⁶ In 1984, Congress responded to these concerns by enacting the SRA, which sought to eliminate unwarranted disparity in sentencing and address the inequalities created by indeterminate sentencing.⁴⁷

³⁷ See S. REP. NO. 97-307, at 956 (1981) (“glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence”); H.R. REP. NO. 98-1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

³⁸ S. REP. NO. 98-225, at 38-39, 40.

³⁹ *Id.* at 41 n.18 (1983) (citing INSLAW Inc., and Yankelovich, Skelly, and White, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions*, III-4 (1981)).

⁴⁰ S. REP. NO. 97-307, at 955.

⁴¹ S. REP. NO. 98-225, at 41 n.21.

⁴² *Id.* at 41. The sentences imposed on the same bank robber ranged from 5 to 18 years in prison. Sentences in a case of filing a false tax return ranged from 3 *months* in prison, plus a \$5,000 fine, to 3 *years* in prison plus a \$5,000 fine. *Id.* at 42-43. In the case of an offender convicted of securities fraud, one judge imposed a sentence of 2 years in prison, another imposed a sentence of 3 years of probation, and yet another judge imposed only a \$2,500 fine. *Id.*

⁴³ *Id.* at 39.

⁴⁴ *Id.* at 38.

⁴⁵ U.S. SENT’G COMM’N, COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM, at 9 (1991) (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

⁴⁶ S. REP. NO. 98-225, at 39.

⁴⁷ S. REP. NO. 97-307; H.R. REP. NO. 98-1017 (1984); 28 U.S.C. § 994(k).

Sentencing Reform in the SRA

In the SRA, Congress set forth four purposes of sentencing, any of which might take precedence in an individual case, but none of which would take precedence in the broader scheme of sentencing.⁴⁸

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner[.]⁴⁹

The provision regarding the need for the sentence “to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense” reflected the retributive “just deserts” concept. “[I]t is another way of saying that the sentence should reflect the gravity of the defendant’s conduct.”⁵⁰ The concept of deterrence was seen as an especially important consideration. For example, the fact that “[m]ajor white collar criminals often [were] sentenced to small fines and little or no imprisonment . . . create[d] the impression that certain offenses . . . [could] be written off as a cost of doing business.”⁵¹ The provision regarding protecting the public expressed Congress’s concern about “those offenders whose criminal histories show[ed] repeated serious violations of the law.”⁵² Finally, while imprisonment was “not an appropriate means of promoting correction and rehabilitation[.]”⁵³

rehabilitation was “a particularly important consideration in formulating conditions for persons placed on probation.”⁵⁴ The SRA also established that sentences should be “sufficient but not greater than necessary” to meet the purposes set forth in § 3553(a)(2), including the seriousness of the offense, deterrence, protection of the public, and needed correctional treatment.⁵⁵

The SRA established a robust right of appeal⁵⁶ and meaningful appellate review of federal sentences for the first time.⁵⁷ The right of appeal supported compliance with the guidelines in a number of ways. First, the courts of appeals were tasked with ensuring that the guidelines were properly determined in individual cases. Section 3742 did not allow appeals by either party of sentences within a properly determined guidelines range. Specifically, 18 U.S.C. § 3742(a) provided that a defendant may appeal if the sentence:

- (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines or; (3) is greater than the sentence specified in the applicable guideline range . . . ; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.⁵⁸

that they should acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation.”).

⁵⁴ S. REP. NO. 98-225, at 76.

⁵⁵ 18 U.S.C. § 3553(a) (“The court shall impose a sentence sufficient but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.”).

⁵⁶ See 18 U.S.C. § 3742.

⁵⁷ See *Koon*, 518 U.S. at 96 (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (reiterating “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”).

⁵⁸ 18 U.S.C. § 3742(a).

⁴⁸ S. REP. NO. 98-225, at 75-77.

⁴⁹ 18 U.S.C. § 3553(a)(2).

⁵⁰ S. REP. NO. 98-225, at 75.

⁵¹ *Id.* at 76.

⁵² *Id.*

⁵³ 18 U.S.C. § 3582(a); see also *Tapia v. United States*, 131 S. Ct. 2382, 2388 (2011) (“[Section] 3582(a) tells courts

Section 3472(b) extended to the government the right to appeal on the same bases, except that it could only appeal those sentences that were “less than the sentence specified in the applicable guideline range.”⁵⁹ Appellate review of departures was deemed “essential” to ensuring proper application of the guidelines,⁶⁰ and, therefore, district courts were required to state on the record the reasons for the sentence so that the courts of appeals would have full information about how courts reached their sentencing decisions.⁶¹

Further, legislative history of the SRA reveals that Congress intended the right of appeal to go hand in hand with the guidelines system:

The Committee believes that section 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.⁶²

Congress also anticipated that the Commission’s work would inform appellate courts. “[I]t is expected that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the

appropriateness of the sentence and corrections program applied to a particular case.”⁶³

The Commission and a set of guidelines that judges were required to follow were central to the sentencing reform envisioned by Congress. “The [congressional] Committee resisted [the] attempt to make the sentencing guidelines more voluntary than mandatory” because studies and testimony before Congress noted that voluntary guidelines in the states had a “poor record” and “were completely ineffective in reducing sentencing disparities.”⁶⁴ Congress studied guidelines systems adopted by the states and considered Minnesota’s guideline system to be successful for three main reasons: the guidelines were required, not voluntary; the guidelines reflected policy judgments about what any given sentence ought to be, rather than merely reflecting past sentencing practices; and appellate review of sentences outside of the guideline range “assure[d] judicial compliance.”⁶⁵ To achieve Congress’s statutory purposes of sentencing, the SRA created the Commission as an independent agency within the judicial branch⁶⁶ and directed it to promulgate guidelines that were required to be used for sentencing within the prescribed statutory maximum.⁶⁷

Congress also envisioned the guidelines system to be flexible “in providing the sentencing

⁶³ *Id.* at 167-68.

⁶⁴ *Id.* at 79.

⁶⁵ *Id.* at 62.

⁵⁹ 18 U.S.C. § 3742(b).

⁶⁰ S. REP. NO. 98-225, at 151.

⁶¹ *Id.* at 60. *See also* 18 U.S.C. § 3553(c). Judges could depart from the guidelines in any case upon a finding that “an aggravating or mitigating circumstance [was] present in the case that was not adequately considered in the formulation of the guidelines[.]” S. REP. NO. 98-225, at 51. *See also* 18 U.S.C. § 3553(b)(1).

⁶² S. REP. NO. 98-225, at 155. From the outset, Congress intended the courts of appeals to support general compliance with the guidelines, which in turn would reduce unwarranted disparity. The SRA established two principle determinants in sentencing: “the prior records of offenders and the criminal conduct for which they are to be sentenced.” *Id.* at 161.

⁶⁶ Established as “as an independent commission in the Judicial Branch of the United States,” the Commission comprises seven voting members (including the Chair) appointed by the President “by and with the advice and consent of the Senate.” The Act provides that “[a]t least [three] of the [Commission’s] members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States” and no more than four members of the Commission can be members of the same political party. The Attorney General, or the Attorney General’s designee, and the Chairman of the United States Parole Commission are designated as *ex officio* non-voting members. *See* 28 U.S.C. § 991(a), 18 U.S.C. § 3551 note (Pub. L. No. 98-473; 98 Stat. 2032 [set out in an Effective and Applicability Provisions note under this section]).

⁶⁷ *See* 28 U.S.C. § 994.

judge with a range of options from which to fashion an appropriate sentence”⁶⁸ and noted that the guidelines would not “remove all of the judge’s sentencing discretion.”⁶⁹ While Congress envisioned “that most cases [would] result in sentences within the guideline range,” there would be “appropriate” instances when sentences fell outside the applicable guideline range.⁷⁰ Reflecting the balance struck between the goals of certainty and uniformity in sentencing and the need to retain sufficient flexibility to individualize sentences, 18 U.S.C. § 3553(b) codified the limited authority of sentencing courts to impose a sentence outside the sentencing guideline range:

[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.⁷¹

The SRA’s Directives to the Commission

In meeting those purposes set forth in 18 U.S.C. § 3553(a)(2), Congress specifically charged the Commission with establishing federal sentencing guidelines that provided certainty, fairness, national uniformity, and avoided unwarranted disparities among defendants with similar criminal records who were found guilty of similar conduct.⁷² At the same time, the guidelines were to maintain sufficient

flexibility to permit individualized sentences when warranted by mitigating or aggravating factors of a kind or to a degree not adequately taken into account in the guidelines.⁷³ Finally, Congress also charged the Commission with assessing whether sentencing, penal, and correctional practices are meeting the purposes of sentencing.⁷⁴ It was anticipated that the guidelines would “reflect, to the extent practicable, advancement in knowledge of human behavior as it relate[s] to the criminal justice process.”⁷⁵ The guidelines were seen as “an unprecedented opportunity in the Federal system to look at sentencing patterns as a whole to assure that the sentences imposed are consistent with the purposes of sentencing.”⁷⁶ It was expected that the guidelines would result in proportional punishment by “treat[ing] all classes of offenses committed by all categories of offenders consistently.”⁷⁷

Anticipating that the guidelines would evolve over time in response to data and public comment, Congress “necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest.”⁷⁸ The first Commission also acknowledged that the courts’ sentencing decisions would significantly inform its work on the guidelines over time:

The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that

⁶⁸ S. REP. NO. 98-225, at 50.

⁶⁹ *Id.* at 51.

⁷⁰ *Id.* at 52. Congress specifically noted that it believed a sentencing judge “has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.” *Id.*

⁷¹ 18 U.S.C. § 3553(b)(1), *excised by* United States v. Booker, 543 U.S. 220 (2005).

⁷² 28 U.S.C. § 991(b)(1)(A).

⁷³ 28 U.S.C. § 991(b)(1)(B).

⁷⁴ 28 U.S.C. § 991(b)(2).

⁷⁵ 28 U.S.C. § 991(b)(1)(C).

⁷⁶ S. REP. NO. 98-225, at 51.

⁷⁷ *Id.*

⁷⁸ *Braxton v. United States*, 500 U.S. 344, 348 (1991).

specify precisely where departures should and should not be permitted.⁷⁹

Directives: Categories of Offenses and Offenders

The SRA directed the Commission to consider, and take into account to the extent they are relevant, seven factors in its formulation of offense categories: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense.⁸⁰

The SRA directed the Commission to develop sentencing ranges applicable for specific categories of offenses involving particular categories of offenders. Congress expected that “there [would] be numerous guidelines ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances,” including “several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances.”⁸¹ Congress intended that there would “be a complete set of sentencing guidelines that covers in one way or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results.”⁸²

More specifically, the SRA required that the sentencing ranges be consistent with all pertinent provisions of title 18 of the United States Code, and that they not include sentences in excess of the statutorily prescribed maximum sentence.⁸³ It also directed that, for sentences of imprisonment, “the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that,

if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.”⁸⁴

Directives: Sentence Length

The SRA contained several directives related to sentence length for certain types of offenses and offenders. For example, legislative history reflected concern that white collar offenders were often “sentenced to small fines and little or no imprisonment . . . creat[ing] the impression that certain offenses are punishable by a small fine that can be written off as a cost of doing business.”⁸⁵ Accordingly, the Commission was required to ensure that the guidelines reflected the fact that, “in many cases, current sentences do not accurately reflect the seriousness of the offense.”⁸⁶ The Commission, therefore, was not “bound by such average sentences” but rather was required to “independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.”⁸⁷

The SRA also directed that the sentencing guidelines require a term of confinement at or near the statutorily prescribed maximum sentence for certain crimes of violence and for drug offenses, particularly when committed by recidivists.⁸⁸ The SRA further directed the Commission to assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career felon, for an individual convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics.⁸⁹ Various aggravating and mitigating circumstances,

⁷⁹ USSG Ch.1, Pt.A(4)(b) (Apr. 13, 1987).

⁸⁰ 28 U.S.C. § 994(c)(1)–(7).

⁸¹ S. REP. NO. 98-225, at 168.

⁸² *Id.*

⁸³ *Mistretta v. United States*, 488 U.S. 361, 375 (1989); *see also* 28 U.S.C. § 994(b)(1).

⁸⁴ 28 U.S.C. § 994(b)(2). The Sentencing Reform Act originally provided that the maximum of the range shall not exceed the minimum by more than “25 per centum,” but this language was amended in 1986 to its present language. *See* Pub. L. No. 99-363, § 2 (1986).

⁸⁵ S. REP. NO. 98-225, at 76.

⁸⁶ 28 U.S.C. § 994(m).

⁸⁷ *Id.*

⁸⁸ 28 U.S.C. § 994(h).

⁸⁹ 28 U.S.C. § 994(i).

such as multiple offenses and substantial assistance to the government, were to be reflected in the sentencing guidelines.⁹⁰

Directives: Offender Characteristics

The SRA addressed offender characteristics in three provisions. Section 994 of Title 18 governed how the Commission should treat certain offender characteristics in the guidelines, listing eleven additional factors for the Commission to consider in formulating the guidelines and policy statements, to the extent that they had any relevance “to the nature, extent, place of service, or other incidents of an appropriate sentence”: age; education; vocational skills; mental and emotional condition; physical condition; previous employment record; family ties and responsibilities; community ties; role in the offense; criminal history; and degree of dependence upon criminal activity for a livelihood.⁹¹ The SRA required that the Commission ensure that the guidelines be “entirely neutral” as to the race, sex, national origin, creed, and socioeconomic status of offenders,⁹² and instructed that the sentencing guidelines should reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of offenders.⁹³

Section 3553(a)(1) of Title 18 directed courts to consider “the history and characteristics of the defendant,” among other factors, in determining the

⁹⁰ 28 U.S.C. § 994(l) and (n), respectively.

⁹¹ 28 U.S.C. § 994(d)(1)–(11). The legislative history provides additional guidance for the Commission’s consideration of the statutory factors. For example, the history indicates Congress’s intent that the “criminal history . . . factor includes not only the number of prior criminal acts – whether or not they resulted in convictions – the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a ‘career criminal’ or a manager of a criminal enterprise.” S. REP. NO. 98-225, at 174. The promulgated guidelines include these and other criminal history measures that necessarily may require judicial factfinding extending well beyond the ascertainment of the fact of prior convictions. *See* USSG Ch.4 (Nov. 2012).

⁹² *See* 28 U.S.C. § 994(d).

⁹³ *See* 28 U.S.C. § 994(e).

particular sentence to be imposed on that defendant.⁹⁴ After considering all of these factors, including the guidelines and policy statements, the court was required to sentence a defendant within the applicable guideline range unless the court found that there existed “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”⁹⁵

Finally, section 3661 of Title 18 recodified 18 U.S.C. § 3577 without change:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.⁹⁶

Implementation of the SRA’s Directives

In considering sentencing guidelines to implement the SRA, the Commission was required to resolve a host of important policy questions.⁹⁷ For example, the Commission had to decide whether appropriate punishment would be defined primarily on the principles of just deserts or crime control. Consistent with the SRA’s rejection of a single doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing, the Commission did not choose one theory over the

⁹⁴ 18 U.S.C. § 3553(a)(1).

⁹⁵ 18 U.S.C. § 3553(b)(1).

⁹⁶ 18 U.S.C. § 3661. The Commission incorporated this statute into the guidelines at USSG §1B1.4 (“In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.”).

⁹⁷ *See* USSG Ch.1, Pt.A(1)(4) (Nov. 2012).

other.⁹⁸ Instead, the guidelines embody aspects of both just deserts and crime-control philosophies of sentencing.⁹⁹

Implementation of Directives: Categories of Offenses

Categorizing offenses was a difficult task due to the complexity of the federal criminal code. The code contained “innumerable statutes dealing with such basic offenses as theft and fraud” that were “scattered about hither and yon among various titles of the United States Code” resulting in “conflicting court interpretations.”¹⁰⁰ The first *Guidelines Manual* listed more than 700 penal statutes or subsections thereof in Appendix A (Statutory Index),¹⁰¹ and the 2012 *Guidelines Manual* references more than 1,200 different statutes or subsections thereof.¹⁰² Because the major goal of the SRA was to increase uniformity in sentencing while not sacrificing proportionality, the sentencing guidelines had to authorize appropriately different sentences for criminal conduct of significantly different severity.¹⁰³

The Commission examined existing state guidelines systems’ methods of categorizing offenses and offenders.¹⁰⁴ The Commission rejected the approaches many states used, concluding that “[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal

crimes.”¹⁰⁵ For example, under many states’ systems, “a single category of robbery . . . lumped together armed and unarmed robberies, robberies with and without injuries, [and] robberies of a few dollars and robberies of millions,” and thus “would have been far too simplistic to achieve just and effective [federal] sentences, especially given the narrowness of the permissible sentencing ranges.”¹⁰⁶ Consequently, the Commission determined that the sentencing guidelines should be descriptive of generic conduct rather than track statutory language.¹⁰⁷

The Commission ultimately decided to create a system requiring a court to consider, within constraints, the defendant’s real offense conduct and the defendant’s criminal history. The Commission created a sentencing table with 43 offense levels and six criminal history categories. The offense level (located on the vertical axis of the Sentencing Table) is determined based upon the offense conduct and the particular harms associated with the defendant’s crime. The offense level increases based upon the severity of the offense committed as well as the number of identified harms associated with the commission of the offense. For example, in a drug crime, the base offense level is determined by the type and quantity of drug involved in the offense of conviction and related criminal conduct (whether charged or uncharged). The base offense level is enhanced, for example, if the crime involved a firearm.¹⁰⁸ A defendant’s role in the offense or other conduct can result in an increase or decrease of the offense level.¹⁰⁹ Determination of the sentence also requires a determination of the defendant’s criminal history (located on the horizontal axis of the Sentencing Table).¹¹⁰ Once the offense level and criminal history are calculated, the applicable sentencing range is determined by use of the sentencing table.¹¹¹

⁹⁸ U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS at 16 (1987) [hereinafter SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES].

⁹⁹ *Id.*

¹⁰⁰ U.S. SENT’G COMM’N, PRELIMINARY REPORT TO THE CONGRESS: STATUTORY PENALTIES PROJECT DESCRIPTION AND COMPILATIONS OF FEDERAL CRIMINAL OFFENSES at vi (1989) (quoting *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Crim. Law and Proc. of the Senate Comm. on the Judiciary*).

¹⁰¹ See USSG App. A (Apr. 13, 1987).

¹⁰² See USSG App. A (Nov. 2012).

¹⁰³ U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES at 13 (1991).

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 13.

¹⁰⁷ See USSG Ch.1, Pt.A(1)(A)(4)(a) (Nov. 2012).

¹⁰⁸ USSG §2D1.1(b)(1) (Nov. 2012).

¹⁰⁹ See USSG Ch.3 (Nov. 2012) for other adjustments that apply to a wide variety of offenses.

¹¹⁰ See USSG Ch.4 (Nov. 2012).

¹¹¹ See USSG Ch.5, Pt.A (Nov. 2012).

Like Congress, the Commission recognized that departures would play an important role in the guideline system because of the “difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.”¹¹² In the initial guidelines, the Commission provided the following guidance on the use of departures:

The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.¹¹³

The Commission also anticipated that some individual offender characteristics such as age, education and vocational skills, and family ties and responsibilities could “constitute grounds for a departure in an unusual case.”¹¹⁴

Implementation of Directives: Sentence Length

In incorporating data on then extant sentencing practices in accordance with 28 U.S.C. § 994(m), the Commission examined data for nearly 100,000 federal convictions, which included a description of the offense, a characterization of the defendant’s background and criminal record, the method of disposition of the case, and the sentence imposed, including both sentences of imprisonment and those of probation.¹¹⁵ The Commission

considered more detailed information for more than 10,000 defendants, including their presentence investigation reports and the time actually served by those defendants sentenced to prison.¹¹⁶ The Commission also examined the United States Parole Commission’s guidelines and resulting statistics, public commentary, and information from other relevant sources to determine existing sentencing practices and to detail the specific characteristics of offenses and offenders that judges considered salient at sentencing.¹¹⁷

In determining then extant sentence lengths, the Commission identified offenders who were sentenced to prison, then computed average sentence lengths for those offenders. The Commission also considered the estimated percentage of defendants sentenced to probation for the offense.¹¹⁸ The Commission used both sentence length for those sentenced to prison, and the estimated percentage of defendants sentenced to probation, to determine then extant sentencing practices. This information “provided a concrete starting point and identified a list of relevant distinctions that, although of considerable length, [was] still short enough to create a manageable set of guidelines.”¹¹⁹

Although the guideline ranges for many offenses incorporated then extant sentencing practices, the Commission was cognizant of the fact that past sentencing practices were merely a starting point. The first *Guidelines Manual*, for example, set sentence ranges equal to or higher than the average time served under then extant sentencing practices for many white collar offenses.¹²⁰

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 16.

¹¹⁸ *See id.* at 23-24, 27-34. For example, then extant sentencing practices resulted in a range of 2 to 8 months of imprisonment for an unsophisticated embezzlement of less than \$1,500, if a prison term was imposed. *Id.* at 24. However, a prison term was imposed in only about 24 percent of such cases, with probation imposed in the other 76 percent. *Id.* “Because of this, the average time served by all first-time embezzlers convicted at trial of stealing [was] actually about 1 month (rather than 2-8 months).” *Id.*

¹¹⁹ *Id.* at 16.

¹²⁰ For example, under then extant sentencing practices, a defendant convicted of a sophisticated fraud involving a loss

¹¹² USSG Ch.1, Pt.A(4)(b) (Apr. 13, 1987).

¹¹³ *Id.*

¹¹⁴ *Id.*; USSG §§5H1.1, p.s. (Age), 5H1.2, p.s. (Education and Vocational Skills (Policy Statement)), 5H1.6, p.s. (Family Ties and Responsibilities, and Community Ties) (Apr. 1987). *See also* 28 U.S.C. § 994(d) and (e).

¹¹⁵ U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES, at 16, 21.

The Commission also examined public views on offense seriousness and sentencing policy in accordance with 28 U.S.C. § 994(c)(4) and (5), which require the Commission to consider, and take account only to the extent that they do have relevance, the “community view of the gravity of the offense” and the “public concern generated by the offense” in formulating the guidelines. With respect to the community view of the gravity of the offense, Congress explained how changes in community norms concerning particular criminal behavior might “justify increasing or decreasing the recommended penalties for the offense.”¹²¹ Moreover, Congress acknowledged that there may be circumstances in which the Commission might find it appropriate to consider regional differences in community views

of between \$60,001 and \$400,000 would receive a sentence of 15-21 months of imprisonment if sentenced to prison, and 74 percent of sophisticated fraud defendants with these loss amounts were sentenced to prison. *See* U.S. SENT’G COMM’N, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES, at 33. Use of the 1987 *Guidelines Manual* resulted in a guideline range of 12-18 months’ imprisonment for a first-time offender with a loss of \$50,001-\$100,000 (offense level 13 with more than minimal planning increase); a guidelines range of 15-21 months for a loss of \$100,001 to \$200,000 (offense level 14 with more than minimal planning increase); and a guideline range of 18-24 months for a loss of \$200,001 to \$500,000 (offense level 15 with more than minimal planning increase). USSG §2F1.1 (Apr. 1987). For defendants convicted of embezzling less than \$2,000, the 1987 *Guidelines Manual* provided for guideline ranges which authorized sentencing judges to impose probation in lieu of confinement. This range was lower than then extant sentencing practices for those embezzlement offenders sentenced to prison. USSG §2B1.1 (Apr. 1987).

¹²¹ S. REP. NO. 98-225, at 170. Congress provided two examples of action by the Parole Commission to “suggest the kinds of situations in which the Commission might wish to reflect the community view of an offense in its guidelines: the Parole Commission has in recent years lowered the guidelines parole dates applicable to simple possession of marihuana, and, following the Vietnam War, lowered the guidelines parole dates for draft violations.” *Id.* Congress suggested that “similarly, if there were a substantial increase in the rate of commission of a very serious crime, the public concern generated by that increase might cause the Commission to conclude that the guidelines sentences for that offense should be increased.” *Id.* at 170-71.

when drafting guidelines that would apply nationwide.¹²² Despite its acknowledgement of community norms, Congress made clear its goal of nationwide consistency. Therefore, if regional differences in community views were to be considered at all, they were to be considered by the Commission, not by individual judges.

In addition to reviewing contemporaneous legal and social science research about public assessments of crime and punishment,¹²³ the Commission held a public hearing on the issue of offense seriousness in April 1986, at which a wide variety of interested organizations and individuals shared their views.¹²⁴ In preparation for the hearing,

¹²² *Id.* at 170 n.408. (“It is expected that, while nationwide consistency in Federal cases is generally desirable, in certain situations the Commission may find it appropriate to draft the guidelines to take account of considerations based on pertinent regional differences.”).

¹²³ *See, e.g.*, SURVEY RESEARCH CENTER, PUBLIC AND INMATE ASSESSMENT OF PRISON SENTENCES, Fed. 1980 (Oregon State Univ. Corvallis); David Smith & C. McCurdy Lipsey, *Public Opinion and Penal Policy*, 14 CRIMINOLOGY 113-124 (May 1976); Craig Boydell & Carl Grindstaff, *Public Opinion Toward Legal Sanctions for Crimes of Violence*, 65 J. CRIM. LAW & CRIMINOLOGY 113-116 (1974); Charles Thomas, Robin Cage, & Samuel Foster, *Public Opinion on Criminal Law and Legal Sanctions*, J. CRIM. LAW & CRIMINOLOGY, Vol. 67, No. 1, pp. 110-116 (1976); Don Gibbons, Joseph Jones, & Peter Garabedian, *Gauging Public Opinion about the Crime Problem*, 18 CRIME AND DELINQUENCY 134-146 (April 1972); Phoebe Ellsworth & Lee Ross, *Public Opinion and Capital Punishment*, 29 CRIME AND DELINQUENCY, 116-69 (Jan. 1983); John Doble, *Crime and Punishment: The Public’s View* (Public Agenda Found., June 1987); Tony Poveda, *The Fear of Crime in a Small Town*, 18 CRIME & DELINQUENCY 147-53 (April 1972); National Criminal Justice Association, *Opinion Study Shows Public Concern With Sentencing, Prison Issues*, JUSTICE RESEARCH (August 1987); Joseph E. Jacoby & Christopher S. Dunn, NATIONAL SURVEY ON PUNISHMENT FOR CRIMINAL OFFENSES: EXECUTIVE SUMMARY (Bowling Green State Univ. Oct. 27, 1987).

¹²⁴ Representatives from the Association of the Bar of the City of New York, the Federal Probation Officers Association, the Federal Public Defender Association, the National Rifle Association, the American Civil Liberties Union – National Prison Project, the National Interreligious Service Board for Conscientious Objectors, the Washington Legal Foundation, the Institute for Government and Politics,

the Commission requested written feedback from more than 325 circuit and district court judges, United States Attorneys, federal public defenders, defense attorneys, probation officers, criminal justice organizations, and editorial page editors of 40 of the largest newspapers in the country, sending each individual and organization both general offense seriousness questions as well as a more detailed questionnaire on individual offense scenarios.¹²⁵ The Commission followed up on the offense seriousness questionnaire with a survey of more than 1,700 citizens throughout the United States on their perceptions of federal sentences.¹²⁶ The survey, conducted in 1993 and 1994, “identified links between the public’s just punishment perceptions and elements of the guideline calculations[.]”¹²⁷

Also with respect to sentence length, the Commission implemented the directive in 28 U.S.C. § 994(h) by promulgating §4B1.1 (Career Offender). The career offender guideline prescribed an increased sentence for an adult defendant convicted of a “crime of violence” or a “controlled substance offense” if the defendant had previously been convicted of at least two other such felony offenses. The guideline provided that such defendants would have a Criminal History Category of VI and an offense level that depended upon the statutory maximum for the offense of conviction. The offense levels ranged from 12 to 37 so that the guideline range for a career offender would be at or near the applicable statutory maximum.

The background commentary to §4B1.1 explained the Commission’s view of the relationship between the provisions of the SRA, including 28

U.S.C. § 994(h), and §4B1.1 as promulgated by the Commission. The “definition of a career offender track[s] in large part the criteria set forth in 28 U.S.C. § 994(h),” but the Commission “has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and avoid ‘unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.’”¹²⁸ In creating §4B1.1, the Commission acted “in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)” and its view that “Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute” indicated Congress’s intent that the Commission ensure that the provision was appropriately tailored.¹²⁹

Implementation of Directives: Offender Characteristics

The Commission recognized that, similar to the difficulty noted in establishing guidelines to cover every possible offender and offense characteristic, “[c]ircumstances that may warrant a departure from the guidelines cannot . . . by their very nature, be comprehensively listed and analyzed in advance.”¹³⁰ Therefore, when the Commission promulgated the initial set of guidelines, with some specific exceptions,¹³¹ it did not restrict the kinds of factors that, whether or not mentioned in the guidelines, could constitute grounds for departure in an unusual case.¹³²

Crime Magazine, and the National Association of Criminal Defense Lawyers testified at the April 1986 hearing. *See* U.S. SENT’G COMM’N, PUBLIC HEARING ON OFFENSE SERIOUSNESS, Washington, D.C. (transcript) (April 1986).

¹²⁵ *See* Memorandum from Paul K. Martin to Commissioners & Staff Director, “Offense Seriousness Questionnaire,” (March 24, 1986); U.S. SENT’G COMM’N, PUBLIC HEARING ON OFFENSE SERIOUSNESS, transcript at 5.

¹²⁶ U.S. SENT’G COMM’N, RESEARCH BULLETIN, JUST PUNISHMENT: PUBLIC PERCEPTIONS AND THE FEDERAL SENTENCING GUIDELINES, at 1, available at http://www.ussc.gov/Research/Research_Projects/Miscellaneous/199703_Just_Punishment.PDF.

¹²⁷ *Id.*

¹²⁸ USSG §4B1.1, comment. (backg’d) (Nov. 2012) (quoting 28 U.S.C. § 991(b)(1)(B)).

¹²⁹ *Id.* (citing S. REP. NO. 98-255, at 175).

¹³⁰ USSG §5K2, p.s. (General Provisions) (Apr. 1987).

¹³¹ *See, e.g.*, USSG §5H1.10, p.s. (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status) (Apr. 1987). The Commission subsequently promulgated amendments prohibiting the court from considering additional factors as grounds for departure in §5H1.12, p.s. (Lack of Guidance as a Youth and Similar Circumstances) (Nov. 1992) and §5K2.19, p.s. (Post-Sentencing Rehabilitative Efforts) (Nov. 2000).

¹³² USSG Ch.1, Pt.A(4)(b) (Apr. 1987).

Pursuant to 28 U.S.C. § 994(d)¹³³ and (e),¹³⁴ the Commission did, however, adopt several policy statements in Chapter Five, Parts H and K limiting the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range. The Commission deemed education, vocational skills, employment record, family ties and responsibilities, and community ties “ordinarily not relevant in determining whether a departure is warranted,” although several of these factors were considered relevant in determining the conditions of probation or supervised release.¹³⁵ Those factors also could be considered in an exceptional case, and courts had full discretion to consider them in determining the sentence within the applicable guideline range. In contrast, in response to section 994(d),¹³⁶ the Commission deemed race, gender, national origin, creed, and socioeconomic status “not relevant in the determination of a sentence.”¹³⁷

¹³³ 28 U.S.C. § 994(d) directs the Commission to take into account, “only to the extent that they do have relevance,” the defendant’s: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. Section 994(d) further directs the Commission to “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”

¹³⁴ 28 U.S.C. § 994(e) directs the Commission to “assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”

¹³⁵ See, e.g., USSG §§5H1.1, p.s. (Nov. 2009), 5H1.2, p.s. (Nov. 2009), 5H1.3, p.s. (Nov. 2009), 5H1.6, p.s. (Nov. 2009).

¹³⁶ 28 U.S.C. § 944(d).

¹³⁷ USSG §5H1.10, p.s. (Nov. 2012).

EVOLUTION OF THE GUIDELINES

The Commission expected that its work on the sentencing guidelines would be evolutionary¹³⁸ and that it would gather and analyze data from actual practice, receive feedback through testimony, sentencing and appellate decisions, and various forms of public comment, and revise the guidelines over time. Since the promulgation of the original set of sentencing guidelines through the present, the Commission has amended the sentencing guidelines over 750 times in response to court decisions, legislation, public comment, and the Commission’s own evaluations of the need to change the guidelines.¹³⁹

Departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines. The Commission, therefore, foresaw that a high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly, or that the severity or proportionality of the guidelines for particular offenses or offenders should be adjusted. The Commission envisioned that such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the SRA to periodically review and revise the guidelines.¹⁴⁰

¹³⁸ USSG Ch.1, Pt.A, intro. comment. (“The Commission emphasizes, however that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.”). See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest* [hereinafter Breyer, *Key Compromises*], 17 HOFSTRA L. REV. 1, 8 (1988).

¹³⁹ Generally, amendments to the sentencing guidelines are submitted to Congress by May 1 of each year and take effect not later than November 1 of that year, unless Congress otherwise provides. See 28 U.S.C. § 994(p).

¹⁴⁰ See 18 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).

Recent changes in crack cocaine penalties¹⁴¹ exemplify both the evolutionary nature of the guidelines and the role of feedback in the form of departures and public comment. Cocaine sentencing policy came under extensive criticism from public officials, private citizens, criminal justice practitioners, researchers, and interest groups challenging the efficacy of the 100:1 difference in penalty levels between powder and crack cocaine and its disproportionate impact on the African American community. In response to these concerns, the Commission proposed changes to the sentencing guidelines for cocaine offenses and subsequently submitted three reports to Congress containing its recommendations for reform.¹⁴² In 2007, the Commission reduced penalties for crack cocaine offenders, then did so again after Congress enacted the Fair Sentencing Act of 2010,¹⁴³ which reduced crack cocaine penalties by increasing the quantity thresholds triggering mandatory minimum penalties for crack cocaine offenses and by eliminating the mandatory minimum penalty for simple possession of crack cocaine.

PRE-BOOKER SUPREME COURT CASE LAW AND STATUTORY CHANGES

For nearly 20 years after the guidelines came into effect, federal judges were required to impose sentences within the applicable guideline range¹⁴⁴

unless the judge departed pursuant to a guideline departure provision, or the judge found the existence of an aggravating or mitigating circumstance present to a degree not adequately taken into consideration in the guidelines, or there existed a circumstance not adequately taken into consideration by the Commission in formulating the sentencing guidelines.¹⁴⁵ A series of Supreme Court cases rejected challenges to the guidelines' operation.¹⁴⁶ However, two important events would set the stage for later developments.

First, in 1996, the Supreme Court issued an important decision regarding the appellate review of sentences, *Koon v. United States*.¹⁴⁷ *Koon* established an abuse of discretion standard for appellate courts reviewing trial courts' application of the guidelines to the facts and rejected a *de novo* standard of review for district court judges' departure decisions, holding that departure decisions by district courts are owed deference. In doing so, the Court cited the "institutional advantage" district courts have over their colleagues on the courts of appeals,¹⁴⁸ and observed that departure decisions are fact-specific inquiries requiring the sentencing judge to determine whether a case is "within the heartland given all the facts of the case."¹⁴⁹ The Court suggested that Congress "did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."¹⁵⁰

¹⁴¹ USSG App. C, amend. 706 (effective Nov. 1, 2007).

¹⁴² See, e.g., U.S. SENT'G COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007), at 2, available at http://www.ussc.gov/Legislative_and_Public_Affairs/.

¹⁴³ Pub. L. No. 111-220 (Aug. 3, 2010).

¹⁴⁴ See *Mistretta v. United States*, 488 U.S. 361, 379, 391 (1989) (upholding the constitutionality of the Commission and of the guidelines, noting that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate," and that "[j]ust as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases.").

¹⁴⁵ 18 U.S.C. § 3553(b)(1), *excised* by Booker, 543 U.S. at 250.

¹⁴⁶ See, e.g., *United States v. Watts*, 519 U.S. 148 (1997) (allowing use of acquitted conduct to enhance the defendant's sentence); *United States v. Dunnigan*, 507 U.S. 87 (1993) (rejecting the defendant's claim that the enhancement provision for obstruction of justice violated the defendant's right to testify in his or her own defense).

¹⁴⁷ 518 U.S. 81 (1996). For a more detailed examination of the *Koon* decision, see U.S. SENT'G COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (in Response to Section 401(M) of Pub. Law 108-21), at 5-7 (2003) [hereinafter DEPARTURES REPORT].

¹⁴⁸ 518 U.S. at 98-99.

¹⁴⁹ *Id.* at 100.

¹⁵⁰ *Id.* at 97.

The Court pointed to 18 U.S.C. § 3742(e)(4), which provided that “[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.”¹⁵¹ The Court further noted that the statute was amended in 1988 to require courts of appeals to “give due deference to the district court’s application of the guidelines to the facts.”¹⁵² Therefore, the appellate court’s role was to ensure that the district court had not abused its discretion in concluding that specific facts sufficed to remove the case from the heartland of similar cases.¹⁵³

Second, in 2003, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“the PROTECT Act”),¹⁵⁴ which restricted the use of departures by sentencing courts and changed the appellate standard of review for cases in which departures were imposed. The legislative history of the PROTECT Act reflects congressional concern that the increasing rate of downward departures from the sentencing guidelines at the time was undermining the goals of the SRA, particularly the goals of providing certainty and uniformity in sentencing and of avoiding unwarranted disparity.¹⁵⁵

The PROTECT Act restricted the availability of departures, most notably for defendants convicted of sexual abuse crimes involving children. In addition, the PROTECT Act sought to reduce the overall rate of departures by increasing the specificity with which sentencing courts had to justify sentences outside the guideline range. Congress amended 18 U.S.C. § 3553(c) (Statement of reasons for imposing a sentence) by requiring a court imposing a sentence outside the prescribed guideline range to state “the

specific reason” for departing “with specificity in the written order of judgment and commitment[.]”¹⁵⁶

The PROTECT Act included several directives to the Commission, among them a directive to promulgate guideline amendments “to ensure that the incidence of downward departures are [*sic*] substantially reduced.”¹⁵⁷ The Commission responded to these directives and statutory changes with two amendments implementing the PROTECT Act’s direct amendments to the guidelines¹⁵⁸ and an eight-part emergency amendment that modified nine guideline provisions.¹⁵⁹ The amendment also created the early disposition departure (or “fast track”) called for in the PROTECT Act at §5K3.1 (Early Disposition Programs) (Policy Statement) and a new guideline at §1A3.1 (Authority) setting forth the statutory authority for the Commission and the guidelines. The amendments’ overall effect was to limit the availability of departures by prohibiting certain factors as grounds for departure, restricting the availability of certain departures, narrowing when certain permitted departures were appropriate, and limiting the extent of

¹⁵¹ *Id.*

¹⁵² *Id.* (quoting 18 U.S.C. § 3742(e)). By contrast, the Court held in *Braxton v. United States* that the Commission had unique authority to resolve conflicts between the circuit courts over how to interpret guideline provisions. 500 U.S. 344 (1991).

¹⁵³ *Koon*, 518 U.S. at 100.

¹⁵⁴ Pub. L. No. 108-21 (2003).

¹⁵⁵ See 149 CONG. REC. H3061 (Apr. 10, 2003).

¹⁵⁶ 18 U.S.C. § 3553(c).

¹⁵⁷ Pub. L. No. 108-21, section 401(m). The Commission had “been aware of and concerned about the increasing incidence of downward departures” before the enactment of the PROTECT Act and had already taken certain steps to address specific areas of concern. DEPARTURES REPORT at 71. Between 1999 and 2001, the Commission addressed divisions among the courts of appeals regarding certain types of departures and acted to reduce departures in illegal entry cases. *Id.* at 71-72; see also USSG App. C, amend. 602, 603, and 632 (effective Nov. 2001).

¹⁵⁸ USSG App. C, amend. 649 (effective Apr. 30, 2003) and 650 (effective May 30, 2003).

¹⁵⁹ USSG §§5K2.0, p.s. (Grounds for Departure), 5H1.4, p.s. (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), 5H1.6, p.s. (Family Ties and Responsibilities), 5H1.7, p.s. (Role in the Offense), 5H1.8, p.s. (Criminal History), 5K2.10, p.s. (Victim’s Conduct), 5K2.12, p.s. (Coercion and Duress), 5K2.13, p.s. (Diminished Capacity), 5K2.20, p.s. (Aberrant Behavior), 4A1.3, p.s. (Departures Based on Inadequacy of Criminal History Category), and 6B1.2, p.s. (Standards for Acceptance of Plea Agreements). See USSG App. C, amend. 651 (effective Oct. 27, 2003).

departures.¹⁶⁰ In addition, the Commission addressed the new statutory requirement that sentencing courts provide specific written justification for departures.¹⁶¹

The PROTECT Act fundamentally changed the appellate review standard established in *Koon* by amending 18 U.S.C. § 3742(e) to provide that all departures from the guideline range would be subject to *de novo* review.¹⁶² In addition, the PROTECT Act established factors that courts of appeals had to consider when reviewing a sentence, including whether the sentence:

- (1) was imposed in violation of law;
- (2) resulted from the incorrect application of the guidelines;
- (3) is outside the guideline range, and the sentencing court did not provide an adequate statement of reasons;
- (4) departs from the guideline range based on a factor that does not advance the objectives in § 3553(a)(2), is not authorized under § 3553(b), or is not justified by the facts of the case;
- (5) departs to an unreasonable degree, taking into account § 3553(b); or
- (6) was imposed for an offense for which there are no guidelines and is plainly unreasonable.¹⁶³

THE BOOKER DECISION

In January 2005, the Supreme Court issued its landmark decision rendering the federal sentencing

guidelines “effectively advisory.” In *United States v. Booker*, the Supreme Court addressed two questions:

- (1) Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
- (2) If the answer to the first question is “yes,” . . . whether, in a case in which the Guidelines would require the court to find a sentence enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.¹⁶⁴

The Court answered the first question in the affirmative, holding that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”¹⁶⁵ A different majority of the Court answered the question of the appropriate remedy for the constitutional violation. The Court concluded that the Sixth Amendment requirement that a jury find certain sentencing facts was incompatible with certain components of the SRA, and excised the provisions that made the sentencing guidelines mandatory.¹⁶⁶

In determining that these provisions could be excised, the Court rejected two remedies suggested by the government and the dissenting justices. First, the Court rejected the Government’s proposed remedy that would “render the Guidelines advisory in ‘any case in which the Constitution prohibits’ judicial factfinding” and “leave them as binding in all other cases.”¹⁶⁷ The

¹⁶⁰ DEPARTURES REPORT at 71-72; *see also* USSG App. C, amend. 651 (effective Oct. 27, 2003).

¹⁶¹ DEPARTURES REPORT at 71-72; *see also* USSG App. C, amend. 651 (effective Oct. 27, 2003).

¹⁶² Pub. L. No. 108-21, section 401, codified in 18 U.S.C. § 3742(e).

¹⁶³ 18 U.S.C. § 3472(e).

¹⁶⁴ 543 U.S. at 229 n.1.

¹⁶⁵ *Id.* at 244.

¹⁶⁶ *Id.* at 245.

¹⁶⁷ *Id.* at 266.

Court held that leaving the guidelines binding in some cases but not in others “would impose mandatory Guidelines-type limits upon a judge’s ability to *reduce* sentences, but it would not impose those limits upon a judge’s ability to *increase* sentences.”¹⁶⁸ The Court held that this one-way limit and the complexity of a sometimes-mandatory system would not advance the congressional objective of uniformity in sentencing.¹⁶⁹

Second, the Court rejected the dissent’s proposal to graft a jury factfinding requirement onto the provisions of the SRA, holding that such a requirement “would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand.”¹⁷⁰ The Court reasoned that Congress would prefer an advisory guidelines system that maintained “a strong connection between the sentence imposed and the offender’s real conduct” to a system that would “engraft onto the existing system today’s Sixth Amendment ‘jury trial’ requirement.”¹⁷¹ According to the Court, Congress’ important objectives included honesty, uniformity, and proportionality in sentencing.¹⁷²

In fashioning a remedy to the Sixth Amendment violation, the Court excised only two of the SRA’s provisions.¹⁷³ First, the Court excised 18 U.S.C. § 3553(b)(1), which required courts to impose a sentence within the applicable guideline range in the absence of circumstances justifying a departure. The Court determined that “the existence of [this section] is a necessary condition of the constitutional violation.”¹⁷⁴ Second, the Court excised 18 U.S.C. § 3742(e), which the PROTECT Act had amended to provide a *de novo* standard of review for departures

from the guidelines. The Court observed that excising the standard of review did “not pose a critical problem for the handling of appeals” because “a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*.”¹⁷⁵ Taking into account the “related statutory language” and the “sound administration of justice,” as well as “the past two decades of appellate practice in cases involving departures,” the Court returned to the pre-PROTECT Act version of section 3742, which provided for review of sentences for reasonableness in light of the § 3553(a) factors.¹⁷⁶

The Court rejected criticism questioning the practicality of the reasonableness standard of review, noting that Commission data showed that reasonableness review of departures and sentences imposed for non-guidelines offenses accounted for 16.7 percent of appeals in 2002.¹⁷⁷ The Court also rejected the argument that the application of the reasonableness standard of review would “‘produce a discordant symphony’ leading to ‘excessive sentencing disparities,’ and ‘wreak havoc’ on the judicial system.”¹⁷⁸ Nonetheless, the Court acknowledged that reasonableness review might not “provide the uniformity that Congress originally sought to secure,” but noted that reasonableness review “would tend to iron out sentencing differences.”¹⁷⁹

With respect to the continued role of the Commission, the Court noted that:

The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 266-67.

¹⁷⁰ *Id.* at 249.

¹⁷¹ *Id.* at 248.

¹⁷² *Id.* at 264.

¹⁷³ *Id.* at 258-61. The remaining portions of the Act require a sentencing court to consider guideline ranges but permit a court to tailor the sentence in light of other statutory concerns. See 18 U.S.C. § 3553(a).

¹⁷⁴ 543 U.S. at 259.

¹⁷⁵ *Id.* at 260 (emphasis in original).

¹⁷⁶ *Id.* at 260-61. In *Koon*, the Supreme Court held that departure decisions by district courts were due deference and that appellate courts should use an abuse of discretion standard in reviewing trial courts’ application of the guidelines to the facts. 518 U.S. at 91.

¹⁷⁷ 543 U.S. at 263.

¹⁷⁸ *Id.* (quoting *id.* at 312-13 (Scalia, J., dissenting)).

¹⁷⁹ *Id.* at 263.

uniformity in the sentencing process.¹⁸⁰

Furthermore, “[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives.”¹⁸¹ Even so, the Court recognized that *Booker* would not be the final word on the new sentencing regime:

Ours, of course, is not the last word:
The ball now lies in Congress’ court.
The National Legislature is equipped
to devise and install, long term, the
sentencing system, compatible with
the Constitution, that Congress judges
best for the federal system of
justice.¹⁸²

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 265.

The Sentencing Process After *Booker*

THE THREE-STEP PROCESS

In *Gall v. United States*,¹⁸³ the Supreme Court described the proper procedure for post-*Booker* sentencing. First, a sentencing court must properly determine the guideline range pursuant to 18 U.S.C. § 3553(a)(4). Second, the court must consider whether any of the guidelines' departure policy statements apply pursuant to 18 U.S.C. § 3553(a)(5). Third, the court must consider the factors set forth in 18 U.S.C. § 3553(a) taken as a whole before determining the sentence to be imposed, including whether a variance is warranted. Although the guidelines now incorporate the three-step process,¹⁸⁴ courts take different approaches to applying it, particularly with respect to consideration of departure provisions and offender characteristics.

The First Step: Proper Determination of the Guideline Range

Courts must begin the sentencing process by properly determining the applicable guideline range.¹⁸⁵ Determination of the guideline range continues to include factfinding by the court to resolve disputed issues.¹⁸⁶ Moreover, the burden of proof for judicial factfinding continues to be proof by a preponderance of evidence, and not proof beyond a reasonable doubt,

as some defendants had argued shortly after *Booker*.¹⁸⁷ District courts may still consider reliable hearsay¹⁸⁸ and acquitted conduct¹⁸⁹ in resolving factual disputes to determine the guideline range.

Although this first step remains largely unchanged after *Booker*, one issue on which courts have disagreed is whether the Ex Post Facto clause bars application of a guideline range that was increased after the defendant committed the crime. The Seventh Circuit¹⁹⁰ concluded that the Ex Post Facto clause does not bar application of the *Guidelines Manual* in effect at the time of sentencing even if the guideline range is higher than the range provided by the *Manual* in effect on the date of the offense. The Seventh Circuit reasoned “that the ex post facto clause should apply only to laws and regulations that bind rather than advise.”¹⁹¹ Five other circuits have held that the Ex Post Facto Clause bars such increases in

¹⁸³ 552 U.S. 38, 49-50 (2007).

¹⁸⁴ See USSG §1B1.1(a)–(c) (Application Instructions).

¹⁸⁵ See *Rita*, 551 U.S. at 351; USSG §1B1.1(a).

¹⁸⁶ See, e.g., *United States v. Gonsalves*, 435 F.3d 64 (1st Cir. 2006); *United States v. Sheikh*, 433 F.3d 905 (2d Cir. 2006).

¹⁸⁷ See, e.g., *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006).

¹⁸⁸ See, e.g., *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005) (holding *Booker* did not change the rule that a sentencing court may base sentencing determinations on reliable hearsay). See also *United States v. Brown*, 430 F.3d 942 (8th Cir. 2005) (“We see nothing in *Booker* that would require the court to determine the sentence in any manner other than the way the sentence would have been determined pre-*Booker*”).

¹⁸⁹ See, e.g., *United States v. Lynch*, 437 F.3d 902 (9th Cir. 2006) (en banc).

¹⁹⁰ *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006).

¹⁹¹ *Id.* at 795.

sentences.¹⁹² The Supreme Court has agreed to review this division among the circuits.¹⁹³

The Second Step: Consideration of Departure Provisions

Once the court has correctly determined the guideline range, the court must consider whether to apply any of the guidelines' departure policy statements raised by the parties,¹⁹⁴ including such commonly applied departures as the substantial assistance departure at §5K1.1, the fast track departure at §5K3.1, the departure at §4A1.3 for overstatement of criminal history, and the cultural assimilation departure for illegal entry offenders.¹⁹⁵ In observing that much of the sentencing process has remained

unchanged after *Booker*, the Eighth Circuit has stated that "after determining the appropriate sentencing range, the district court must decide if a traditional departure is appropriate under Part K or §4A1.3."¹⁹⁶ The Third Circuit similarly requires "that the entirety of the Guidelines calculation be done correctly, including rulings on Guidelines departures."¹⁹⁷ Citing section 3553(a) and *Booker*, the Third Circuit explained that this requirement is "[n]ot for jurisdictional reasons, but rather because the Guidelines still play an integral role in criminal sentencing."¹⁹⁸ A number of circuits recognize that departures are part of the guideline analysis, and that if a district court does not conduct a departures analysis, the guideline sentence cannot be properly considered as part of the § 3553(a) analysis either at sentencing or on appeal.¹⁹⁹

Although courts are required to consider departure policy statements, the use of departures, as opposed to variances, has continued to decrease, as parties increasingly have relied on the section 3553(a)

¹⁹² See *United States v. Turner*, 548 F.3d 1094 (D.C. Cir. 2008); *United States v. Ortiz*, 621 F.3d 82 (2d Cir. 2010); *United States v. Lewis*, 606 F.3d 193 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010); and *United States v. Wetherald*, 636 F.3d 1315 (11th Cir. 2010). In addition, the Third, Fifth, and Ninth Circuits have remanded for resentencing cases in which the district court applied a later version of the guidelines that imposed a harsher punishment than the version in effect when the offense was committed. See *United States v. Wood*, 486 F.3d 781 (3d Cir. 2007); *United States v. Reasor*, 418 F.3d 466 (5th Cir. 2005); *United States v. Forrester*, 616 F.3d 929 (9th Cir. 2010). Two other circuits, the Eighth and the Tenth, have, in dicta, agreed with the majority view and rejected *Demaree*. See *United States v. Carter*, 490 F.3d 641 (8th Cir. 2007); *United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008). Finally, the First Circuit, while avoiding the constitutional issue, has followed "a commonsense protocol" under which courts "ordinarily employ the guidelines in effect at sentencing only where they are as lenient as those in effect at the time of the offense; when the guidelines have been made more severe in the interim, the version in effect at the time of the crime is normally used." *United States v. Ricardo-Rodriguez*, 630 F.3d 39 (1st Cir. 2011).

¹⁹³ *Peugh v. United States*, 133 S. Ct. 594 (Nov. 9, 2012).

¹⁹⁴ See, e.g., *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006) (abrogated on other grounds by *Tapia v. United States*, 131 S. Ct. 2382 (2011) (courts must "formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation[.]").

¹⁹⁵ USSG §1B1.1(b).

¹⁹⁶ *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006).

¹⁹⁷ *United States v. Jackson*, 467 F.3d 834, 838 (3d Cir. 2006).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 838-39 ("district courts must still calculate what the proper Guidelines sentencing range is, otherwise the Guidelines cannot be considered properly"); *United States v. Wallace*, 461 F.3d 15, 32 (1st Cir. 2006) ("Only after the district court has conducted the advisory guidelines analysis, including a determination of the appropriateness of downward or upward departures under the guidelines, should the court then decide whether the guidelines sentence comports with the sentencing factors set for in 18 U.S.C. § 3553(a)") (emphasis in original); *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006) ("To effectuate the Supreme Court's mandate, district courts are still required to consider the appropriate Guideline sentencing range. Within this Guideline calculation is the determination of whether a Chapter 5 departure is appropriate.") (emphasis in original); *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) ("the sentencing judge must consider the factors set forth in 18 U.S.C. § 3553(a), including the applicable Guidelines range and available departure authority"); *United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir. 2005) (characterizing erroneous application of a downward departure as "sentencing error").

factors rather than on guideline departure provisions.²⁰⁰ The Seventh Circuit has held that departures are “obsolete,” and that sentences based on departure provisions should be examined in the same way as variances based on factors outside the guidelines, that is, under the general rubric of section 3553(a).²⁰¹

The trend toward examining sentences based on departure provisions under the general rubric of section 3553(a) is reflected in circuits other than the Seventh. While not holding that departures are obsolete, the Sixth Circuit has held that a district court’s consideration of departures is less important after *Booker*:

[B]ecause the Guidelines are no longer mandatory and the district court need only consider them along with its analysis of the section 3553(a) factors, the decision to deny a Guidelines-based downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district

court — with greater latitude — under section 3553(a).²⁰²

The importance of considering departures in the second step of sentencing is also questionable in the Ninth Circuit. In *United States v. Mohamed*, the Ninth Circuit stated:

We think the better view is to treat the scheme of downward and upward “departures” as essentially replaced by the requirement that judges impose a “reasonable” sentence . . . The use and review of post-*Booker* departures would result in wasted time and resources in the courts of appeal, with little or no effect on sentencing decisions. After all, if a district court were to employ a post-*Booker* “departure” improperly, the sentencing judge still would be free on remand to impose exactly the same sentence by exercising his discretion under the now-advisory guidelines. Such a sentence would then be reviewed for reasonableness, in which case it is the review for reasonableness, and not the validity of the so-called departure, that determines whether the sentence stands.²⁰³

In *United States v. Gutierrez-Hernandez*, a panel of the Fifth Circuit parted company with the Ninth Circuit on this issue, vacating the sentence and remanding the case to the district court because the court “erred in the application of the departure provisions.”²⁰⁴ Yet in a subsequent case upholding a sentence that was more than two times the upper end of the guideline range, the Fifth Circuit seemingly disavowed that holding: “[t]o the extent that . . . *Gutierrez-Hernandez* could arguably be construed to require a district court to apply the Guidelines’

²⁰⁰ In fiscal year 2007, courts imposed 8,433 non-government sponsored below range sentences. Those relying at least in part on departure grounds numbered only 2,770 (32.8% of all non-government sponsored below range sentences), while 4,957 (58.8% of all non-government sponsored below range sentences) were explicitly based on *Booker* or § 3553(a) and not on any guideline departure ground. In fiscal year 2008, courts imposed 9,972 non-government sponsored below range sentences, and those resting at least in part on departure grounds numbered 2,459 (24.7%), while those based solely on *Booker* and § 3553(a) numbered 6,678 (67.0%). In the years that followed, those percentages were: fiscal year 2009, 19.0% departures (2,403 out of 12,655 cases) compared to 73.9% *Booker*/ § 3553(a) variances (9,358 out of 12,655 cases); fiscal year 2010, 17.5% departures (2,552 out of 14,565 cases) compared to 76.3% *Booker*/ § 3553(a) variances (11,116 out of 14,565 cases); and fiscal year 2011, 19.6% departures (2,893 out of 14,762 cases) compared to 77.0% *Booker*/ § 3553(a) variances (11,371 out of 14,762 cases).

²⁰¹ See, e.g., *United States v. Moreno-Padilla*, 602 F.3d 802 (7th Cir. 2010). The Seventh Circuit is the only circuit to have held that departures are “obsolete.”

²⁰² *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006).

²⁰³ 459 F.3d 979, 986-87 (9th Cir. 2006).

²⁰⁴ 581 F.3d 251, 255-256 (5th Cir. 2009).

departure methodology before imposing a non-Guidelines sentence, this passage in *Gutierrez-Hernandez* is dicta.”²⁰⁵ The Fifth Circuit upheld the non-guideline sentence even though the district court did not utilize departure methodology in reaching its decision.²⁰⁶

The Third Step: Consideration of § 3553(a) Factors

In the third step of the sentencing process, the court must consider the factors set forth in 18 U.S.C. § 3553(a) taken as a whole before imposing the sentence,²⁰⁷ and “impose a sentence sufficient but not greater than necessary” to meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). The factors the court must consider are —

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other

²⁰⁵ *United States v. Gutierrez*, 635 F.3d 148, 153 (5th Cir. 2011).

²⁰⁶ The Fifth Circuit emphasized cases decided before *Gutierrez-Hernandez*, in which the court of appeals “determine[d] only whether the non-Guidelines sentence at issue was reasonable, not whether the district court was required to perform a calculation of departure []. Indeed, our opinion in *Smith* expressly states that ‘we do not examine whether an upward departure or an enhancement was available under the Guidelines.’” 635 F.3d at 152.

²⁰⁷ See USSG §1B1.1(c); see also *United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005); *United States v. Stone*, 432 F.3d 651, 655 (6th Cir. 2005); *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005).

correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced;

or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

- (7) the need to provide restitution to any victims of the offense.²⁰⁸

The sentencing court need not give prior notice of its intent to vary,²⁰⁹ nor categorically recite each of the 18 U.S.C. § 3553(a) factors on the record when it imposes a sentence.²¹⁰ Nevertheless, the

²⁰⁸ 18 U.S.C. § 3553(a)(1)–(7).

²⁰⁹ In *Irizarry v. United States*, the Supreme Court held that the requirement in Federal Rule of Criminal Procedure 32(h) that the sentencing court provide advance notice to the parties when departing from the applicable guideline range applies only to guideline departures and not to post-*Booker* variances: “[t]he due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for [such a requirement].” 553 U.S. 708, 714 (2008).

²¹⁰ See, e.g., *McBride*, 434 F.3d 470 (6th Cir. 2006); *United States v. Dieken*, 432 F.3d 906 (8th Cir. 2006); *United*

record must include sufficient evidence to demonstrate the court's consideration of these factors. Consequently, the court's consideration of the 18 U.S.C. § 3553(a) factors has become an essential part of the sentencing process.²¹¹ However, with respect to consideration of sections 3553(a)(4) and (5), no circuit has specified what weight to give the Commission's guidelines and policy statements,²¹² and the circuits have not given district courts uniform direction on this issue.

CONSIDERATION OF OFFENDER CHARACTERISTICS

The Supreme Court's renewed emphasis²¹³ on the importance of the history and characteristics of the

States v. Scott, 426 F.3d 1324, 1329 (11th Cir. 2005) ("nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors"); *but see* *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) ("A rote statement that the judge considered all relevant factors will not always suffice; the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored.").

²¹¹ See, e.g., *United States v. Till*, 434 F.3d 880, 887 (6th Cir. 2006).

²¹² See, e.g., *United States v. Hunt*, 459 F.3d 1180, 1184-85 (11th Cir. 2006) (rejecting "any across-the-board prescription regarding the appropriate deference to give the Guidelines" and opting to allow sentencing courts to "determine, on a case-by-case basis, the weight to give the guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors the court must also consider in calculating the defendant's sentence."). A district court must "give respectful consideration to the judgment embodied in the guidelines range that he computes." *United States v. Higdon*, 531 F.3d 561, 562 (7th Cir. 2008); *see also* *United States v. Stewart*, 590 F.3d 93, 167-68 (2d Cir. 2009) ("if the district court has ignored or slighted a factor that Congress has deemed pertinent in § 3553(a), it has abused its discretion.") (citations omitted).

²¹³ See, e.g., *Gall*, 552 U.S. at 49 (a sentencing court must "consider all of the § 3553(a) factors" and "must make an individualized assessment based on the facts presented."); *Kimbrough*, 552 U.S. at 101 ("In sum, while the statute still requires a court to give respectful consideration to the Guidelines, [] *Booker* permits the court to tailor the sentence

defendant is not easily reconciled with section 994 of title 28. For example, in *United States v. Pepper*, the Court noted that sentencing courts should "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come."²¹⁴ On the other hand, Congress directed the Commission to promulgate guidelines consistent with the SRA's proscriptions and limitations on offender characteristics in section 994(d) and (e).²¹⁵

The Supreme Court has not made clear whether the proscriptions and limitations imposed by Congress to which the Commission must adhere in considering the section 3553(a) factors also limit the courts' consideration of offender characteristics under section 3553(a). While the Constitution constrains sentencing judges from considering the "forbidden factors" of race, sex, national origin, and creed,²¹⁶ courts now freely consider, for example, a defendant's educational background and employment record, factors that Congress, in section 994(e), deemed

in light of other statutory concerns as well[.]") (internal citations omitted).

²¹⁴ 131 S. Ct. 1229 (2011) (citing *United States v. Tucker*, 404 U.S. 443, 446 (1972)). *See also* *Rita*, 551 U.S. at 351 ("[A sentencing judge] may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply, USSG §5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless, *see* Rule 32(f).").

²¹⁵ See discussion at 17, 21-22 *supra*.

²¹⁶ *See Pepper*, 131 S. Ct. at 1240 n.8 ("Of course, sentencing courts' discretion under § 3661 is subject to constitutional constraints."); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (a court should construe a statute to avoid a constitutional infirmity if possible); *United States v. Kaba*, 480 F.3d 152, 156 (2d Cir. 2007) ("A defendant's race or nationality may play no adverse role in the administration of justice, including sentencing.") (internal citations omitted); *see also* *United States v. Stewart*, 590 F.3d 93, 167 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part) ("We do not categorically proscribe any factor concerning the [defendant's] background, character, and conduct, with the exception of invidious factors.") (internal quotations omitted).

“generally inappropriate” for the Commission to consider in recommending a term of imprisonment or length of a term of imprisonment.²¹⁷ Moreover, those factors may be associated with socio-economic status, a forbidden factor under section 994(e).²¹⁸ As a result of the lack of certainty in this area, courts sometimes reach different conclusions about whether and to what extent such characteristics should affect the defendant’s sentence.²¹⁹

²¹⁷ See, e.g., *United States v. Tomko*, 562 F.3d 558, 572 (3d Cir. 2009) (affirming a downward variance in part based upon defendant’s prior record as the operator of a large and successful plumbing company that employed more than 300 people); *United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008) (affirming a downward variance in part based upon defendant’s post-offense record of creating a successful house-painting business); *United States v. Ayala-Garcia*, 2008 WL 2566858, *4 (E.D. Wisc. 2008) (imposing a sentence below the applicable guideline range in part based on the “defendant’s recent educational and vocational endeavors”) (unpublished); *United States v. Crocker*, 2007 WL 2757130, *1 (D. Kan. 2007) (imposing a sentence below the guidelines in part based on the defendant’s “efforts to better herself through a college education”) (unpublished).

²¹⁸ See, e.g., *United States v. Peltier*, 505 F.3d 389, 393 (5th Cir. 2007) (“We cannot easily disentangle the weight given to the proper factor of need for treatment from the weight given to the improper factor of socioeconomic status, with which the former proper factor was entwined.”); *United States v. Engle*, 592 F.3d 495, 505 (4th Cir. 2010) (noting that the district court made it clear that, but for the defendant’s earning capacity, it would have imposed a within guidelines sentence of imprisonment, the Fourth Circuit found that, “[r]educed to its essence, the district court’s approach means that rich tax-evaders will avoid prison, but poor tax-evaders will almost certainly go to jail,” that an approach based on socioeconomic status was impermissible pre-*Booker*, and that *Booker* and *Gall* did not “permit[] district courts to rest a sentencing decision exclusively on such constitutionally suspect grounds.”).

²¹⁹ According to some criminal defense attorneys, there is no tension between the statutory proscriptions in section 994 and the section 3553(a) factors because section 994(e) can be interpreted as making certain offender characteristics inappropriate for consideration only for determining whether to impose a sentence of imprisonment, as opposed to probation, or to lengthen a sentence of imprisonment. In their view, despite section 994(e), judges retain discretion under section 3553(a) to consider those same offender characteristics in deciding whether to shorten a sentence of imprisonment, or whether to impose a sentence of probation

A defendant’s status as a young adult (although not a juvenile) at the time of the offense is an example of an offender characteristic that courts have viewed differently. Some courts believe relative youth is a mitigating factor, while others do not. The district judge who sentenced the defendant in *Gall* noted that “[r]ecent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five” and “compared [the defendant’s] sale of ecstasy when he was a 21-year-old adult to the ‘impetuous and ill-considered’ actions of persons under the age of 18.”²²⁰ The Supreme Court agreed that “it was not unreasonable for the District Judge to view *Gall*’s immaturity at the time of the offense as a mitigating factor,” and that such consideration “finds support in [the Court’s] cases.”²²¹ Similarly, a district judge relied in part on age when sentencing a young adult defendant convicted of possessing child pornography because the defendant began viewing such images when he was himself a young teenager.²²² The judge concluded that although the “unformed nature of the adolescent brain” did not “remove[] all culpability,” it did constitute a “critical distinction” from the typical defendant convicted of possessing child pornography, and it “weigh[ed] heavily in favor of a” downward variance from the guideline range.²²³

Other courts, however, have taken the view that a defendant’s status as a young adult cannot support a substantial downward variance. For example, the Eighth Circuit reversed a substantial downward variance in the case of a career offender

or other alternative to incarceration. See, e.g., *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Lisa Wayne, President, National Association of Criminal Defense Lawyers, written statement at 7); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Henry Bemporad, Federal Public Defender, Western District of Texas, written statement at 10).

²²⁰ *Gall*, 552 U.S. at 57-58.

²²¹ *Id.* at 58.

²²² *United States v. Stern*, 590 F. Supp. 2d 945, 952-54 (N.D. Ohio 2008).

²²³ *Id.*

who was 22 years old at the time of the offense, in part because the district court explicitly stated that had the defendant been 35 or 40 years of age, the court would have imposed a sentence at or near the guideline range “because the court would have serious questions about whether a defendant at that age could be rehabilitated.”²²⁴ The Eighth Circuit held that, especially given the size of the downward variance, it was unreasonable because “[r]elative youth is a factor that may apply to many career offenders, and it is unlikely that district courts uniformly will adopt the view of the district court in this case.”²²⁵ In such a circumstance, the Eighth Circuit said, “the potential for excessive sentence disparities would be substantial.”²²⁶ In a subsequent case, one judge of the Eighth Circuit explained his disagreement with a district judge’s reliance on a defendant’s relative youth as a mitigating factor as follows:

[The defendant’s] age does not distinguish him in any meaningful way from other defendants. In fact, 34.1% of all males arrested in the United States in 2007 were between the ages of 20 and 29. In 2007, even more narrowly, males between the ages of 25 and 29 made up the largest demographic group - an estimated 17.24% - of all state and federal prisoners in the United States. ... [The defendant’s] age has no significant or “appreciable probative value” in this sentencing and is irrelevant[.]²²⁷

In the same case, another Eighth Circuit judge explained that “[r]easonable minds can differ” on the question of whether a defendant’s relative youth is a mitigating factor, and that therefore “[t]he offender’s punishment in these career offender cases – ranging from the statutory minimum term to a sentence at or

near the statutory maximum – will depend substantially on the luck of the judicial draw.”²²⁸

Similarly, in the context of considering the history and characteristics of the defendant as required by 18 U.S.C. § 3553(a), courts have considered how to account for a defendant’s positive employment history. As Justice Alito observed in his dissent in *Gall*, before the SRA:

[I]f a defendant had a job, a supportive family, and friends, those factors were sometimes viewed as justifying a harsher sentence on the ground that the defendant had squandered the opportunity to lead a law-abiding life. Alternatively, those same factors were sometimes viewed as justifications for a more lenient sentence on the ground that a defendant with a job and a network of support would be less likely to return to crime.²²⁹

Since *Booker*, judges have expressed disparate views on this issue, making sentencing outcomes less certain. For example, the Third Circuit reviewed *en banc* a substantial downward variance in a tax fraud case in which one of the factors supporting the variance was the defendant’s prior record as the operator of a large and successful plumbing company that employed more than 300 people.²³⁰ The Third Circuit split over the substantive reasonableness of the sentence. Affirming the variance, the majority concluded that the district court appropriately relied in part on the defendant’s prior employment when imposing the sentence.²³¹ The dissent, while acknowledging that a prior record of employment may in some cases be a mitigating factor, emphasized that this consideration “fails to distinguish [the defendant] from other tax evaders ... and therefore falls far short of widening the range of” substantively reasonable

²²⁴ *United States v. Maloney*, 466 F.3d 663, 669 (8th Cir. 2006).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *United States v. Feemster*, 572 F.3d 455, 465-66 (8th Cir. 2009) (citations omitted) (Riley, J., concurring).

²²⁸ *Id.* at 468 (citations omitted) (Colloton, J., concurring).

²²⁹ 552 U.S. at 70 (Alito, J., dissenting).

²³⁰ *Tomko*, 562 F.3d at 572.

²³¹ *Id.*

sentences.²³² The dissent expressed the view that “[a]n admirable record of employment is a characteristic common to many white-collar criminals, and the prospect of business failure seems of little relevance as a mitigating circumstance when the business itself was the vehicle through which the defendant perpetrated the crime.”²³³ Several judges in the Ninth Circuit have made substantially the same observation: “We can hardly be surprised if a white collar criminal has a good employment history – otherwise, he or she would likely not be in a position to commit the crime.”²³⁴

In public hearings before the Commission, several district court judges expressed concern over this uncertainty, suggesting that offender characteristics that do not support a guideline departure are what most often lead them to vary from the guidelines.²³⁵ Several district court judges and the federal public defender community asserted that the authority of district court judges to take account of offender characteristics results in a more fair and just sentencing outcome, allowing judges to mitigate otherwise harsh guidelines or unwarranted sentencing disparities.²³⁶

²³² *Id.* at 583-84 (Fisher, J., dissenting).

²³³ *Id.* at 584.

²³⁴ See, e.g., *United States v. Whitehead*, 559 F.3d 918, 921 (9th Cir. 2009) (Gould, J., dissenting from denial of rehearing en banc).

²³⁵ *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Robin J. Cauthron, District Judge, Western District of Oklahoma, transcript at 11); see also *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable Joan Ericksen, District Judge, District of Minnesota, transcript at 269-270, 274); see also 2010 JUDGES’ SURVEY at 19 (Question 4, Table 14) (76 percent of respondents indicated that they do not rely on a departure provision within the *Guidelines Manual* because the *Guidelines Manual* does not contain a departure provision that adequately reflects the reason for a sentence outside the guideline range; and 65 percent indicated that they do not rely on a departure provision because the departure policy statements in the manual are too restrictive).

²³⁶ See *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing*

The Department of Justice has expressed concern that judges’ increased discretion after *Booker*, including the discretion to consider offender characteristics, has led to increasing unwarranted sentencing disparities.²³⁷ In addition, some probation officers have suggested that the guidelines be amended to better reflect the relevance of the defendant’s history and characteristics as described in section 3553(a), either because those factors that the guidelines discourage courts from considering might

Reform Act of 1984, New York, NY (July 9-10, 2009) (Testimony of the Honorable Donetta W. Ambrose, Chief District Judge, Western District of Pennsylvania, transcript at 51-52); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of the Honorable Paul Barbadoro, District Judge, District of New Hampshire, written statement at 6) (“Downward departures and variances may not reveal a problem with the advisory guidelines system but may in fact reduce undue rigidity in individual cases.”); *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Raymond Moore, Federal Public Defender, Districts of Colorado and Wyoming, written statement at 20-21) [hereinafter *Moore 2012 Public Hearing Statement*] (“Some have suggested that consideration of mitigating offender characteristics creates ‘racial and ethnic disparity.’ One cannot accept disparate impacts of aggravating factors because they are considered relevant (especially when they are often given excessive weight), but decry the supposed disparate impacts of offender characteristics that are clearly relevant, and that judges have used to mitigate excessively harsh punishment in deserving cases.”).

²³⁷ *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of David Axelrod, Associate Deputy Attorney General, United States Department of Justice, written statement at 12) (“We believe these two lines of thought and doctrine – one that insists that the length of federal imprisonment terms be based primarily on the offense and criminal history, and one that suggests that offender characteristics and rehabilitation should join those factors as co-equal determinants – ought to be examined more closely and reconciled to the extent possible in order to create a more coherent, national system. We believe the post-*Booker* sentencing regime, which gives sentencing courts an unbounded menu of sentencing principles from which to devise the ultimate sentence, will continue to lead, if not reformed, to unwarranted disparities in sentencing outcomes.”).

be relevant to assessing the risk of recidivism,²³⁸ or simply because section 3553(a) suggests such factors are relevant while the *Guidelines Manual* categorizes them as not ordinarily relevant.²³⁹

In 2010, the Commission amended certain offender characteristics in Chapter Five, Part H to remove age, mental and emotional condition, physical condition, and military service from the list of characteristics the Commission considered not ordinarily relevant.²⁴⁰ Those offender characteristics

now “may be relevant in determining whether a departure is warranted” “if the characteristic individually or in combination with other offender characteristics, is present to an unusual degree and distinguish[] the case from the typical cases covered by the guidelines.”²⁴¹ However, departures based on these offender characteristic provisions are still very rare.²⁴²

POLICY DISAGREEMENTS WITH THE GUIDELINES

The distinction between the consideration of guideline policy during the second step, and the consideration of the section 3553(a) factors during the third step has led courts to consider to what extent courts may disregard guideline policy in favor of their own policy judgments. In *Kimbrough v. United States*, the Supreme Court held that a sentencing judge may consider the disparity that existed before the Fair Sentencing Act of 2010 between the Guidelines’ treatment of crack and powder cocaine offenders, and therefore may reject the guidelines’ policy of sentencing crack cocaine offenders more harshly.²⁴³ According to the Court, in creating the drug trafficking guidelines the Commission varied from what the Court perceived as its usual practice of employing an “empirical approach based on data about past sentencing practices,” instead adopting the “weight-driven scheme” used in the Anti-Drug Abuse Act of 1986²⁴⁴ (“1986 Act”) and maintaining the 100-to-1 quantity ratio throughout the drug table.²⁴⁵

The Court rejected the government’s position that the 1986 Act implicitly required both the

²³⁸ See, e.g., *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of Christopher Hansen, Chief Probation Officer, District of Nevada, transcript at 166).

²³⁹ *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of William Henry, Chief U.S. Probation Officer for the District of Maryland, transcript at 173); *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Phoenix, AZ (Jan. 20-21, 2010) (Testimony of Mario Moreno, Chief U.S. Probation Officer for the District of Arizona, transcript at 112-113). See also *U.S. Sent’g Comm’n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of Honorable Robert W. Pratt, Chief U.S. District Judge for the Southern District of Iowa, written statement at 3-4).

²⁴⁰ Pursuant to the SRA’s directives to the Commission in section 994, the guidelines had until recently listed age, education and vocational skills, mental and emotional condition, physical condition, employment record, and several other offender characteristics as “not ordinarily relevant” in determining whether a departure is warranted. See USSG §§5H1.1, p.s. (Age), 5H1.2, p.s. (Education and Vocational Skills), 5H1.3, p.s. (Mental and Emotional Conditions), 5H1.4, p.s. (Physical Condition, Including Drug and Alcohol Dependence or Abuse; Gambling Addiction), 5H1.5, p.s. (Employment Record), and 5H1.11, p.s. (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works). Recently, the Commission amended these provisions to state that age, mental and emotional conditions, physical condition, and military service “may be relevant in determining whether a departure is warranted,” generally “if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” See USSG App. C, amend. 739 (effective Nov. 1, 2010).

²⁴¹ See, e.g., USSG §5H1.1, p.s. (Age).

²⁴² A comparison of Table 25 in the 2010 *Sourcebook* with the same table in the 2011 *Sourcebook* shows a slight increase: 2010 – age (cited 97 times), mental and emotional condition (cited 97 times) and physical condition (cited 111 times); 2011 – age (cited 138 times), mental and emotional condition (cited 153 times), and physical condition (cited 163 times). Given the limited data it would be difficult to draw conclusions on the amendment’s effectiveness at promoting uniform consideration of these characteristics.

²⁴³ 552 U.S. at 91.

²⁴⁴ Pub. L. No. 99-570.

²⁴⁵ *Kimbrough*, 552 U.S. at 96-97.

Commission and sentencing courts to apply the 100-to-1 ratio: “The statute says nothing about the appropriate sentences within [the maximum and minimum sentences applicable to crack and powder cocaine], and we decline to read any implicit directive into that congressional silence.”²⁴⁶ The Court found that “drawing meaning from silence [was] particularly inappropriate” in this case, because Congress had shown that “it knows how to direct sentencing practices in express terms,” by, for example, requiring in 28 U.S.C. § 994(h) that the Commission set the guideline sentences for serious recidivist offenders “at or near” the statutory maximum.²⁴⁷

In addition, the Court was unpersuaded by the government’s argument that allowing district courts to vary based on the crack/powder disparity would lead to the very unwarranted disparities district courts are instructed to avoid under 18 U.S.C. § 3553(a)(6): “Under [§ 3553(a)(6)], district courts must take account of sentencing practices in other courts and the ‘cliffs’ resulting from the statutory mandatory minimum sentences” and “[t]o reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself.”²⁴⁸

Finally, while underscoring the “important institutional role” the Commission fills by “bas[ing] its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise,” the Court found that the crack cocaine guidelines “do not exemplify” what the Court considered to be the Commission’s “characteristic institutional role.”²⁴⁹ The Court noted that the Commission itself had reported that the crack cocaine guidelines produce “disproportionately harsh sanctions.”²⁵⁰ The Court then concluded that “[g]iven all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a

sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”²⁵¹

In 2009, the Supreme Court reinforced this holding in *Spears v. United States*, ruling that “district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.”²⁵² The Court made clear that the holding in *Kimbrough* allowing categorical disagreements with the guidelines “necessarily implies adoption of some other [crack/powder] ratio to govern the mine-run case.”²⁵³ Accordingly, district courts “must also possess the power to apply a different ratio which, in [the court’s] judgment, corrects the disparity.”²⁵⁴

Kimbrough engendered significant disagreement in the circuit courts about whether a district court may categorically reject several other sentencing guidelines, including the child pornography guideline at USSG §2G2.2, the fast track departure policy statement at USSG §5K3.1, and the career offender guideline at USSG §4B1.1. The circuit courts holding that courts could reasonably reject guideline policy based this holding on two aspects of the *Kimbrough* opinion: first, *Kimbrough*’s conclusion that the crack cocaine guidelines were not based on an “empirical approach;”²⁵⁵ and second, its indication that

²⁵¹ *Id.* at 110.

²⁵² 555 U.S. 261, 265-66 (2009).

²⁵³ *Id.* at 265.

²⁵⁴ *Id.*

²⁵⁵ See, e.g., *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (“Like the crack/powder ratio, the fast-track departure scheme does not ‘exemplify the [Sentencing] Commission’s exercise of its characteristic institutional role.’ . . . In other words, the Commission has ‘not take[n] account of empirical data and national experience’ in formulating them.”); *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (“[T]he Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under §2G2.2 several times since their introduction in 1987, each time recommending harsher penalties.”). For a discussion of the limited role of empirical evidence in promulgating guidelines, see “Directives: Sentence Length,” above at 16, and “Implementation of Directives: Sentence Length,” above at 19-21.

²⁴⁶ *Id.* at 103.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 108.

²⁴⁹ *Id.* at 109.

²⁵⁰ *Id.* at 109-110.

a district court's categorical variance may be rooted in a finding that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, rather than based on any one § 3553(a) factor in isolation.²⁵⁶ By contrast, the circuit courts holding that a categorical rejection was not a reasonable exercise of a district court's discretion based their conclusion on other aspects of the *Kimbrough* opinion: the Court's determination that Congress neither expressly nor implicitly required that the Commission incorporate the 100-to-1 ratio into the guidelines, and its corresponding reference to congressional policy embodied in section 994(h), as distinct from guideline or Commission policy.²⁵⁷

In a similar vein, several circuits have considered whether the child pornography guidelines deserve less weight at sentencing because Congress directly amended them. In *United States v. Dorvee*, the Second Circuit concluded that USSG §2G2.2 is "fundamentally different" from most other guidelines because it was not based on "an empirical approach based on data about past practices" but promulgated "at the direction of Congress[.]"²⁵⁸ The circuit court

went further by encouraging district courts "to take seriously the broad discretion they possess in fashioning sentences under §2G2.2 . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."²⁵⁹ The Third and Ninth Circuits agreed, concluding that a district court may give less weight to §2G2.2 because, as the Third Circuit stated, it "was not developed pursuant to the Commission's institutional role and based on empirical data and national experience, but instead was developed largely pursuant to congressional directives."²⁶⁰

The First Circuit, while acknowledging the district court's authority to vary because of a policy disagreement with the child pornography guidelines, recognized that this discretion also includes the authority to agree with the congressional policies inherent in a certain guideline:

Even though a guideline is affected by congressional adjustment, a sentencing court may rely on it. We see no reason why it would be somehow invalid for a district court, in its broad sentencing discretion, to conclude that its reason for rejecting a

²⁵⁶ See, e.g., *United States v. Michael*, 576 F.3d 323, 327 (6th Cir. 2009) ("A district court may lawfully conclude [] that the policies underlying the career-offender provisions – including their implicit incorporation of the 100:1 ratio – yield a sentence 'greater than necessary' to serve the objectives of sentencing.") (internal quotations omitted).

²⁵⁷ See, e.g., *United States v. Gomez-Herrera*, 523 F.3d 554, 559, 562 (5th Cir. 2008) ("[I]n *Kimbrough*, which concerned a district court's ability to sentence in disagreement with Guideline policy, does not control this case, which concerns a district court's ability to sentence in disagreement with Congressional policy [B]ecause any disparity that results from fast-track programs is intended by Congress, it is not 'unwarranted' within the meaning of § 3553(a)(6)."); *United States v. Vazquez*, 558 F.3d 1224, 1228 (11th Cir. 2009), cert. granted, judgment vacated, 130 S. Ct. 1135 (Jan. 19, 2010) ("[I]n *Kimbrough* does not gut our analysis in *Williams* [that variances based on a disagreement with the career offender guideline are improper]. To the contrary, the Supreme Court expressly made a distinction between the Guidelines' disparate treatment of crack and powder cocaine offenses -- where Congress did not direct the Sentencing Commission to create this disparity -- and the Guideline's punishment of career offenders -- which was explicitly directed by Congress.").

²⁵⁸ 616 F.3d 174, 184 (2d Cir. 2010).

²⁵⁹ *Id.* at 188.

²⁶⁰ *United States v. Grober*, 624 F.3d 592, 608 (3d Cir. 2010); *United States v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011) ("[T]he history of the child pornography Guidelines reveals that, like the crack-cocaine Guidelines at issue in *Kimbrough*, the child pornography Guidelines were not developed in a manner 'exemplify[ing] the [Sentencing] Commission's exercise of its characteristic institutional role,' . . . so district judges must enjoy the same liberty to depart from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*."); see also *United States v. Huffstatler*, 571 F.3d 620, 623 (7th Cir. 2009) (a district court "perhaps" has the freedom to sentence below the child pornography guidelines, but it is "certainly not required to do so; 'perhaps for good reason, the government did not take issue with Huffstatler's premise that the child-exploitation guidelines lack an empirical basis. As the Sentencing Commission itself stated, '[m]uch like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses.'").

Kimbrough variance is that it values congressional input. If these results seem inconsistent, it is only because a sentencing court's discretion is so broad. After *Kimbrough*, the law allows one judge to find that congressional input makes a sentence less empirical, and so less appropriate, while another judge may reasonably find such input makes the sentence more reflective of democratic judgments of culpability, and so more reasonable.²⁶¹

The Sixth Circuit called the criticism of guidelines based on congressional directives “misguided” and explained that in our system of government, defining crimes and fixing penalties are legislative functions. While Congress has delegated limited authority to the Commission, “it is normally a constitutional virtue, rather than vice, that Congress exercises its power directly, rather than hand it off to an unelected commission.”²⁶² The circuit court emphasized that it

was not constraining district court discretion to disagree with the child pornography guidelines on policy grounds, but rather holding that “the fact of Congress’ role in amending a guideline is not itself a valid reason to disagree with the guideline.”²⁶³ Moreover, the Sixth Circuit found that the argument that the Commission had departed from its usual role in amending §2G2.2 “simply misse[d] the point”: “It is true that the Commission did not act in its usual institutional role with respect to the relevant amendments to §2G2.2. But that is because *Congress* was the relevant actor with respect to those amendments; and that puts §2G2.2 on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*.”²⁶⁴

The import of congressional directives to the Commission took on a different significance in the context of the EDP and career offender guidelines. With respect to EDP departures, the existence of fast track programs in some, but not all districts, generated significant circuit conflict about whether a district court may vary on the basis of this disparity. The Fifth, Ninth, and Eleventh Circuits disapproved of variances on this basis, explaining that “*Kimbrough*, which concerned a district court’s ability to sentence in disagreement with Guideline policy, does not control this case, which concerns a district court’s ability to sentence in disagreement with Congressional policy.”²⁶⁵ Furthermore, “because any disparity that

²⁶¹ *United States v. Stone*, 575 F.3d 83, 93 (1st Cir. 2009) (“[A] district court is free to agree with the guidelines (or, at least, some particular guideline). Part of this freedom must be a freedom to agree with the guidelines because the sentencing court believes that the guidelines express some societal wisdom beyond what an entirely unrestricted sentencing judge might possess. Thus, part of the sentencing court’s broad discretion must be the discretion to conclude that guidelines are convincing for various reasons, including that they reflect popular will.”) (internal citations omitted).

²⁶² *United States v. Bistline*, 665 F.3d 758, 762 (6th Cir. 2012) (“Congress can marginalize the Commission all it wants: Congress created it.”); *see also* *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (“The [child pornography] Guidelines involved in Pugh’s case . . . do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*.”); *but see* *United States v. Irely*, 612 F.3d 1160, 1212 n.32 (11th Cir. 2010) (“In *Pugh*, we rejected the notion that *Kimbrough*-style policy disagreement could justify the district court’s decision to impose a probation-only sentence in a child pornography case where the minimum guidelines sentence was 97 months. . . . We do not rule out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines. We hold simply that in this case (involving production of child pornography), as in *Pugh* (involving possession of child

pornography), the district court did not come close to doing so.”).

²⁶³ *Bistline*, 665 F.3d at 762; *see also* *United States v. Plate*, 361 F. App’x 318, 332 (3d Cir. 2010) (holding that a sentence is not substantively unreasonable solely on the basis that §2G2.2 was based on statutory directives; “*Kimbrough* did not hold it impermissible for a guideline to be formulated based on statutory directives, but that when it is so formulated, a court may choose to give it less weight.”).

²⁶⁴ *Bistline*, 665 F.3d. at 763.

²⁶⁵ *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008) (“*Kimbrough* addressed only a district court’s discretion to vary from the Guidelines based on a disagreement with Guideline, not Congressional, policy.”); *see also* *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008) (same); *United States v. Gonzalez-Zoleta*, 556 F.3d 736, 741 (9th Cir. 2009) (“[T]he judge’s downward departure reflected not a disagreement with the Guidelines, but with congressional policy authorizing

results from fast-track programs is intended by Congress, it is not ‘unwarranted’ within the meaning of § 3553(a)(6).”²⁶⁶ Other circuits adopted the opposite view, concluding that the Commission did not “take[] account of empirical data and national experience in formulating” the fast track departure scheme,²⁶⁷ and therefore, “guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract.”²⁶⁸ The Department of Justice has recently changed its policy to require EDP programs in all districts for illegal entry offenses.²⁶⁹ However, criteria for qualifying for the departure and the amount of the reduction from the guideline minimum (within the 4-level-reduction limit in USSG §5K3.1), remain within the discretion of the United States Attorney for each district. Therefore, regional differences in the programs may continue.

The division among the circuits with respect to the career offender guideline continues unresolved. In the immediate aftermath of *Kimbrough*, the Seventh and Eleventh Circuits held that district courts lack the discretion to vary on the basis of a policy disagreement with the career offender guideline because, in the words of the Seventh Circuit in *United States v. Welton*, “[u]nlike the crack/powder disparity, the career offender Guideline range is the product of a

Congressional mandate” and “the statutory origin of the disparity embedded in §4B1.1 removes that disparity from the sentencing discretion provided by *Kimbrough*.”²⁷⁰ The Eleventh Circuit in *United States v. Vazquez* pointed to the Supreme Court’s specific citation to section 994(h) in *Kimbrough*: “[*Kimbrough* does not gut our analysis in *Williams* [that variances based on a disagreement with the career offender guideline are improper]. To the contrary, the Supreme Court expressly made a distinction between the Guidelines’ disparate treatment of crack and powder cocaine offenses -- where Congress did not direct the Sentencing Commission to create this disparity -- and the Guideline’s punishment of career offenders -- which was explicitly directed by Congress.”²⁷¹

The reasoning of these courts “seems to be falling out of favor.”²⁷² The government confessed error in both *Welton* and *Vazquez* – the government asked the Seventh Circuit to overrule *Welton*, which it did in *United States v. Corner*,²⁷³ and in *Vazquez*, the Solicitor General argued that:

the reference to Section 994(h) was not intended to suggest that Congress had also bound *sentencing courts* to follow the career offender Guidelines. Such a conclusion would have to rest on a faulty premise: that congressional directives to the Sentencing Commission are equally binding on the courts.²⁷⁴

In addition, in a case before the Third Circuit, the government “concede[d] that a sentencing court may vary downward from the Guidelines range

downward departures for fast-track defendants. While *Kimbrough* permits a district court to consider its policy disagreements with the Guidelines, it does not authorize a district judge to take into account his disagreements with congressional policy.”).

²⁶⁶ *Gomez-Herrera*, 523 F.3d at 562.

²⁶⁷ *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (internal quotations omitted); *see also* *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 155 (3d Cir. 2009) (indicating that the Commission did not use an empirical approach but “[r]ather, it quickly adopted the congressional language.”).

²⁶⁸ *Rodriguez*, 527 F.3d at 227.

²⁶⁹ On January 31, 2012, the Deputy Attorney General issued a memorandum in requiring all districts to create fast track programs for felony illegal reentry offenses. *See* Memorandum of James M. Cole, Deputy Attorney General, *Department Policy on Early Disposition or “Fast-Track” Programs* (Jan. 31, 2012) available at <http://www.justice.gov/dag/fast-track-program.pdf>.

²⁷⁰ 583 F.3d 494, 496-97 (7th Cir. 2009), *overruled by* *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010).

²⁷¹ *United States v. Vazquez*, 558 F.3d 1224, 1228 (11th Cir. 2009), *vacated*, 130 S. Ct. 1135 (2010).

²⁷² *United States v. Merced*, 603 F.2d 203, 218 (3d Cir. 2010).

²⁷³ *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010).

²⁷⁴ *United States v. Vazquez*, 796 F. Supp. 2d 1370, 1374 (M.D. Fl. 2011) (emphasis in original).

generated by the career offender provision based solely on a policy disagreement with the scope of that provision.”²⁷⁵ This concession brought the government’s position in line with the decisions of the First, Sixth, Eighth, Ninth, and, following *Corner*, Seventh Circuits.²⁷⁶

These circuits have held, in the words of the Sixth Circuit, that a district court “may lawfully conclude[] that the policies underlying the career-offender provisions . . . yield a sentence ‘greater than necessary’ to serve the objectives of sentencing.”²⁷⁷

²⁷⁵ *Merced*, 603 F.2d at 218. Based on the government’s concession, the Third Circuit assumed that it was permissible to vary from §4B1.1 based on a policy disagreement, but held that the district court had provided inadequate explanation of the reasons for its variance in this case. *Id.* at 219.

²⁷⁶ See *United States v. Boardman*, 528 F.3d 86 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651 (2d Cir. 2008); *United States v. Michael*, 576 F.3d 323 (6th Cir. 2009); *United States v. Gray*, 577 F.3d 947 (8th Cir. 2009); *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010).

²⁷⁷ *United States v. Michael*, 576 F.3d 323, 327 (6th Cir. 2009); see also *United States v. Sanchez*, 517 F.3d 651, 663 (2d Cir. 2008) (“Section 994(h), [] by its terms, is a direction to the Sentencing Commission, not to the courts, and it finds no express analog in Title 18 or Title 21. While 21 U.S.C. § 841(b) expressly establishes the minimum and maximum prison terms that the court is allowed to impose for violations of § 841(a), there is no statutory provision instructing the court to sentence a career offender at or near the statutory maximum.”); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (“we do not see why disagreement with the Commission’s policy judgment [] would be any less permissible a reason to deviate than disagreement with the guideline policy judgment at issue in *Kimbrough*.”); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (“On the more general question of a district court’s authority to vary from the guidelines, the Supreme Court in *Kimbrough* quoted the government’s concession that a district court may vary based on policy considerations, including disagreements with the guidelines, [] and the district court [in the instant case] gave no indication that it failed to understand its authority to vary from the career-offender guideline on that basis.”); *United States v. Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010) (“As the Supreme Court through *Booker*, *Kimbrough*, and *Spears* has instructed, and as other circuits that have confronted the crack/powder variance in the sentence of a career offender have accepted and clarified in their circuit law, sentencing judges can reject *any* Sentencing Guideline, provided that the sentence imposed is reasonable.”) (emphasis in original).

The Seventh Circuit explained its changed position from *Welton* to *Corner* as follows:

Further reflection has led us to conclude that the Justices’ reference to § 944(h) in *Kimbrough* does not equate §4B1.1 with either § 994(h) or the statutory maximum sentence that the career-offender guideline must be “at or near.” The Court made two related points in *Kimbrough*: first, the crack/powder ratio in the Guidelines was the choice of the Commission rather than Congress; second, district judges are entitled to disagree with the Commission’s policy choices, as long as judges follow all statutes. The reference to § 994(h) in *Kimbrough* concerned the first of these points rather than the second; and it is the second, reiterated in *Spears*, that controls the career-offender issue.²⁷⁸

The Seventh Circuit concluded: “Because §4B1.1 is just a Guideline, judges are as free to disagree with it as they are with §2D1.1(c) (which sets the crack/powder ratio). No judge is *required* to sentence at variance with a Guideline, but every judge is at liberty to do so.”²⁷⁹

Although not specifically addressing congressional directives to the Commission, *Pepper v. United States* also addressed the authority of district courts to disregard those guideline policy statements with which they disagree, and may affect future circuit court decisions about sentencing courts’ authority to reject other guideline policies.²⁸⁰ In addition, as a matter of statutory interpretation, the Court declined the invitation to give greater weight to the guidelines and policy statements than to any other § 3553(a) factor.²⁸¹

²⁷⁸ *Corner*, 598 F.3d at 415 (“Sentencing judges must implement all statutes, whether or not the judges agree with them – but all § 994(h) requires is that the Sentencing Commission set the presumptive sentencing range for certain serial criminals at or near the statutory maximum.”).

²⁷⁹ *Id.* at 416 (emphasis in original).

²⁸⁰ 131 S. Ct. 1229 (2011).

²⁸¹ *Id.* at 1249.

Specifically, the question in *Pepper* was whether a district court may, on resentencing a defendant after a successful appeal, look to evidence of the defendant's post-sentencing rehabilitation to support a downward variance from the guideline range.²⁸² The Court found it "clear" that such evidence "may, in appropriate cases, support a downward variance from the advisory Guidelines range."²⁸³ The Court noted that 18 U.S.C. § 3661 made no distinction between an initial sentencing and any subsequent resentencing on remand; instead, the Court said a categorical ban on the consideration of post-sentencing rehabilitation evidence would contravene this provision. Moreover, the Court observed that post-sentencing rehabilitation evidence "may also critically inform a sentencing judge's overarching duty under section 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in section 3553(a)(2)."²⁸⁴ In short, the Court concluded that a prohibition on the consideration of such post-sentencing rehabilitation evidence "conflicts with longstanding principles of federal sentencing law and contravenes Congress' directives in §§ 3661 and 3553(a)."²⁸⁵ Accordingly, the Court held "as with the provisions in *Booker*, the proper remedy here is to invalidate § 3742(g)(2)," a provision of the SRA that limited resentencing to grounds expressly relied upon in the prior sentencing.²⁸⁶

The Court also expressly disagreed with the Commission's reasoning as stated in the commentary to §5K2.19,²⁸⁷ which provided that "[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when

resentencing the defendant for that offense."²⁸⁸ In rejecting the policy statement, the court noted that the policy found no support in section 3661's broad requirement that "no limitation" be placed "on the information concerning the background, character, and conduct" of the offender before the court.

The Court "recognized that the Commission post-*Booker* continues to 'fil[il] an important institutional role' because '[i]t has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise'" and the guidelines themselves are due "respectful consideration" at sentencing.²⁸⁹ Nevertheless, the Court emphasized that "a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views" and stated, "[t]hat is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."²⁹⁰ Finally, the Court declined the invitation to elevate the guidelines' policy statements (18 U.S.C. § 3553(a)(5)) and the need to avoid unwarranted sentence disparities (18 U.S.C. § 3553(a)(6)) above all other section 3553(a) factors.²⁹¹

To the extent that courts may disagree with guideline and congressional policy in favor of their own policy views, individual judges, sentencing practitioners, and academics are divided about whether district court judges should be allowed to take policy disagreements into account at sentencing. Some believe sentences based on policy disagreements should be reviewed with greater scrutiny on appeal, while others believe such heightened scrutiny would present constitutional problems by tending to make the guidelines more mandatory.²⁹²

²⁸² *Id.* at 1235.

²⁸³ *Id.* at 1241.

²⁸⁴ *Id.* at 1242.

²⁸⁵ *Id.* at 1243.

²⁸⁶ *Id.* at 1245.

²⁸⁷ *Id.* at 1248. The Commission deleted §5K2.19 effective November 1, 2012. USSG App. C, amend. 768 (Nov. 1, 2012).

²⁸⁸ USSG §5K2.19, p.s. (Nov. 2011).

²⁸⁹ *Pepper*, 131 S. Ct. at 1247.

²⁹⁰ *Id.* (citing *Kimbrough*, 552 U.S. at 109-110).

²⁹¹ *Id.* at 1249.

²⁹² Compare, e.g., *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Gerard Lynch, Circuit Judge, United States Court of Appeals for the Second Circuit, transcript at 104-05) ("[T]he result that judges are free, individually, to disagree with the policy of the Guidelines is what strikes at the heart of the Guidelines

In sum, disagreements in circuits and among practitioners regarding when courts may disregard Commission policy – and even congressional policy – and the permissible grounds for doing so have not been resolved. Further, the courts are divided on two important questions: how much weight should be given to guidelines resulting from congressional directives to the Commission; and the appropriate interaction between the proscriptions and limitations on consideration of offender characteristics in section 994 of Title 28 and the courts’ consideration of offender characteristics in section 3553(a).

POST-BOOKER APPELLATE REVIEW

Presumption of Reasonableness

In *Rita v. United States*,²⁹³ the Supreme Court responded to a division among the circuits that had arisen since *Booker*: the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits adopted the rule that a sentence within the applicable guideline range is “presumed reasonable” on appeal,²⁹⁴

system. . . . I think [policy disagreements are] the biggest problem with the current system, and I would like to see stronger appellate review in those cases. . . . I think it is a good idea that policy disagreements, however defined, should be subject to de novo review in the courts of appeals, and ultimately in the Supreme Court, so that we do not have a system where some judges think that child pornography is not to be sentenced as severely, and others take a completely different approach.”) and *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Statement of Matthew Miner, Attorney, written statement at 8) (“I also support the Commission’s proposal for heightened appellate scrutiny for sentencing decisions that are based upon policy disagreements with the Guidelines.”), with *U.S. Sent’g Comm’n Public Hearing on Federal Sentencing Options After Booker*, Washington, DC (Feb. 16, 2012) (Testimony of Henry Bemporad, Federal Public Defender, Western District of Texas, transcript at 118) (“if judges are not free to disagree with the Guidelines on the basis of policy. . . if judges on the courts of appeals are substituting their judgments on this factor, it is going to lead to unconstitutional sentences.”).

²⁹³ 551 U.S. 338 (2007).

²⁹⁴ *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th

but the First, Second, Third, Ninth, and Eleventh Circuits held to the contrary.²⁹⁵ In adopting a presumption of reasonableness, the Seventh and Tenth circuits had emphasized the need for nationwide uniformity.²⁹⁶ The First and Third Circuits had declined to adopt a presumption of reasonableness due to the concern that a presumption would tend in the direction of making the guidelines mandatory.²⁹⁷ The Ninth Circuit had rejected a presumption of reasonableness because it found that a non-binding presumption would have little practical effect.²⁹⁸ Ultimately, the Court affirmed *Rita*’s within range sentence, and held that courts of appeals may, but need not, apply a presumption of reasonableness when reviewing within range sentences.²⁹⁹

In allowing the courts of appeals to adopt a presumption of reasonableness, the Court emphasized the close relationship between the guidelines and the section 3553(a) factors.³⁰⁰ First, the Court discussed

Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1053-54 (10th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006).

²⁹⁵ *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006), *abrogated on other grounds as recognized in* *United States v. Wells*, 279 F. App’x 100 (3d Cir. 2008); *United States v. Carty*, 520 F.3d 984, 993-94 (9th Cir. 2008) (en banc); *United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006).

²⁹⁶ *Mykytiuk*, 415 F.3d at 607-608; *Kristl*, 437 F.3d at 1054. For the various circuits’ reasoning on this issue, see Part B of this report, available online.

²⁹⁷ *Jimenez-Beltre*, 440 F.3d at 518; *Cooper*, 437 F.3d at 331.

²⁹⁸ *Carty*, 520 F.3d at 993-94.

²⁹⁹ *Rita*, 551 U.S. at 347-48. In *Nelson v. United States*, the Supreme Court reiterated that the presumption of reasonableness is an appellate presumption only: “[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, explaining any variance from the former with reference to the latter.” 555 U.S. 350, 351 (2009).

³⁰⁰ *Rita*, 551 U.S. at 348.

the statutory provisions governing the promulgation of the guidelines and how those provisions mirror the factors that § 3553(a) requires sentencing courts to consider, noting that “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.”³⁰¹

According to the Court:

[T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) The provision also tells the sentencing judge to “impose a sentence sufficient, but not greater than necessary, to comply with” the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same section 3553(a) objectives.³⁰²

Second, the Court discussed the process the Commission used to initially promulgate and subsequently amend the guidelines, concluding that the guidelines “seek to embody the § 3553(a) considerations, both in principle and in practice,” and that they “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.”³⁰³ Accordingly, the Court held that a rebuttable presumption of reasonableness at the appellate level “simply recognizes the real-world circumstance that when the judge’s discretionary decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is probable

that the sentence is reasonable.”³⁰⁴ Nonetheless, even after *Rita*, in some circuits a sentence within a properly determined guideline range is presumed reasonable on appeal, while in others it is not.

Reasonableness Review

In *Gall v. United States*,³⁰⁵ the Supreme Court made clear that reasonableness review is a two-step process in which the courts of appeals first consider procedural reasonableness by determining whether the sentencing court correctly determined the guideline range, properly considered the § 3553(a) factors, and sufficiently explained the sentence imposed; and then consider the substantive reasonableness of the sentence.³⁰⁶ The first step is “to ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.”³⁰⁷ “Assuming that the district court’s sentencing decision is procedurally sound, the appellate court,” as a second step, should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard,³⁰⁸ taking into account “the totality of the circumstances.”³⁰⁹ Moreover, the Court emphasized, “[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”³¹⁰

The Supreme Court considered whether the standard of review differs for sentences within the

³⁰¹ *Id.*

³⁰² *Id.* (emphasis in original).

³⁰³ *Id.* at 350.

³⁰⁴ *Id.* at 350-51.

³⁰⁵ 552 U.S. 38 (2007).

³⁰⁶ *Id.* at 51. *But see Rita*, 551 U.S. at 370 (“I would hold that reasonableness review cannot contain a substantive component at all.” (Scalia, J., dissenting.)).

³⁰⁷ *Gall*, 552 U.S. at 51.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

guideline range and those outside the guideline range. The Court held that an abuse of discretion standard applies equally to all sentences “whether inside, just outside, or significantly outside the Guidelines range.”³¹¹ Where the sentence varies from the guideline range, the appellate court “may consider the extent of the deviation but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”³¹²

The Court also addressed whether the standard of review is heightened depending on how far outside the guideline range the sentence falls. The Court stated that it is “clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.”³¹³ However, the Court rejected any “appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range” or “the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.”³¹⁴ Such rules or formulas, the Court noted, “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”³¹⁵ Moreover, such rules and formulas would be “inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions — whether inside or outside the Guidelines range.”³¹⁶

Nonetheless, if a court chooses a sentence outside the guideline range, the court “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance”³¹⁷ and must provide an

explanation sufficient “to allow for meaningful appellate review and to promote the perception of fair sentencing.”³¹⁸ Furthermore when a judge varies in a “mine-run case” based “solely on the judge’s view that the Guidelines range ‘fails properly to reflect § 3553(a) considerations,’” closer review may be in order.³¹⁹

Reasonableness Review after Rita and Gall

The courts of appeals have uniformly recognized that the appellate court’s role is to determine whether the sentence is procedurally sound and falls within the broader range of reasonable sentences, not whether the sentence was the correct sentence.³²⁰ However, review of the circuits’ sentencing cases reveals variations among the circuits’ stated approaches to this two-step review, as well as differences between the circuits’ stated approaches and their actual practices.

These differences range from the types of reasonableness a court will consider on appeal, to the factors sentencing courts are permitted to consider, to the manner in which an appellate court will determine whether a sentence is substantively unreasonable. Some circuits focus more on procedural reasonableness than substantive reasonableness. For example, the Ninth Circuit has held that “appellate courts have a *sua sponte* duty to undertake a review for procedural error even where . . . no such error is expressly asserted by the [parties].”³²¹ At least one

³¹¹ *Id.* at 41.

³¹² *Id.* at 51.

³¹³ *Id.* at 46.

³¹⁴ *Id.*

³¹⁵ *Id.* at 47.

³¹⁶ *Id.* at 49.

³¹⁷ *Id.* at 50.

³¹⁸ *Id.*

³¹⁹ *Id.* at 109-110 (citations omitted).

³²⁰ See, e.g., *United States v. Treadwell*, 593 F.3d 990, 1015 (9th Cir. 2010) (discussing the “broad range of sentences that would be reasonable in the particular circumstances”); *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (en banc) (“if the district court’s sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.” Additional caselaw on this topic can be found in Part B of this report, available online.

³²¹ *United States v. Evans-Martinez*, 611 F.3d 635, 638 (9th Cir. 2010) (*citing* *United States v. Rexam*, 593 F.3d 1095, 1115 (9th Cir. 2010), *opinion superseded by* 679 F.3d 1069 (9th Cir. 2012) (en banc)).

circuit does not read *Gall* to require such review absent an argument by the parties.³²² Similarly, at least one circuit considers *Gall*'s instructions to preclude a review for substantive reasonableness when procedural errors are found,³²³ while another circuit elects to rule on substantive reasonableness even where procedural errors are established.³²⁴ Moreover, there are cases in several circuits that blur the line between procedural and substantive reasonableness; in at least two circuits, grave procedural errors may render a sentence substantively unreasonable.³²⁵

Procedural Reasonableness Review

The courts of appeals have not taken a uniform approach to the depth of explanation

³²² *United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009) (examining only the substantive reasonableness of the sentence where the appellant did not challenge the procedural reasonableness of the sentence).

³²³ *United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006) (“the new reasonableness standard of review established in *Booker* comes into play only if there was no material error in the district court’s calculation of the appropriate Guidelines range”); *c.f.* *United States v. Vickers*, 528 F.3d 1116, 1120 (8th Cir. 2008) (“Absent reversible procedural error, we then review the reasonableness of the court’s sentence for abuse of discretion.”).

³²⁴ *United States v. Dorvee*, 616 F.3d 174, 182-83 (2d Cir. 2010) (“nothing in our existing sentencing law prevents us from reaching both the procedural and substantive reasonableness of the sentence in the course of an appeal where we find both types of error. . . It is especially appropriate to reach the matter of substantive unreasonableness now because we have found and identify here certain serious flaws . . . which are squarely presented on *this* appeal and which must be dealt with by the district court at resentencing.”) (internal quotations omitted).

³²⁵ *United States v. Lychock*, 578 F.3d 214, 218 (3d Cir. 2009) (district court’s analysis was so “procedurally flawed” as to result in a substantively unreasonable sentence); *United States v. Olhovsky*, 562 F.3d 530, 553 (3d Cir. 2009) (same); *United States v. Goff*, 501 F.3d 250, 256-57 (3d Cir. 2007) (same); *United States v. Friedman* 554 F.3d 1301, 1312 (10th Cir. 2009) (“the very limited nature of the record and the paucity of reasoning on the part of the district court most certainly bear on our review of the substantive reasonableness”).

necessary for a sentence to be deemed procedurally sound. Many circuits clearly state that a sentencing court need not explain why it is *not* imposing a certain sentence proposed by either the government or the defendant.³²⁶ However, some appellate courts have faulted sentencing courts for failing to make such explanations. For example, in *United States v. Hall*, the District of Columbia Circuit reversed a within range sentence where, among other things, “the district court did not explain why, in view of the factors in 18 U.S.C. § 3553(a), a sentence of 188 months was necessary, much less why the lower sentence that Hall requested would be insufficient.”³²⁷

In contrast, in some circuits an adequate explanation may render procedural error harmless. If the court uses the wrong starting point, for example by miscalculating the guidelines, the sentence will withstand appeal in most cases as long as the court recognizes the potential calculation error and announces that it would impose the same sentence under section 3553(a) regardless of the erroneous computation.³²⁸ Even the Ninth Circuit, which appears

³²⁶ *See, e.g., United States v. Wallace*, 597 F.3d 794, 804 (6th Cir. 2010) (“It is well-settled that a district judge need not give the reasons for rejecting any and all arguments by the parties for alternative sentences, nor must she give the specific reason for a within guidelines sentence.”) (internal quotation marks omitted); *United States v. Vargas*, 560 F.3d 45, 52 (1st Cir. 2009) (a sentencing court is not required “to provide a lengthy and detailed statement of its reasons for refusing to deviate” from the guideline range).

³²⁷ 610 F.3d 727, 745 (D.C. Cir. 2010). *See also United States v. Akhigbe*, 642 F.3d 1078, 1086 (D.C. Cir. 2011) (“Reviewing the sentencing proceedings as a whole . . . we conclude that the court plainly erred in failing to provide an adequate explanation for the unsought above-Guidelines sentence imposed”).

³²⁸ *See, e.g., United States v. Barner*, 572 F.3d 1239, 1248 (11th Cir. 2009) (“Where a district judge clearly states that he would impose the same sentence, even if he erred in calculating the guidelines, then any error in the calculation is harmless.”); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009) (same); *United States v. O’Georgia*, 569 F.3d 281, 296 (6th Cir. 2009) (“Where a Guidelines departure provision has been erroneously applied, the resulting sentence may still be procedurally reasonable if the district court has adequately explained it by reference to the 18 U.S.C. § 3553(a) factors. In such a case, the sentence would be unreasonable as a departure but reasonable as a variance from the advisory Guidelines range.”); *United States v.*

to have adopted a general rule of reversing sentences imposed after an improper calculation of the guideline range,³²⁹ has failed to adopt an explicit *per se* reversal rule.³³⁰

Likewise, courts of appeals take different approaches to the appropriate section 3553(a) factors to be considered at sentencing. For example, in one case the First Circuit rejected as unreasonable an upward variance from a range of zero to six months to a sentence of 48 months because the defendant had been deported twice before and was subject to an unexecuted bench warrant for a prior arrest.³³¹ In contrast, the Fifth Circuit has held that an upward departure from a range of 24 to 30 months to a sentence of 72 months was reasonable based upon the sentencing court's reliance on the defendant's criminal history and post-deportation re-entry arrests as

evidence that the defendant had "no respect" for the laws of the United States.³³²

Substantive Reasonableness Review

Although a direct assessment of how uniformly courts conduct substantive reasonableness review is difficult, a review of cases suggests appellate courts have reached different outcomes for seemingly similarly situated defendants. A review of child pornography and fraud cases illustrates that courts of appeals may reach different outcomes in similar cases, based in part on which sentencing factors the circuit court chooses to emphasize in that particular case.

In the area of child pornography the Ninth Circuit in *United States v. Autery*³³³ found a sentence of probation provided just punishment and adequate deterrence based on the defendant's personal characteristics, while the Eleventh Circuit in *United States v. Pugh*³³⁴ found that a sentence of probation did not provide adequate general deterrence or protect the public. In both cases, the defendants had no criminal history and no known history of sexual misconduct. In *Autery* the district court emphasized that the defendant "did not 'fit the profile of a pedophile,'"³³⁵ and had the support of his family as well as "redeeming personal characteristics," including "no history of substance abuse, no 'interpersonal instability,' no 'sociopathic or criminalistic attitudes.'"³³⁶ In upholding the probationary sentence as substantively reasonable, the Ninth Circuit emphasized the district court's assessment that the defendant was not a pedophile and that his "redeeming personal characteristics" were sufficient to support the district court's conclusion that the defendant's case was not a mine-run child pornography possession case, and did not lead to unwarranted sentencing disparities.³³⁷ In contrast, in reversing Pugh's probationary sentence as

Henson, 550 F.3d 739, 742 (8th Cir. 2008) (guideline calculation error is harmless if court recognizes specific potential for error and expressly states same sentence would be imposed in absence of error). *But c.f.* *United States v. Bah*, 439 F.3d 423, 432 (8th Cir. 2006) ("[T]he district court cannot preemptively announce an alternative sentence under the § 3553(a) factors without first having determined the correct advisory guidelines range").

³²⁹ *United States v. Pham*, 545 F.3d 712, 716 (9th Cir. 2008) ("If upon review we conclude that the district court committed a 'significant procedural error,' such as a 'material error in the Guidelines calculation that serves as the starting point for the district court's sentencing decision, we will remand for resentencing pursuant to 18 U.S.C. § 3742(f).' If no such material error in applying the Guidelines is found, however, we may go on to evaluate the sentence for its substantive reasonableness under an abuse of discretion standard.") (citations omitted).

³³⁰ *United States v. Cantrell*, 433 F.3d 1269, 1279 n.3 ("We leave open the question whether, and under what circumstances, district courts may find it unnecessary to calculate the applicable Guidelines range.").

³³¹ *United States v. Zapate-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006). *See also* *United States v. Poynter*, 495 F.3d 349, 354 (6th Cir. 2007) (holding that an above-guideline sentence for a repeat child sex offender is substantively unreasonable where the sentencing court relied on recidivism, which is "a problem common to all repeat sex offenders" and the guideline "was meant to account for the problem of recidivism").

³³² *United States v. Lopez-Velasquez*, 526 F.3d 804, 807 (5th Cir. 2008);

³³³ 555 F.3d 864 (9th Cir. 2009).

³³⁴ 515 F.3d 1179 (11th Cir. 2008).

³³⁵ 555 F.3d at 867.

³³⁶ *Id.* at 868.

³³⁷ *Id.* at 876.

substantively unreasonable, the Eleventh Circuit emphasized sentencing factors other than the defendant's personal characteristics, including general deterrence, the seriousness of the offense, the need to protect the public, and the need to avoid sentencing disparity.³³⁸

Even within range sentences in child pornography cases may be subject to different outcomes on substantive reasonableness review. In *United States v. Dorvee*, the Second Circuit held that a within range sentence was substantively unreasonable, and that “unless applied with great care, [application of the child pornography guideline] can lead to unreasonable sentences that are inconsistent with what section 3553(a) requires.”³³⁹ In contrast, the Seventh Circuit acknowledged the *Dorvee* court's view of the child pornography guidelines generally, but declined to adopt it.³⁴⁰ In particular, the Seventh Circuit concluded that “[w]hether one agrees or disagrees with the concerns expressed by the Second Circuit, it is ultimately for Congress and the Commission to consider these concerns.”³⁴¹

In fraud cases, different approaches to substantive review have led to discord among judges on the Ninth Circuit over the appropriateness of non-

imprisonment sentences for white collar criminals. In *United States v. Whitehead*, the defendant was convicted of selling unauthorized “access cards” which allowed purchasers to pirate copyrighted material from DirecTV, resulting in more than a million dollar loss to the company.³⁴² In dissenting from an opinion upholding a sentence of probation, which was a reduction from a guideline range of 41 to 51 months, Judge Bybee argued that the district court's decision was “not an exercise of discretion so much as an abdication of responsibility,”³⁴³ and expressed deep concern over the impact of the majority's decision on sentencing practice in the Ninth Circuit:

Whitehead's non-sentence surely becomes an important starting point for defendants in this circuit willing to claim close family ties and post-conviction remorse to avoid prison. As a circuit, we have an obligation to ensure roughly equal sentences both among our judicial districts and within each judicial district. Deferring equally to district court sentences is not the same as securing equal sentences in district court.³⁴⁴

In *United States v. Proserpi*,³⁴⁵ the First Circuit affirmed a sentence of probation, a downward variance from a range of 87 to 108 months, in a case in which “[t]he government charged that over the course of nine years [the defendants' company] knowingly provided concrete that failed to meet project specifications and concealed that failure by creating false documentation purporting to show that the concrete provided complied with the relevant

³³⁸ 515 F.3d at 1194-1203.

³³⁹ 616 F.3d at 183-84.

³⁴⁰ *United States v. Mantanes*, 632 F.3d 372, 376-77 (7th Cir. 2011).

³⁴¹ *Id.* at 377. In a subsequent case, the Second Circuit declined to find a sentence imposed under the illegal reentry guideline unreasonable, and in so doing commented on its holding in *Dorvee*: “the absence of empirical support is not the relevant flaw we identified in *Dorvee*. We criticized the child pornography Guideline in *Dorvee* because Congress ignored the Commission and directly amended the Guideline, which had the effect of ‘eviscerat[ing] the fundamental statutory requirement in section 3553(a) that district courts consider the nature and circumstances of the offense and the history and characteristics of the defendant.’ There is no such flaw in the reentry Guideline. Congress did not bypass the usual procedure for amending the Guidelines with respect to illegal reentry cases. To the contrary, the 16-level enhancement in §2L1.2 was based on the Commission's own determin[ation] that these increased offense levels are appropriate to reflect the serious nature of these offenses.” *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (citations omitted).

³⁴² 532 F.3d 991, 992 (9th Cir. 2008).

³⁴³ *Id.* at 994 (Bybee, J., dissenting).

³⁴⁴ *Id.* at 999-1000 (Bybee, J., dissenting). *See also* *United States v. Edwards*, 622 F.3d 1215, 1216 (9th Cir. 2010) (Gould, J., dissenting) (“[O]ur court's practice of uncritically affirming unreasonably lenient sentences for white-collar criminals renders the Sentencing Guidelines a nullity, makes us an outlier among the circuit courts, and impairs our ability to effectively review sentences for substantive reasonableness.”).

³⁴⁵ 686 F.3d 32 (1st Cir. 2012).

specifications.”³⁴⁶ The concrete was used in Boston’s Central Artery/Tunnel project (the “Big Dig”) over a 16-year period. The project “was one of the largest public works projects in United States history at the time of its completion.”³⁴⁷ While recognizing that any loss calculation in the case would be imprecise given legitimate questions about whether the government sustained any loss at all,³⁴⁸ the court adopted the government’s \$5.2 million loss figure, but determined that the loss amount should not drive the sentence:

[L]oss is certainly important, but the crimes at issue do not fit the usual white collar crime profile. There was no intent on defendants’ part to enrich themselves personally. Nor is there any evidence that defendants intended to do harm to the [Big Dig] project or to the taxpaying public in any specific sense.³⁴⁹

In upholding the sentence, the First Circuit noted, among other things, that the district court had fulfilled its duty to consider the purposes of sentencing, including deterrence. The court of appeals found “plausible” the district court’s explanation of the sentence, including the lack of evidence that the substandard concrete created a safety issue, the court’s belief that the defendants were not seeking to enrich themselves, and the individual circumstances of the defendants.³⁵⁰

Other circuits have rejected sentences in fraud cases as substantively unreasonable because the court found the sentences too lenient.³⁵¹ For example, in *United States v. Engle*, the Fourth Circuit vacated a sentence of probation, a downward variance from a guideline range of 24 to 30 months. Engle had evaded taxes for 16 years and had a total tax liability

exceeding \$2 million.³⁵² While the Fourth Circuit recognized that after *Booker* a district court could disagree with the guidelines or its policy statements, it explained that the district court had not even acknowledged the policy statements and had given a significantly lower sentence in a case that some could believe warranted an *above* range sentence on the basis of the defendant’s lengthy tax evasion and his failure to pay anything toward his debt after receiving a lenient sentence.³⁵³ More specifically, the Fourth Circuit held that the district court’s near-total focus on the defendant’s ability to repay his debt was substantively unreasonable,³⁵⁴ noting that *Booker* and *Gall* did not “permit[] district courts to rest a sentencing decision exclusively on such constitutionally suspect grounds.”³⁵⁵

In *United States v. Martin*, a case involving securities and mail fraud in which the defendant’s guideline range was 108 to 135 months, the Eleventh Circuit found that a sentence of probation was “shockingly short and wholly fail[ed] to serve the purposes of sentencing as set forth by Congress in § 3553(a).”³⁵⁶ Similarly, in *United States v. Cutler*, a case involving “various charges relating to extensive bank frauds and tax frauds,” the Second Circuit rejected two downward departures, one from a range of 78 to 97 months down to a sentence of one year and one day of imprisonment for one defendant, and the other from a range of 108 to 135 months down to probation for another defendant, based on their extraordinary family circumstances, need to pay restitution, health, age, and “public humiliation” associated with the charges.³⁵⁷

³⁵² 592 F.3d 495 (4th Cir. 2010).

³⁵³ *Id.* at 502-03.

³⁵⁴ *Id.* at 504.

³⁵⁵ *Id.* at 505.

³⁵⁶ 455 F.3d 1227, 1239 (11th Cir. 2006).

³⁵⁷ 520 F.3d 136, 158-175 (2d Cir. 2008), questioned in *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (while not questioning the ultimate result in *Cutler*, the court noted that it will “set aside a district court’s *substantive* determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’”) (emphasis in original).

³⁴⁶ *Id.* at 34.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 43.

³⁴⁹ *Id.* at 38.

³⁵⁰ *Id.* at 50.

³⁵¹ See, e.g., *United States v. Givens*, 443 F.3d 642, 645 (8th Cir. 2006).

In addition to the different outcomes resulting from substantive reasonableness review, questions have arisen regarding how to calculate the size of a departure or a variance for purposes of appellate review. In *United States v. Castillo*,³⁵⁸ the Seventh Circuit upheld an above-range sentence of 60 months from a guideline range of 37 to 46 months in a false identification case under 18 U.S.C. § 1028. In so doing the court clarified “an ambiguity concerning the scope of appellate review of an above-guidelines sentence.” After noting that circuit precedent requires that “the farther the judge’s sentence departs from the guidelines . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer to enable the court of appeals to assess the reasonableness of the sentence imposed,” the court went on to identify an ambiguity in the word “farther.”³⁵⁹

“It can be conceived of in either relative or absolute terms,” according to the court, and a variance that is 30 percent longer than the top of the guideline range seems large, but “in absolute terms . . . it is a smallish 14 months.”³⁶⁰ The court determined that “the relative is generally more important than the absolute, as is implicit in a number of our previous decisions,” and gave greater weight to the percentage deviation, than to the number of months it represented.³⁶¹ In *Castillo*’s case, the court found the 30 percent upward variance reasonable, because the guidelines encourage an upward departure if the offense involved substantially more than 100 false documents, and *Castillo*’s offense involved 2,800 documents, “28 times the number of fraudulent documents that triggers the highest guideline sentence.”³⁶²

Other factors may limit the ability of the appellate process to “iron out sentencing differences,” as the Court anticipated in *Booker*.³⁶³ First, fewer than ten percent of all offenders appeal some aspect of their

sentence, and the proportion of cases that are appealed has diminished over time.³⁶⁴ This may be due in part to the prevalence of appeal waivers in plea agreements.³⁶⁵ Second, of the appeals in the Commission’s database,³⁶⁶ defendants initiate the vast majority. In most of these cases the court of appeals affirms the sentence. The number of appellate orders and opinions arising from appeals initiated by the government pales in comparison to the number of appeals initiated by defendants, but the government prevails in a higher percentage of its appeals. The Commission’s analysis of court orders and opinions issued in fiscal year 2011 showed that courts of appeals ruled on nearly 6,000 constitutional issues, reasonableness issues, and issues related to the section 3553(a) factors (as distinct from guideline determination issues) raised by the defendant, and approximately 30 such issues raised by the government.³⁶⁷

³⁶⁴ See Figure, “Number of Defendants Sentenced and Appeals Decided Fiscal Years 1993-2011,” Part B, available online.

³⁶⁵ Many factors likely contribute to the overall rate of appeal, including the prevalence of waivers of the right to appeal in plea agreements. See Nancy J. King and Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 53 DUKE L. J. 209, 219-225 (2005) (“Based on interviews and an analysis of data coded from 971 randomly selected cases sentenced under the United States Sentencing Guidelines, the study’s findings include (1) in nearly two-thirds of the cases settled by plea agreement, the defendants waived their rights to review”).

³⁶⁶ The appeals database includes orders and opinions, both published and unpublished, in direct appeals of federal criminal cases in which the defendant has been convicted and sentenced.

³⁶⁷ A more in-depth discussion of appeals data is in Part B, available online.

³⁵⁸ 695 F.3d 672 (7th Cir. 2012).

³⁵⁹ *Id.* at 673 (citations omitted).

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at 675.

³⁶³ 543 U.S. at 263.

Analysis of Federal Sentencing Data

METHODOLOGY

The Commission analyzed sentencing data for offenses in the aggregate and individually for five offense types and one commonly applied guideline: drug trafficking offenses³⁶⁸ under §§2D1.1 or 2D1.2 (all drugs combined, powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine); firearms offenses³⁶⁹ under §2K2.1; immigration offenses³⁷⁰

under §§2L1.1 or 2L1.2 (alien smuggling and illegal entry); fraud offenses³⁷¹ under §2F1.1 or §2B1.1; child pornography offenses³⁷² under §§2G2.1, 2G2.2, and

³⁶⁸ Drug trafficking offenses include distribution, possession with intent to distribute, or manufacture of controlled substances, or conspiracy or attempt to do the same, importation and exportations of controlled substances, or conspiracy or attempt to do the same. These offenses are sentenced under USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Drug trafficking offenses also include distribution of controlled substances to persons under 21 years of age, distribution, possession with intent to distribute, or manufacture controlled substances in or near protected locations, and employment or use of persons under the age of 18 in drug operations, and distribution of controlled substances to pregnant individuals. These offenses are sentenced under USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy).

³⁶⁹ Firearms offenses include unlawful possession/transportation of firearms or ammunition; unlawful acquisition of a firearm from a licensed dealer, receiving or possessing a stolen firearm or ammunition, making false statements regarding firearms recordkeeping, and possessing or receiving an unregistered firearm. These offenses are sentenced under USSG §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

³⁷⁰ Immigration offenses include smuggling, transporting or harboring an unlawful alien, and unlawfully entering or remaining in the United States. These offenses are sentenced under USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and USSG §2L1.2 (Unlawfully Entering or Remaining in the United States). The Commission has previously reported that beginning in fiscal year 2009 immigration cases became the most common serious federal crime. *See* U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009, at 1-2 (December 2010) (noting immigration cases comprised 32.2 percent of the federal caseload while drugs comprised 30.3 percent). However, that analysis was based on the defendant's statute of conviction, not on the guideline applied at sentencing.

³⁷¹ Fraud offenses include theft, embezzlement, fraud, forgery, some counterfeiting offenses, some insider trading offenses, simple property damage and destruction, and a wide variety of federal statutes and assimilative crimes sentenced under USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) with a primary offense type of fraud sentenced under a *Guidelines Manual* effective November 1, 2001 or later, or the former USSG §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) (deleted by consolidation with §2B1.1 effective November 1, 2001 (*see* USSG App. C, amend. 617)).

2G2.4 (production and non-production); and the career offender guideline, §4B1.1. These analyses are discussed in detail in Part C of this report, available online.

The data in this report necessarily differs in certain respects from the data published annually in the Commission's *Sourcebook of Federal Sentencing Statistics*. In the *Sourcebook*, offenses are generally classified by the offense of conviction, whereas in this analysis, offenses are classified by the guideline applied at sentencing. These two methods of defining cases are both useful for research analysis; the choice of which method to use depends on the type of analysis to be undertaken. For this report, the Commission classified offenses by the guideline applied at sentencing because it enables several analyses. The guidelines take into account real offense conduct, such as the presence of a weapon, or the amount stolen in a robbery, that are not accounted for by mere reference to the statute of conviction.³⁷³ If, for example, an offender convicted of a drug trafficking offense engaged in conduct in which a victim was killed, that offender might be sentenced pursuant to the guideline applicable to homicide rather than drug trafficking.³⁷⁴ Such an offender's sentence would not reflect the operation of the drug trafficking guideline, and therefore, including that sentence in the analysis of drug trafficking sentences would not contribute to an accurate analysis of the drug trafficking guideline. In summary, because the

offender's conduct ultimately determines the applicable sentencing range, classifying offenders by guideline rather than by statute of conviction facilitates a more precise analysis in which offenders engaged in similar criminal conduct are grouped together.

Complete guideline information is required for most of the analyses in this report, and therefore cases with missing data were excluded from the analyses. As a result, statistics in this report differ from those reported in the *Sourcebook*. For example, in fiscal year 2011, the Commission received sentencing information on 86,201 cases.³⁷⁵ However, the Commission received sufficient documentation for the analyses in this report in 76,216 individual cases for fiscal year 2011, the last full fiscal year available. The Commission excluded 9,985 cases because those cases lacked the complete documentation needed for the analyses performed in this report. In 8,164 of those cases, the majority of which were illegal entry offenses from border districts, the court waived the presentence investigation report. As a result, those cases lacked certain guideline application and demographic information. The Commission excluded other cases in which the statement of reasons form and the presentence investigation report contained conflicting information concerning guideline application, and therefore, the Commission could not ascertain how the Chapter Two guideline was applied.

In the additional parts of this report available online, each guideline-specific section begins with a brief discussion about the guideline and the statutes referenced to it, followed by detailed fiscal year 2011 data regarding the caseload and its distribution across the circuits and districts. The single year data is followed by analyses of trends over time with respect to demographic characteristics and criminal history of the offenders, the types of sentence imposed, the sentence relative to the range (*e.g.*, sentence length for within range, government sponsored below range, and non-government sponsored below range sentences), the rates of within and below range sentences, and the

³⁷² Child pornography offenses include the production, sale, distribution, transportation, shipment, receipt, or possession of materials involving the sexual exploitation of minors sentenced under USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), or USSG §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct) (deleted by consolidation with §2G2.2 effective November 1, 2004 (*see* USSG App. C, amend. 664)).

³⁷³ *See* USSG Ch.1, Pt.A, intro. comment. (Nov. 2012).

³⁷⁴ USSG §2D1.1(d) (cross references) (Nov. 2012).

³⁷⁵ Title 28, United States Code, section 994(w) requires that the chief judge of every district ensure that within 30 days of entry of judgment in every felony and Class A misdemeanor case, the sentencing court submit to the Commission: (1) the judgment and commitment order; (2) the statement of reasons for the sentence imposed; (3) the plea agreement, if any; (4) the indictment or other charging information; and (5) the presentence report (unless waived by the court).

variation among the districts in the rates of below range sentences.

In most instances, four periods are examined: the *Koon* period³⁷⁶ (June 13, 1996 through April 30, 2003), the PROTECT Act period³⁷⁷ (May 1, 2003 through June 24, 2004), the *Booker* period³⁷⁸ (January 12, 2005 through December 10, 2007), and the *Gall* period³⁷⁹ (December 11, 2007 through September 30, 2011). The Commission selected these periods based on Supreme Court decisions and legislation that influenced federal sentencing in fundamental ways. Specifically, in *United States v. Koon*,³⁸⁰ the Supreme Court defined the level of deference due district courts' decisions to sentence outside the guideline range and determined that such decisions should be reviewed for abuse of discretion. In passing the PROTECT Act³⁸¹ nearly seven years later, Congress restricted district courts' discretion to impose sentences outside the guideline range, and required that courts of appeals review such decisions without deference to the decision of the district court. In

³⁷⁶ The *Koon* period includes 333,564 offenders sentenced from June 13, 1996 through and including April 30, 2003 for which the Commission has received complete information.

³⁷⁷ The PROTECT Act period includes 67,554 offenders sentenced from May 1, 2003 through and including June 24, 2004 for which the Commission has received complete information. Offenders sentenced after *Blakely* but before *Booker* are not included in this period. In *Blakely v. Washington*, decided on June 24, 2004, the Supreme Court invalidated a sentence imposed under Washington's sentencing guidelines system. See *Blakely v. Washington*, 542 U.S. 296 (2004). Following the *Blakely* decision, district and circuit courts voiced varying opinions on the implications of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines.

³⁷⁸ The *Booker* period includes 187,632 offenders sentenced from January 12, 2005 through and including December 10, 2007 for which the Commission has received complete information.

³⁷⁹ The *Gall* period includes 274,623 offenders sentenced from December 11, 2007 through and including September 30, 2011 for which the Commission has received complete information.

³⁸⁰ 518 U.S. 81 (1996).

³⁸¹ Pub. L. No. 108-21 (Apr. 30, 2003).

United States v. Booker,³⁸² the Supreme Court struck the statutory provisions that made the guidelines mandatory, and in *United States v. Gall*,³⁸³ the court reiterated that the guidelines were no longer mandatory and further defined the appellate standard of review.

A direct comparison across all four periods cannot always be made. Shortly before the enactment of the PROTECT Act in April 2003 the Commission changed the way it reports data on departures. Before the PROTECT Act, the Commission reported only two categories of below range sentences: "substantial assistance" and "other downward departures."³⁸⁴ In its 2003 report on departures under the sentencing guidelines, the Commission found that approximately 40 percent of the "other downward departures" attributed to courts in fiscal year 2001 actually cited some benefit to the government as the reason for the departure in the sentencing documents.³⁸⁵ Such benefits included "waiver of indictment" and "early plea," among others.³⁸⁶ The practice known as "fast track" had been used informally in some districts along the southwest border prior to the PROTECT Act but had been reported as an "other downward departure." Prior to the PROTECT Act, the existence of only two departure categories resulted in an overstatement of the proportion of downward departures attributable solely to the courts and an understatement of the proportion of downward departures attributable to government sponsorship.

The Commission subsequently refined its collection of below range sentence data to properly attribute the below range sentence either to the court or to the government. In addition, in the PROTECT Act, Congress authorized Early Disposition Programs (EDP) which authorize below range sentences for offenders in high-volume districts who agree to plead guilty and meet other criteria as determined by the United States Attorney. Such sentences now are reported as government sponsored below range

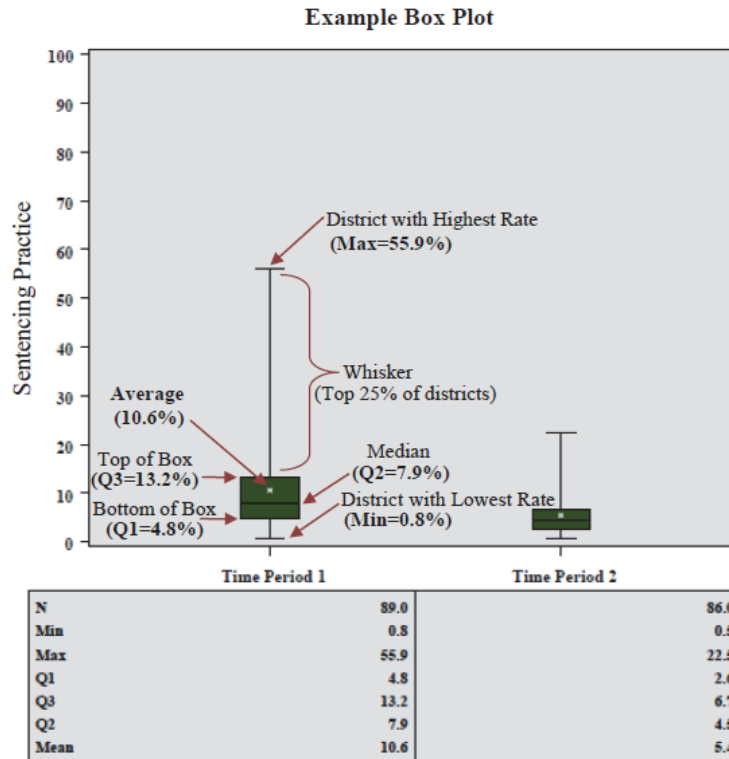
³⁸² 543 U.S. 220 (2005).

³⁸³ 552 U.S. 38 (2007).

³⁸⁴ See, e.g., U.S. SENT'G COMM'N, 2001 SOURCEBOOK, at 51.

³⁸⁵ U.S. SENT'G COMM'N, DEPARTURES REPORT at 59.

³⁸⁶ *Id.* at 59 n.130.



sentences pursuant to USSG §5K3.1 (Early Disposition Programs (Policy Statement)). Consequently, the *Koon* period data is not as refined as the data from subsequent periods and as a result, in some instances, cannot be compared to data from the other periods.

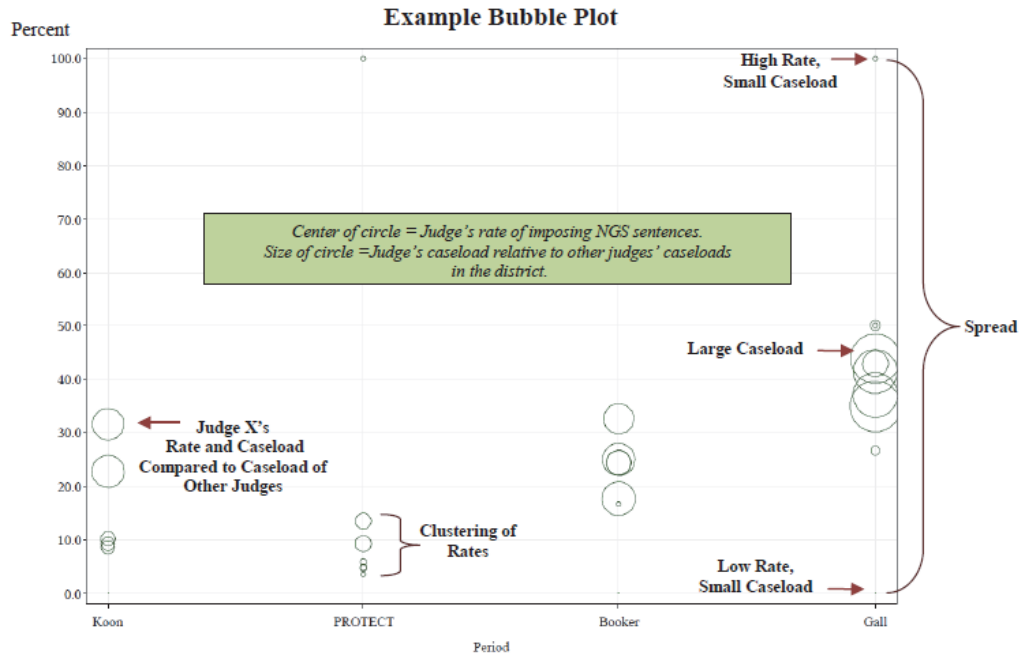
Box plots

Offense specific data is presented, for the most part, in ways familiar to most readers. For example, information regarding the demographic characteristics of offenders, the sentence length, and sentence relative to the range is presented in table format. Information such as the rates of below range sentences is presented in bar graphs. However, information on the rates of government sponsored and non-government sponsored below range sentences, and the variation across districts in these rates, is presented in alternative ways, including using a box plot like the example plot above.

A full explanation of how to read the box plot is provided in Part C of this report, available online. Each box plot depicts the *spread in rates* among the districts that engaged in the sentencing practice. The rate for each district is the percentage of all sentences imposed in a given district that are below range sentences (either government sponsored or non-government sponsored below range sentences). The

spread is the variation in those rates among the districts that engaged in the sentencing practice. All districts in which the practice occurred (for example, all districts in which a non-government sponsored below range sentence was imposed for a fraud offense) are plotted along the vertical axis. If a district did not have any cases exhibiting the particular sentencing practice, then that district is not depicted on the box plot.

The main value of the box plot is its depiction of the size and position of the box over time. These plots answer the question: excluding those districts that did not impose any such sentence (*i.e.*, non-government sponsored below range sentences) and focusing only on those districts that did, what is the spread in rates over time? The top and bottom of the whiskers (vertical lines) show the highest (top) and lowest (bottom) rates of non-government sponsored below range rates. The boxes depict the rates and variation within the middle 50 percent of districts that imposed such sentences. Changes in the height of the box's position along the vertical axis over the four periods depict at a glance whether the rates are increasing or decreasing among the middle 50 percent of districts that engaged in the practice, and the size of the box depicts the spread in rates among those districts that engaged in the practice. A higher box signifies that the sentencing practice occurred more



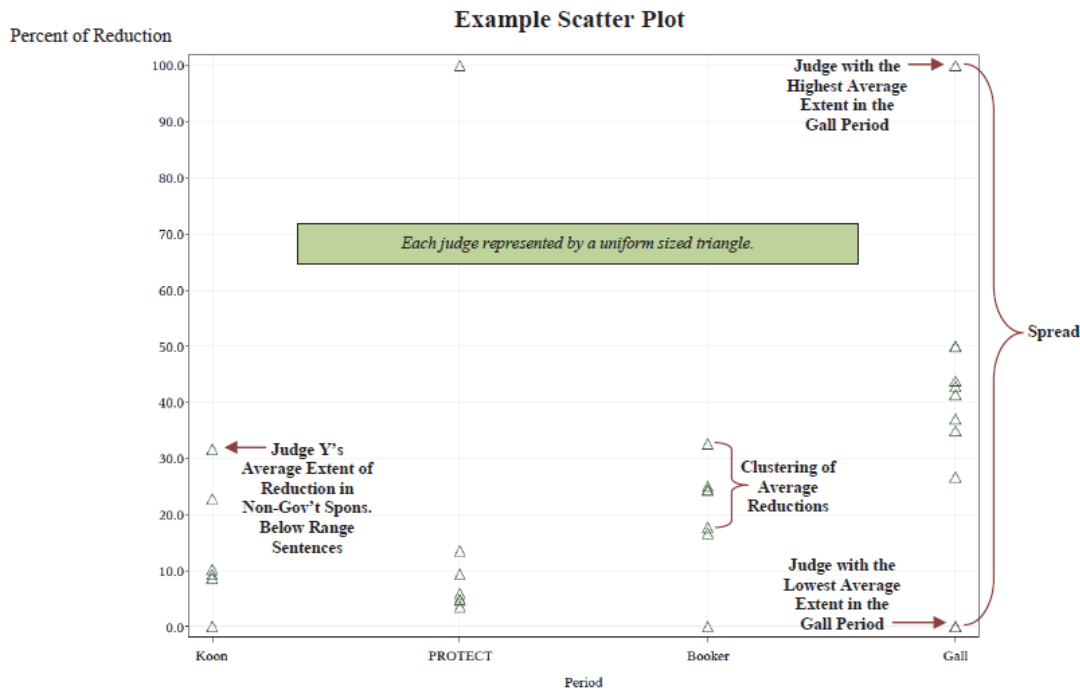
often among the middle 50 percent of districts that engaged in the practice, a lower box signifies that the sentencing practice occurred less often. A smaller box means there is less spread (greater uniformity) among the middle 50 percent of districts that engaged in the practice, and a larger box means there is a greater spread (less uniformity). The districts depicted on the box plot, as well as which districts make up the particular portions of the box plot, may change across time periods.

The “whiskers,” the vertical lines above and below the box, represent those districts that engaged in the sentencing practice more or less often than those districts depicted within the box. The district that had the highest rate marks the endpoint of the top whisker, and the district that had the lowest rate (but still engaged in the practice at least once) marks the endpoint of the bottom whisker. The “Max” and “Min” values listed in the table below the figure report the numerical rates for those districts at the top and bottom endpoints of the whisker. The districts in the whiskers are not necessarily evenly distributed along the axis and may cluster at any point along the axis. An appendix to this report, available online, lists all 94 districts for each offense type and for each type of sentence, in order of their rates, highest to lowest.

Bubble plots

In addition to offense-specific data analyses, the Commission analyzed intra-district sentencing data. This analysis is presented in Part D of this report in the form of bubble plots for each of the 12 circuits and 94 districts. The methodology behind the plots is explained fully in Part D, available online. The bubble plots depict the rates of non-government sponsored below range sentences for each judge within a district. The bubble plot contains one circle (or “bubble”) for each judge who sentenced a felony or Class A misdemeanor offender during the relevant period. The position of the bubbles along the vertical axis indicates the judge’s rate of imposing non-government sponsored below range sentences. The spread in the distribution of all the bubbles on the plot illustrates the spread in rates of non-government sponsored below range sentences.

The bubble for each judge is sized according to the judge’s overall caseload relative to the overall caseload of other judges within the district. The smallest overall caseloads may be represented by a dot, while the largest overall caseloads will have the largest bubbles. Often judges with the highest and lowest rates of non-government sponsored below range sentences had small overall caseloads relative to the other sentencing judges in the district.



Scatter plots

Following each bubble plot is a “scatter plot” depicting, for each judge in the district, the average extent of the reduction below the guideline minimum for that judge’s non-government sponsored below range sentences. Each triangle represents a judge who sentenced at least one offender in that district for a Class A misdemeanor or felony offense. The triangles in the scatter plot are of uniform size; unlike the bubble plots, they are not sized according to the judge’s caseload. These scatter plots answer the question: when a judge imposes a non-government sponsored below range sentence, how far below the guideline minimum is the sentence on average? The answer is expressed in terms of the percentage reduction below the guideline minimum: the triangle is placed along the vertical axis according to the average extent of reduction for that judge. It should be noted that some of the non-government sponsored below range sentences in the bubble plot were excluded from the corresponding scatter plot either because of missing sentence information, or because the offender’s guideline minimum was either life or zero.³⁸⁷

³⁸⁷ Alternatively, a court may report that the defendant received a below range sentence but not provide the actual sentence imposed. In such a case, the extent of the departure below the range cannot be calculated.

Sentencing Appeals

This report also presents data on sentencing appeals, which the Commission has systematically collected from all 12 circuit courts since 1992. Each fiscal year, the Commission collects from all 12 circuit courts of appeals final dispositive decisions of direct criminal appeals in which the defendant has been convicted and sentenced.³⁸⁸ Where possible, the appellate case is linked to the original sentencing datafile on that offender in the Commission’s monitoring database so that the Commission can identify data about the defendant that may not be part of the appellate decision.

Historically, the Commission used the data collected from appellate opinions to track the frequency with which guideline interpretation issues were appealed. After *Booker*, the Commission expanded its data collection to capture additional information on non-guidelines issues in sentencing appeals, such as arguments about whether the court properly considered offender characteristics under 18 U.S.C. § 3553(a), or whether the sentence was substantively and procedurally reasonable.

³⁸⁸ The Commission’s methodology for collecting and coding appeals cases is described in detail in Part C of this report, available online.

Multivariate Regression Analysis

The final data analysis presented is a multivariate regression analysis addressing whether differences in sentencing outcomes are correlated with offenders' demographic characteristics. The Commission most recently published this analysis in its 2010 report titled *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis*.³⁸⁹ The Commission later updated its analysis with data through fiscal year 2010 for the testimony of Commission Chair Patti Saris before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, in October 2011.³⁹⁰ For this report, the Commission has included data through fiscal year 2011.

Multivariate regression analysis usually begins with a decision to examine an observed phenomenon or outcome. For this analysis, the observed phenomenon was the difference in sentence length between offenders, specifically the fact that, among other differences, Black male offenders receive longer sentences than White male offenders. In this multivariate analysis, the Commission identified a number of factors that affect sentence length, such as the type of offense, the applicable guideline minimum, and whether the defendant remained subject to a mandatory minimum penalty at sentencing. Once the relevant factors were identified, the multivariate analysis controlled for those factors, meaning that offenders who were alike in relevant ways were compared to each other. This type of analysis seeks to answer the question: if two offenders are similar in certain ways, what other factors might be associated with those two offenders receiving different sentences?

Multivariate regression analysis often does not control for all relevant factors because sufficient data is not always readily available. Judges make sentencing decisions based on many legally relevant considerations that are not accounted for in the Commission's analysis. Judges may consider other

potentially relevant factors available to them at sentencing. For example, the presentence report may describe whether the offender's history included violent criminal conduct or a long employment history; however, the Commission does not routinely extract that information from the sentencing documents it receives. Such factors, therefore, are not included in the Commission's datafile, and therefore are not controlled for in this analysis. In addition, some commentators have stated that disparities in prosecutorial decisionmaking contribute to demographic differences in sentencing.³⁹¹ The presumptive sentence as used in this analysis controls in a limited way for some prosecutorial decisions (for example the charging of mandatory minimum statutes or the government's motion for a below range sentence). However, data to determine whether other aspects of prosecutorial decision making (for example, the decision not to prosecute an offense federally at all) contribute to demographic differences is not readily available and therefore the complete impact of prosecutorial decision making could not be controlled for in the multivariate analysis. For these reasons, the Commission's analysis should be interpreted with caution and is not intended to suggest any racial or gender bias on the part of judges in making sentencing decisions.

The Commission performed additional multivariate regression analyses to determine whether demographic differences in sentence length were present in any of three specific offense types for which

³⁸⁹ U.S. SENT'G COMM'N, MULTIVARIATE REPORT, *supra* note 10.

³⁹⁰ 2011 Chair Statement to Subcomm. on Crime, Terrorism, & Homeland Security, *supra* note 36.

³⁹¹ For further discussion of demographic differences in prosecutorial decision making, see VERA Institute of Justice, *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies* (June 2012), available at <http://www.vera.org/download?file=3532/race-and-ethnicity-in-prosecution-first-edition.pdf> (reviewing 34 studies analyzing the role of race and ethnicity in prosecutorial decision making). At least one researcher has attempted to measure through a multivariate analysis the contribution, if any, of prosecutorial decision-making to sentencing outcomes. See Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases* (U. Mich. L. & Econ. Research Paper Series, Paper No. 12-018, 2012), available at <http://ssrn.com/abstract=2144002>; M. Marit Rehavi & Sonja Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* (U. Mich. L. & Econ. Working Paper Series, Paper No. 12-002, 2012), available at <http://ssrn.com/abstract=1985377>.

there was a sufficiently diverse population to conduct the analysis: drug trafficking, firearms, and fraud. Other analyses in the report examined whether there were differences in sentence length depending on the position of the sentence relative to the range (*i.e.*, within range, government sponsored below range, or non-government sponsored below range), and whether there were demographic differences in the likelihood of receiving a non-government sponsored below range sentences. The final multivariate analysis determined whether sentence length changed for certain demographic groups over the four periods, and if so, whether sentences for these groups were longer or shorter compared to past periods.

ANALYSIS AND FINDINGS

A review of the table below indicates that beginning in the PROTECT Act period and continuing through the *Gall* period, the proportion of sentences within the guideline range generally has decreased, while the rates of both government sponsored and non-government sponsored below range sentences generally have increased. The extent of the reductions below the guideline minimum, however, has remained relatively stable. The table also shows that average sentences have decreased somewhat in the *Gall* period compared to the *Booker* period, which reflects a similar reduction in the average guideline minimum. These data points and others are discussed at length in the analysis that follows.

Selected Sentencing Characteristics
All Offenses
Koon Period through *Gall* Period

	<i>Koon</i> Period (6/13/96 - 4/30/03)	PROTECT Act Period (5/1/03 - 6/24/04)	<i>Booker</i> Period (1/12/05 - 12/10/07)	<i>Gall</i> Period (12/11/07-9/30/11)
	Percent	Percent	Percent	Percent
GUILTY PLEA	95.0	95.4	95.3	96.5
WEAPON	8.9	9.3	9.4	8.4
GUIDELINE ADJUSTMENTS				
Aggravating Role (USSG §3B1.1)	6.2	5.2	4.6	4.2
Mitigating Role (USSG §3B1.2)	12.8	10.1	9.5	8.0
SENTENCE RELATIVE TO GUIDELINE RANGE				
Within Range	64.1	70.1	59.7	53.9
Above Range	0.7	0.9	1.6	1.9
All Gov't Sponsored Below Range	19.8	23.4	26.1	26.8
Substantial Assistance (USSG §5K1.1)	19.1	16.6	15.2	12.9
Early Disposition Program (USSG §5K3.1)	n/a	1.7	7.6	9.7
Other Gov't Sponsored Below Range	n/a	5.1	3.3	4.2
Non-Gov't Sponsored Below Range	15.4	5.7	12.6	17.4
AVERAGE GUIDELINE MINIMUM	Months	Months	Months	Months
	58	59	63	59
AVERAGE SENTENCE				
Within Range	49	53	54	49
Above Range	54	56	59	51
All Gov't Sponsored Below Range	103	101	81	85
Substantial Assistance (USSG §5K1.1)	44	44	44	42
Early Disposition Program (USSG §5K3.1)	45	50	53	53
Other Gov't Sponsored Below Range	n/a	25	24	23
Non-Gov't Sponsored Below Range	n/a	30	46	51
	32	39	50	47
AVERAGE EXTENT OF REDUCTION	Percent (Months)	Percent (Months)	Percent (Months)	Percent (Months)
All Gov't Sponsored Below Range	51.8 (41)	44.9 (33)	42.5 (31)	42.8 (29)
Substantial Assistance (USSG §5K1.1)	52.4 (41)	50.5 (41)	49.9 (44)	51.4 (45)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	29.8 (10)	30.7 (10)	32.4 (10)
Other Gov't Sponsored Below Range	n/a (n/a)	31.1 (13)	36.3 (22)	40.5 (26)
Non-Gov't Sponsored Below Range	41.8 (17)	40.0 (17)	39.1 (20)	40.7 (21)

Categories may not sum to exactly 100.0 percent due to rounding.
SOURCE: U.S. Sentencing Commission, 2011 *Booker* Report Datafiles.

The number of federal offenders has substantially increased, and most federal offenders have continued to receive substantial sentences of imprisonment.

The number of federal offenders and the percentage sentenced to imprisonment without any alternative to incarceration, such as home detention or community confinement, has increased over the periods studied in this report. In fiscal year 1996, there were 37,091 federal offenders, compared to 76,216 in fiscal year 2011. In fiscal year 2011, 87.8 percent of federal offenders were sentenced to serve a term of imprisonment without any alternative to incarceration, an increase from 76.9 percent in fiscal year 1996.³⁹² As a result of these trends, the number of inmates housed by the federal Bureau of Prisons has more than doubled, from just below 100,000 in 1996, to more than 200,000 in 2011.³⁹³

For offenses in the aggregate, the average sentence was 49 months in the *Koon* period, 53 months in the PROTECT Act period, 54 months in the *Booker* period, and 49 months in the *Gall* period. Average sentences have increased or decreased over time depending on the offense type.

Immigration and drug trafficking offenses have comprised the majority of all federal offenses over the four periods. Immigration offenses have grown substantially as a percentage of the federal case load. Average sentences for illegal entry offenses were 32 months in the *Koon* period, 29 months in the PROTECT Act period, 26 months in the *Booker* period, and 20 months in the *Gall* period. Average sentences have decreased in part because of amendments to the guidelines, and in part because of increasing rates of departures for offenders sentenced through an Early Disposition Program (EDP). EDP departure rates were 7.1 percent in the PROTECT Act

period, 26.2 percent in the *Booker* period, and 26.8 percent in the *Gall* period.

In drug trafficking offenses average sentences peaked during the *Booker* period (83 months) and decreased to 75 months during the *Gall* period, three months longer than average sentences during the *Koon* period (72 months). Average sentences for firearm offenses have been the most consistent of any offense type, increasing by one month during each period, from 56 months in the *Koon* period, to 57 months in the PROTECT Act period, to 58 months in the *Booker* period, and to 59 months in the *Gall* period.

For two offense types, average sentences have increased markedly over time. In child pornography non-production offenses (including receipt, trafficking, and possession offenses) average sentences have increased significantly over the periods due to statutory changes, congressional directives to the Commission to increase guideline penalties, and Commission-initiated amendments. Average sentences for child pornography non-production offenses were 34 months in the *Koon* period, 47 months in the PROTECT Act period, 82 months in the *Booker* period, and 93 months in the *Gall* period. Average sentences for fraud offenders have also increased, partly due to increases in offense seriousness (e.g., loss amounts) over time and partly due to guideline amendments increasing penalties. Average sentences for fraud offenses were 13 months in the *Koon* period, 16 months in the PROTECT Act period, 19 months in the *Booker* period, and 25 months in the *Gall* period.

For career offenders, average sentences have decreased, even though the average guideline minimum has increased slightly. Average sentences for career offenders were 180 months in the *Koon* period, 187 months in the PROTECT Act period, 184 months in the *Booker* period, and 172 months in the *Gall* period. The decrease in sentence length for career offenders was attributable in part to the increasing rates of both government and non-government sponsored below range sentences in career offender cases. During the *Koon* period, 53.4 percent of career offenders were sentenced within the guideline range, and in the *Gall* period only 36.1 percent of career offenders were sentenced within the guideline range.

³⁹² The increase in incarceration rates over time was attributable in part to increasing numbers of immigration offenders, most of whom were not eligible to receive alternatives to incarceration because of their undocumented status.

³⁹³ U.S. SENT'G COMM'N, 2011 MANDATORY MINIMUM REPORT at 76, *supra* note 17; U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options after Booker, Washington, DC (Feb. 16, 2012) (Testimony of Charles E. Samuels, Director, Federal Bureau of Prisons, transcript at 30-32, written statement at 2).

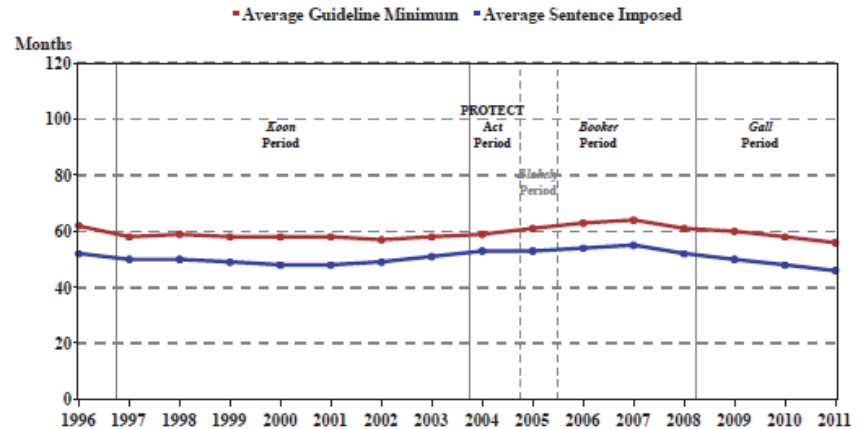
The guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.

The Supreme Court has held that courts must begin the sentencing process by properly determining the applicable guideline range.³⁹⁴ Accordingly, the guidelines have continued to significantly influence sentences for most offenses. During the *Gall* period 80.7 percent of sentences were either within range or below range pursuant to a government motion.³⁹⁵ As seen in the line chart to the right, average sentences have continued to parallel average guideline minimums for offenses in the aggregate. That is, when the average minimum of the applicable guideline range has increased (due to guideline amendments, increases in offense seriousness, or increases in the criminal history of the offenders) the average sentence also has tended to increase, as evidenced by the close tracking between the blue and red lines. Where the two lines were closer together, the average sentence was closer to the average guideline minimum; where the two lines were farther apart, the reverse was true.

The fact that there was distance between the two lines does not necessarily indicate that the guidelines lacked influence over sentences. Some sentences were lower than the guideline minimum due to substantial assistance or EDP below range sentences, which are guidelines-based and pursuant to specific statutory authority. Substantial assistance departures have occurred frequently in drug trafficking offenses (24.4% of drug trafficking offenses in the *Gall* period) and typically have led to the greatest reductions among government sponsored below range sentences (54 months, or 48.4% below the guideline minimum in the *Gall* period), therefore the average sentence has been noticeably lower than the average guideline minimum for those offenses. EDP departures have accounted for many below range sentences in immigration offenses (26.8% of illegal entry offenses in the *Gall* period), therefore average

sentences were lower than average guideline minimums. However, EDP departures generally have resulted in much smaller sentence reductions than substantial assistance departures (10 months, or 30.0% below the guideline minimum for illegal entry offenses in the *Gall* period) and for this reason the distance between the two lines has been smaller in immigration offenses than in drug trafficking offenses.

Average Guideline Minimum and Sentence Imposed
All Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

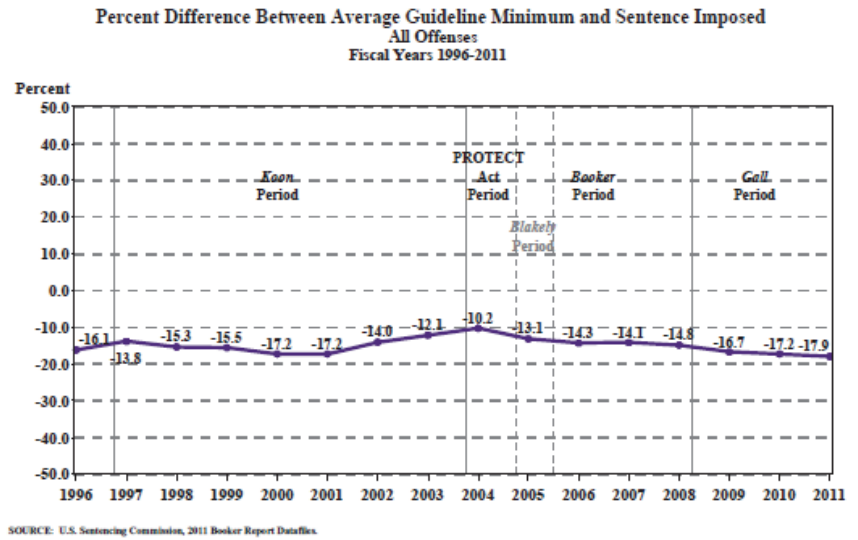
The degree to which the lines for the average guideline minimum and the average sentence have been parallel has reflected the degree of influence of the guidelines. Where the lines have diverged, as in the cases of fraud and child pornography (discussed below), the lack of parallelism suggests that the influence of the guidelines has diminished. Where the lines have been consistently parallel, as in drug trafficking, immigration, and firearms offenses (discussed below), the influence of the guidelines has remained relatively stable, even though the difference between the average sentence and the average guideline minimum may have been sizeable.

The graph on the next page depicts an alternative way to view the parallelism between the guideline minimum and the sentence imposed. The single line illustrates the percentage difference between the average guideline minimum and the average sentence. A line below zero indicates that the average sentence was lower than the average guideline minimum.

³⁹⁴ See *Rita* 551 U.S. at 351.

³⁹⁵ See *supra*, p. 58, Table “Selected Sentencing Characteristics – All Offenses.”

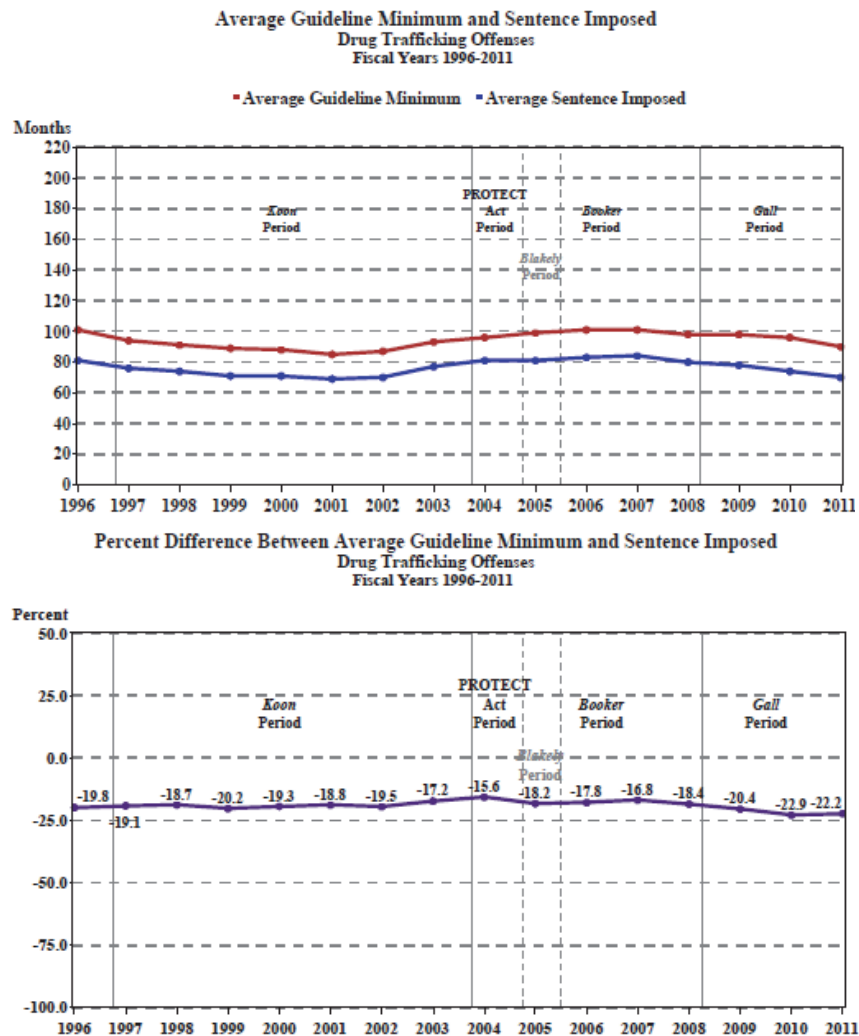
As the figure shows, the percentage difference has varied from a low of 10.2 percent below the guideline minimum in fiscal year 2004 to a high of 17.9 percent below the guideline minimum in fiscal year 2011. There has been a general widening of the difference since fiscal year 2005, from 13.1 percent in fiscal year 2005 to 17.9 percent in fiscal year 2011. However, the line is relatively flat, indicating relative stability over time in the relationship between the average guideline minimum and the average sentence for offenses in the aggregate.



The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, has generally remained stable in drug trafficking, firearms, and immigration offenses.

For drug trafficking, firearms, and immigration offenses (alien smuggling and illegal entry) the average guideline minimum and the average sentence have maintained a fairly consistent parallel relationship during all four periods, although there has been a slight divergence between the PROTECT Act and *Gall* periods.³⁹⁶

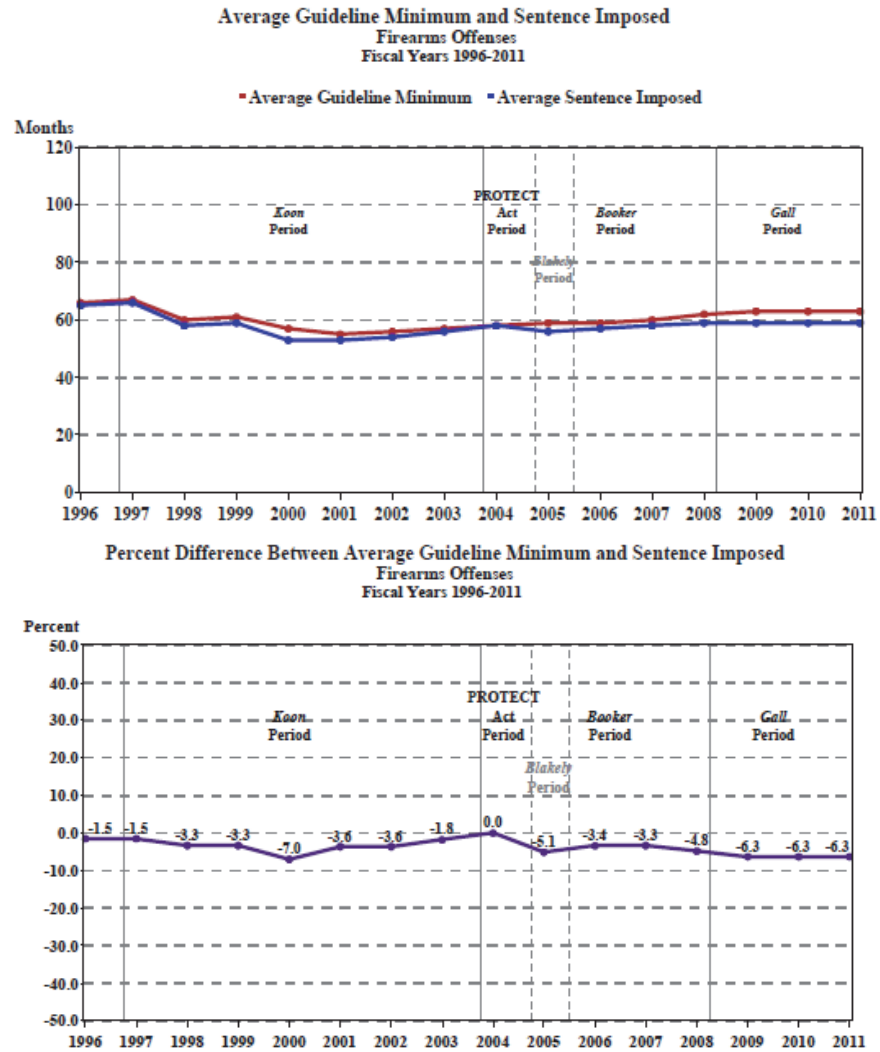
The influence of the guidelines has remained stable for drug trafficking offenses generally.³⁹⁷ The average guideline minimum for drug trafficking offenses increased from 89 months in the *Koon* period to 96 months in the PROTECT Act period and 101 months in the *Booker* period, but then decreased to 95 months in the *Gall* period. The same trend occurred with average sentence length, which increased from 72 months in the *Koon* period to 81 months in the PROTECT Act period and 83 months in the *Booker* period, but decreased to 75 months in the *Gall* period.



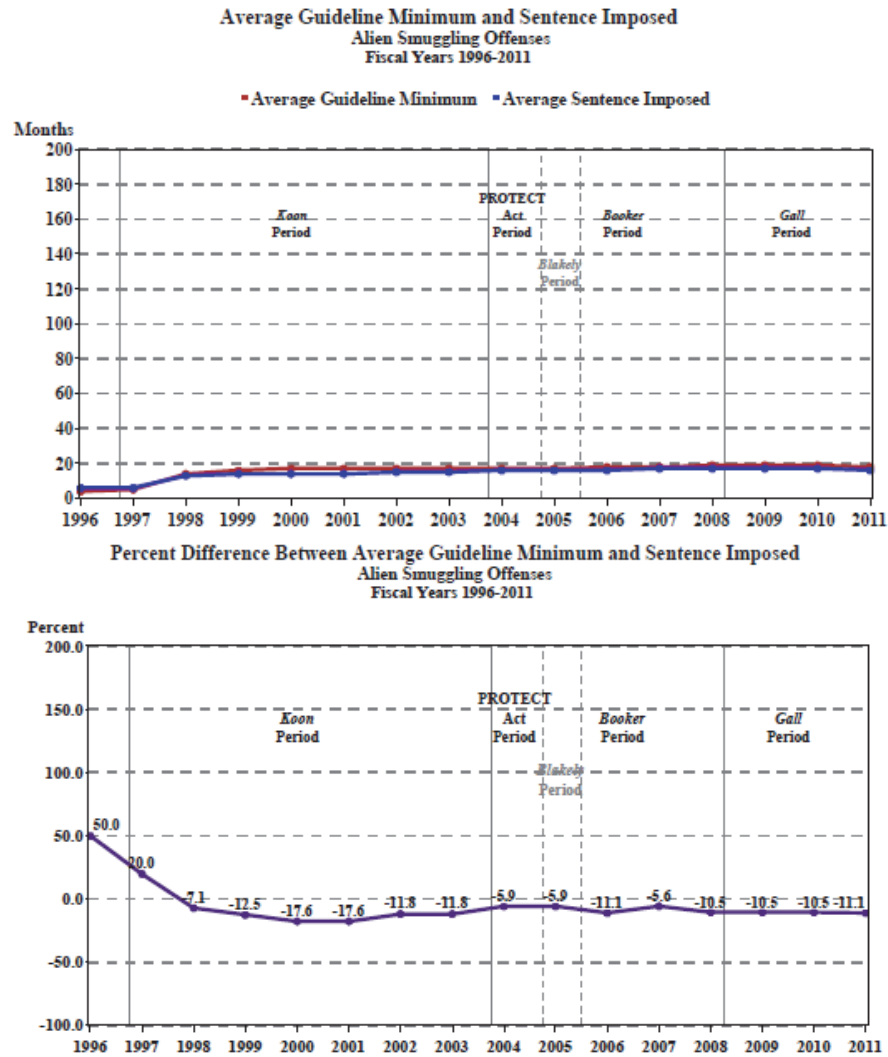
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

³⁹⁶ See “Percent Difference Between Average Guideline Minimum and Sentence Imposed, Fiscal Years 1996-2011” for each offense type, nationally and by circuit, in Part C online. For a more detailed discussion of the relevant legislative and guidelines changes for these offenses, see Part C, available online.

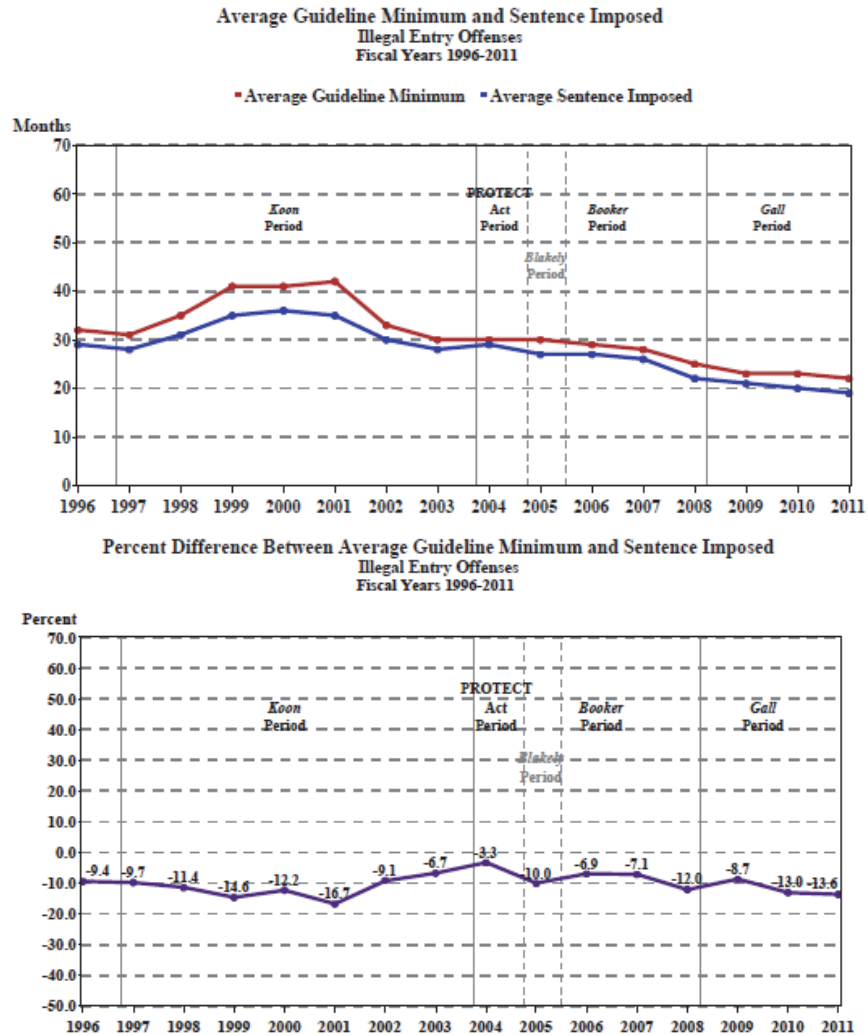
³⁹⁷ The drug trafficking guidelines incorporate statutory mandatory minimum penalties where applicable. For a more detailed discussion of this topic, see Part C, available online.



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

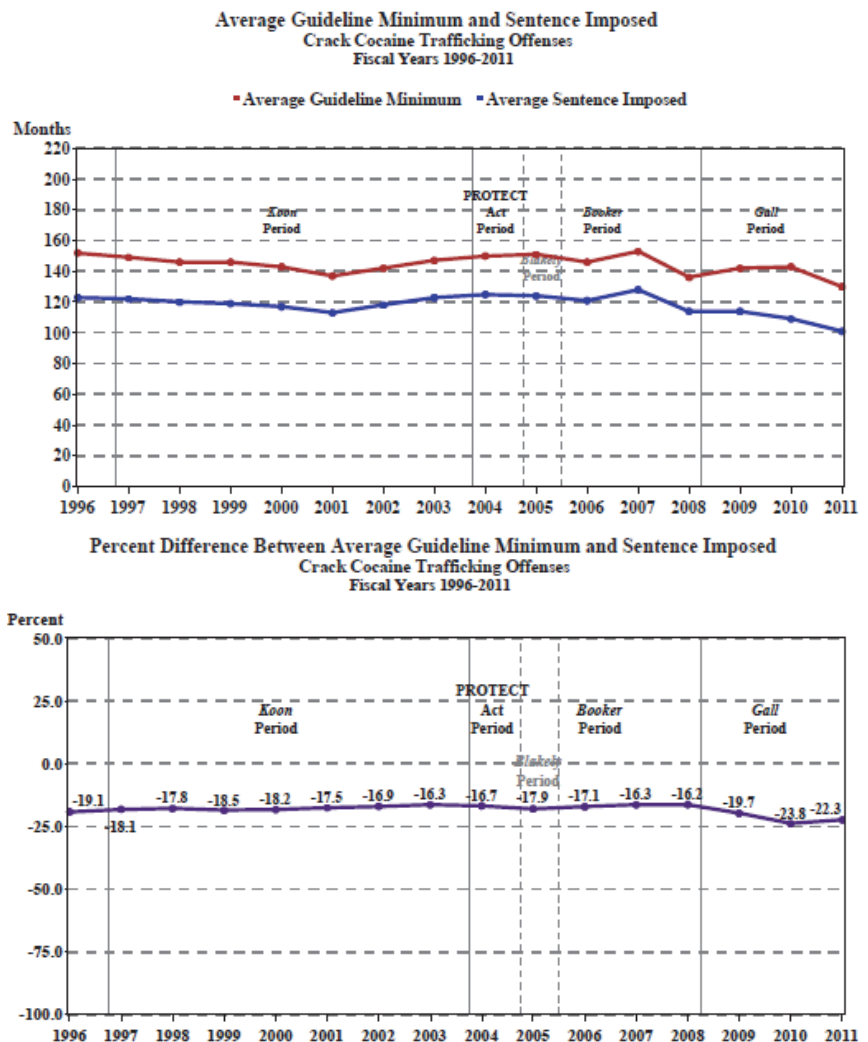
As seen in the line charts on the preceding page, the average sentence was notably further below the average guideline minimum in drug trafficking offenses than in firearms and immigration offenses. This was due, in part, to higher rates of government sponsored below range sentences based on substantial assistance for drug trafficking offenses than for other offenses. In drug trafficking offenses, rates of substantial assistance below range sentences were 29.3 percent during the *Koon* period, 27.0 percent during the PROTECT Act period, 26.1 percent during the *Booker* period, and 24.4 percent during the *Gall* period.

In contrast, in firearms offenses, substantial assistance below range rates were 11.7 percent during the *Koon* period, 11.4 percent during the PROTECT Act period, 9.4 percent during the *Booker* period, and 8.8 percent during the *Gall* period. In alien smuggling offenses, rates of substantial assistance below range sentences were less than ten percent during all periods. In illegal entry offenses, rates of substantial assistance below range sentences have never exceeded two percent.

In addition to the rate of below range sentences, the extent of the reduction below the guideline minimum for drug trafficking offenses has contributed to the distance between the red and blue lines. Substantial assistance below range sentences have been nearly 50 percent below the average guideline minimum (49.3% in the *Koon* period, 46.8% in the PROTECT Act period, 46.5% in the *Booker* period, and 48.4% in the *Gall* period), which has amounted to reductions of between 52 and 54 months, substantially larger than reductions for other types of below range sentences.

The Commission also examined individual drug types, and analyses for each are in Part C, available online. In crack cocaine trafficking offenses, sentences have diverged from the average guideline minimum during the past few years. However, reduced penalties for crack cocaine offenders, resulting from the Fair Sentencing Act of

2010 and the guideline amendments in response to it,³⁹⁸ may have slowed the divergence. In fiscal year 2010, the average sentence for crack cocaine trafficking offenders was 23.8 percent below the average guideline minimum. This was the largest percent difference between the average guideline minimum and the average sentence dating back to fiscal year 1996. In contrast, the average sentence during 2011 was 22.3 percent below the average guideline minimum. The change is small, and it may be too soon to determine whether reduced penalties for crack cocaine trafficking offenses might bring average sentences closer to the guideline minimum.

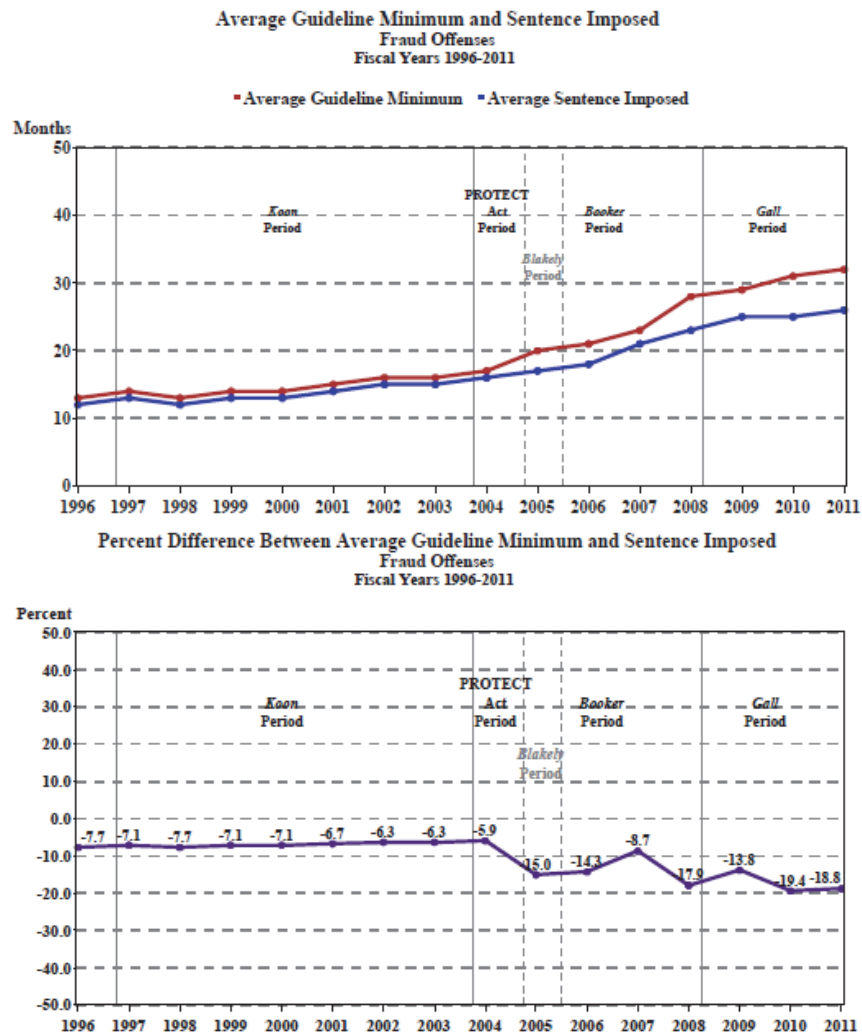


³⁹⁸ See USSG App. C, amend. 748 (effective Nov. 1, 2010) and 750 (effective Nov. 1, 2011).

The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, has diminished in fraud and child pornography offenses.

In contrast to drug trafficking, firearms, and immigration offenses, for fraud and child pornography non-production offenses (which include receipt, trafficking, and possession offenses) the average guideline minimum and the average sentence have not consistently paralleled one another over time, and the divergence between the two has increased since fiscal year 2004 in the case of fraud offenses, and since fiscal year 2005 in the case of child pornography non-production offenses. Average guideline minimums for these two offense types have increased over time as a result of statutory changes, including congressional directives to the Commission, guideline amendments, and the seriousness of the offenses.

With respect to fraud offenses, the average guideline minimum has more than doubled from 14 months during the *Koon* period to 30 months during the *Gall* period. The average sentence also has nearly doubled from 13 months during the *Koon* period to 25 months during the *Gall* period, but during the past few years the average guideline minimum has increased at a faster rate than the average sentence. For example, between fiscal years 2009 and 2010, the average sentence remained flat, while the average guideline minimum increased.

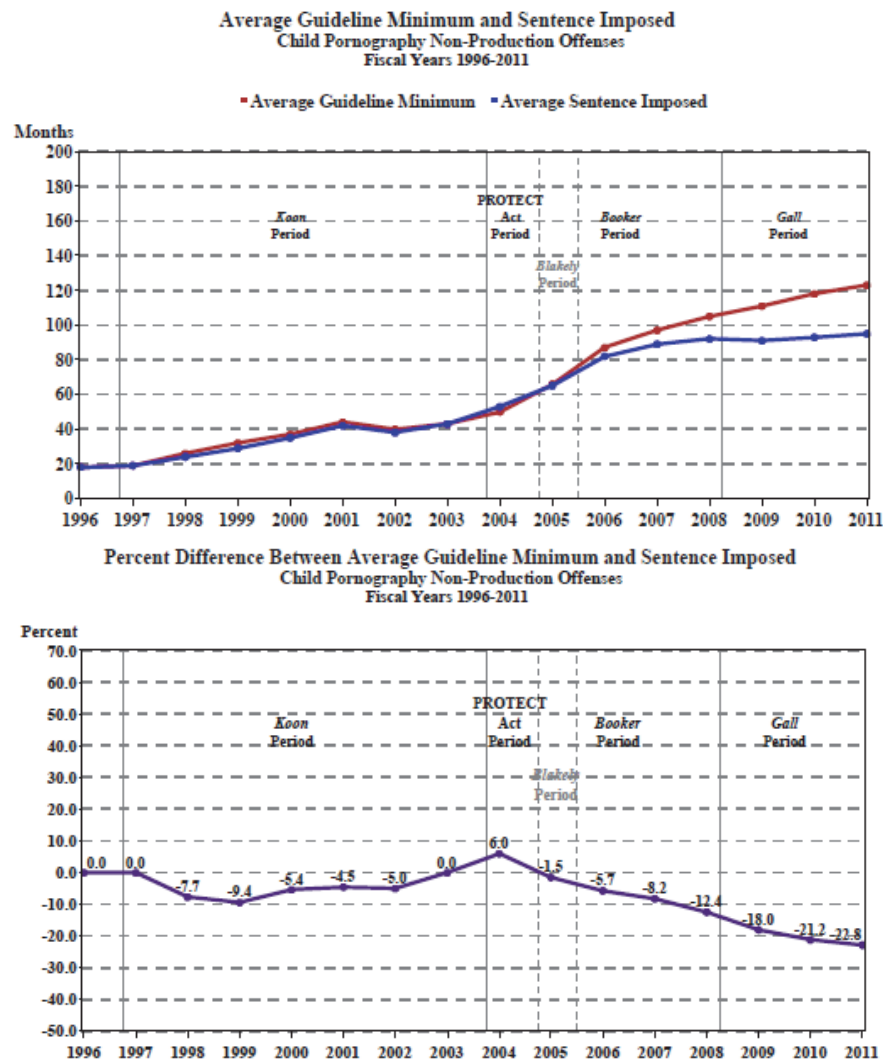


SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

With respect to child pornography non-production offenses, the recent divergence between the average guideline minimum and the average sentence has been even more pronounced. The average guideline minimum for child pornography non-production offenses has increased steadily over time in large part due to statutory changes implemented between 1997 and the enactment of the PROTECT Act of 2003, and the guideline amendments in response to it. The average guideline minimum has more than tripled from 36 months in the *Koon* period to 115 months in the *Gall* period. For many years the average sentence continued to track closely these sharp increases in the average guideline minimum. As the average guideline minimum has continued to increase through the *Booker* and *Gall* periods, however, the average sentence increasingly has diverged from the guideline minimum. Whereas the average sentence was 34 months during the *Koon* period (two months less than

the average guideline minimum), the average sentence was 93 months during the *Gall* period (22 months less than the average guideline minimum). A graphical depiction of the average guideline minimum compared to the average sentence reveals that, as the average guideline minimum for child pornography non-production offenses has increased during the *Booker* and *Gall* periods, the average sentence has remained relatively flat by comparison.

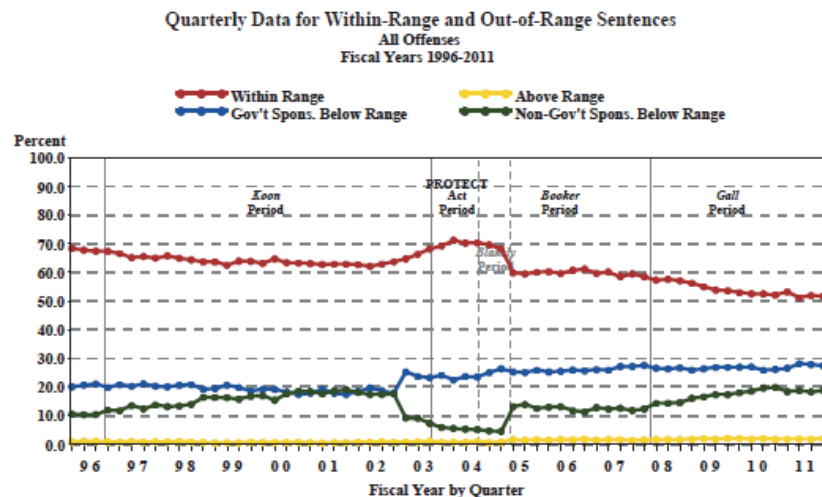
In sum, during all four periods, the influence of the guidelines has remained relatively stable in drug trafficking, firearms, and immigration offenses, while in fraud and child pornography non-production offenses, the average sentence increasingly has diverged from the average guideline minimum during the *Booker* and *Gall* periods.



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

For most offense types, the rate of within range sentences has decreased while the rate of below range sentences (both government sponsored and non-government sponsored) has increased over time.

For most offenses studied, rates of within range sentences have decreased while rates of below range sentences, particularly non-government sponsored below range sentences, have increased.³⁹⁹ While average sentences have tended to parallel the average guideline minimum, courts have imposed more non-government sponsored below range sentences, resulting in a widening gap between the average guideline minimum and the average sentence. A review of quarterly data for offenses in the aggregate illustrates this trend. The notable decrease in non-government sponsored below range sentences between fiscal years 2002 and 2003 was due primarily to the change in the way the Commission reported data on departures shortly before enactment of the PROTECT Act.⁴⁰⁰ EDP departures in immigration offenses have increased, and immigration offenses have increased as a proportion of the federal case load. For example, in fiscal year 2003 there were 10,722 immigration offenses. That number increased to 11,113 in fiscal year 2004, and more than doubled to 23,810 in fiscal year 2011.



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

³⁹⁹ See Figures, “Quarterly Data for Within-Range and Out-of-Range Sentences” in Part C, available online.

⁴⁰⁰ See *supra* at 53-54 (discussing changes in Commission collection methodology).

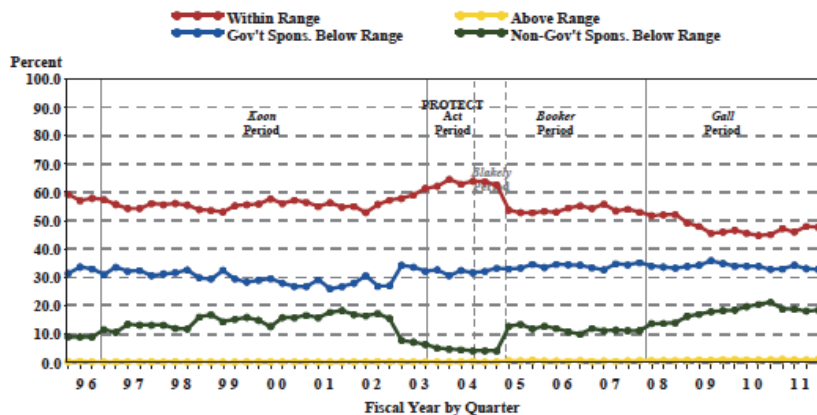
Even in drug trafficking, firearms, and immigration offenses, where the line graphs of the average guideline minimum and average sentence have shown a relatively stable relationship,⁴⁰¹ the rates of non-government sponsored below range sentences increased during the *Gall* period, while rates of within range sentences decreased. The line graphs on the following pages depict quarterly data on within range and out of range sentences for drug trafficking (in the aggregate and by each major drug type), firearms, and immigration offenses.

In drug trafficking offenses, rates of within range sentences decreased throughout the *Booker* and *Gall* periods from a high during the PROTECT Act period. Rates of within range sentences in drug trafficking offenses were 55.8 percent during the *Koon* period, 63.3 percent during the PROTECT Act period, 53.7 percent during the *Booker* period, and 47.8 percent during the *Gall* period. Rates of both government sponsored and non-government sponsored below range sentences have generally increased during those periods. Rates of substantial assistance below range sentences decreased from 29.3 percent during the *Koon* period, to 27.0 percent during the PROTECT Act period, 26.1 percent during the *Booker* period, and 24.4 percent during the *Gall* period. Rates of EDP below range sentences, on the other hand, have increased over the three periods during which they were available, from 1.0 percent in the PROTECT Act period, to 4.9 percent in the *Booker* period, to 5.3 percent in the *Gall* period. Even though EDP departures have been available in only a small number of districts until recently (Southern California, Arizona, and New Mexico had the highest rates) EDP departures have contributed to an overall increase in the rate of government sponsored below range sentences. The rates of other government sponsored below range sentences were 3.7 percent in the PROTECT Act period, 3.0 percent in the *Booker* period, and 4.1 percent in the *Gall* period.

Non-government sponsored below range rates for drug trafficking offenses increased during the *Booker* and *Gall* periods. Those rates were 14.2 percent during the *Koon* period, 4.7

⁴⁰¹ See *e.g.*, *supra* at 62, “Average Guideline Minimum and Sentence Imposed – Drug Trafficking Offenses.”

Quarterly Data for Within-Range and Out-of-Range Sentences
Drug Trafficking Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

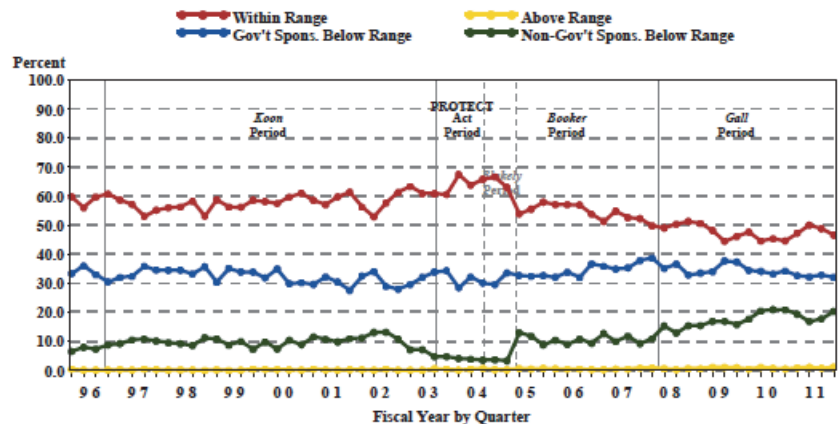
percent during the PROTECT Act period, 11.7 percent during the *Booker* period, and 17.6 percent during the *Gall* period. Rates of non-government sponsored below range sentences were lowest during the PROTECT Act period, whereas government sponsored below range sentences increased during that period, reflecting, in part, the change in the manner in which the Commission collected and attributed below range sentences.⁴⁰²

Even though rates of both government sponsored and non-government sponsored below range sentences have increased for drug trafficking offenses, the extent of the reduction below the guideline minimum has not changed markedly over time. The average extent of reduction for government sponsored below range sentences varied from an average reduction of 51 months (49.2% below the average guideline minimum) during the *Koon* period, to an average reduction of 46 months (45.2% below the average guideline minimum) during the *Gall* period. Reductions in non-government sponsored below range sentences ranged from an average reduction of 22 months (40.4% below the average guideline minimum) during the *Koon* period, to an average reduction of 28 months (34.3% below the average guideline minimum) during the *Gall* period.

⁴⁰² See *supra* at 53-54 (discussing changes in Commission collection methodology).

Examination of the same figures by drug type illustrates differences in rates of within range, government sponsored below range, and non-government sponsored below range sentences, depending on the type of drug involved in the offense. Of all drug types, the pattern for powder cocaine trafficking offenses was most similar to the pattern for all drugs combined. Marijuana was the only drug type in which the within range rate remained relatively stable during the *Booker* and *Gall* periods.

Quarterly Data for Within-Range and Out-of-Range Sentences
Powder Cocaine Trafficking Offenses
Fiscal Years 1996-2011



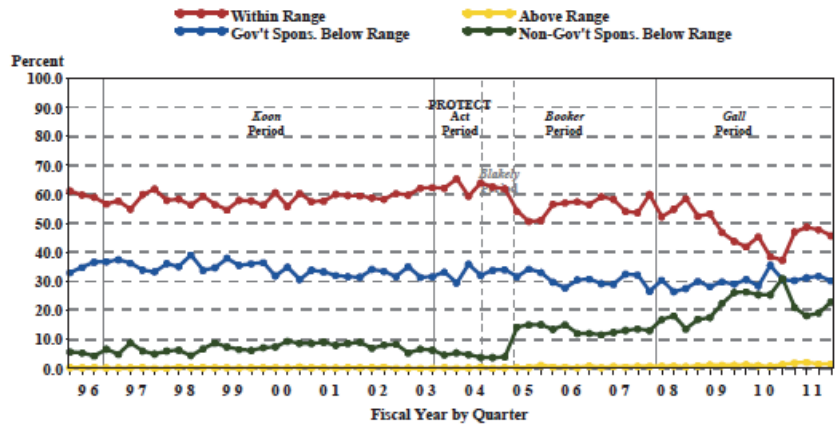
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In crack cocaine trafficking offenses, as with all drugs, rates of within range sentences have decreased markedly after the PROTECT Act period. Between 2008 and 2010 there was an additional decrease in within range rates, and a corresponding increase in rates of non-government sponsored below range sentences. Within range rates increased and non-government sponsored below range rates decreased between fiscal years 2010 and 2011, perhaps in response to statutory changes and guideline amendments reducing penalties for crack cocaine trafficking offenders.

In heroin trafficking offenses, within range rates have decreased markedly since *Booker* and have generally declined through fiscal year 2011. In heroin trafficking offenses, rates of both government sponsored and non-government sponsored sentences have increased. During fiscal year 2010 the rate of non-government sponsored below range sentences exceeded the rate of government sponsored below range sentences.

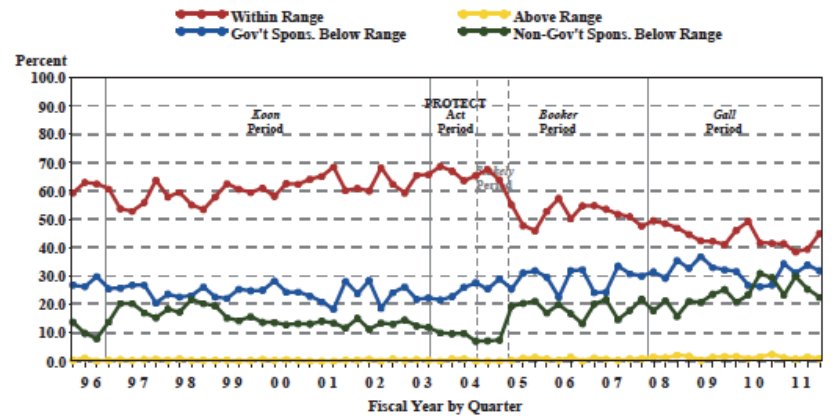
Of the five major drug types, marijuana trafficking offenses had the lowest average guideline minimums. For each of the four periods, the average guideline minimum for marijuana trafficking offenses never exceeded 50 months, compared to average guideline minimums of not less than 93 months for powder cocaine trafficking, not less than 138 months for crack cocaine trafficking, not less than 74 months for heroin trafficking, and not less than 112 months for methamphetamine trafficking. Marijuana trafficking offenses also had the lowest rates of non-government sponsored below range sentences of all the drug types, and the smallest decline in rates of within range sentences. The rate of government sponsored below range sentences increased markedly between fiscal years

Quarterly Data for Within-Range and Out-of-Range Sentences
Crack Cocaine Trafficking Offenses
Fiscal Years 1996-2011



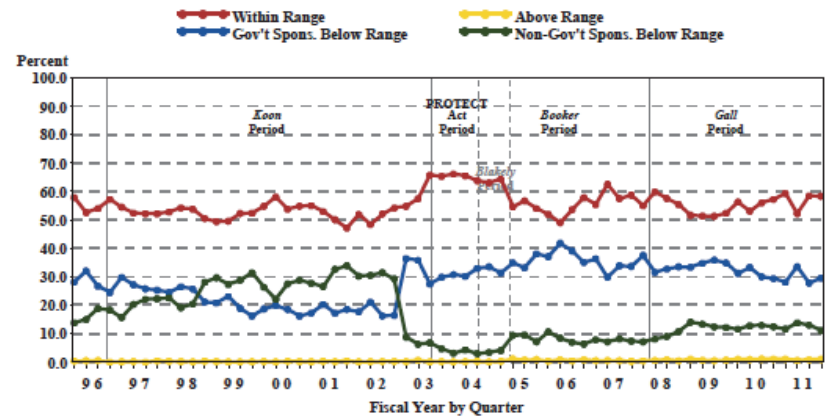
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Quarterly Data for Within-Range and Out-of-Range Sentences
Heroin Trafficking Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Quarterly Data for Within-Range and Out-of-Range Sentences
Marijuana Trafficking Offenses
Fiscal Years 1996-2011



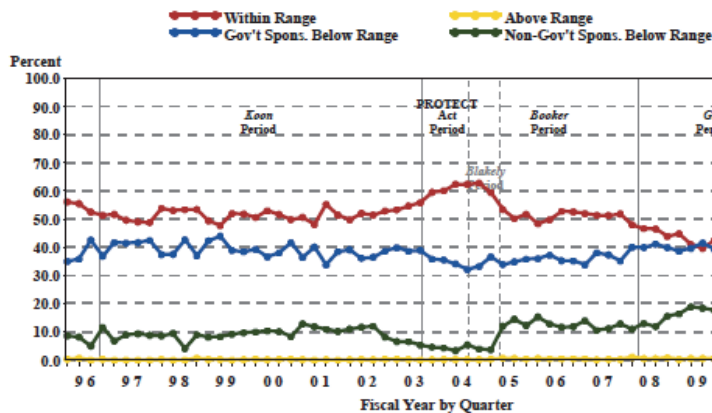
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

2002 and 2003, while the rate of non-government sponsored below range sentences decreased. This marked change occurred at least in part because of the change in the way the Commission reported its departure data in the first quarter of fiscal year 2003 to better account for downward departures attributable to the government, including Early Disposition Program departures (commonly referred to as “fast-track” departures).⁴⁰³ Three districts appeared to have EDP programs in marijuana trafficking offenses: Southern California, Arizona and New Mexico had the highest rates during the PROTECT Act, *Booker*, and *Gall* periods. In Southern California, for example, 69.6 percent of marijuana trafficking offenders received EDP departures during the *Gall* period.

In firearms offenses, the rate of within range sentences has remained high relative to other offenses, but it has decreased over time. Within range rates were 75.1 percent during the *Koon* period, 79.7 percent during the PROTECT Act period, 70.6 percent during the *Booker* period, and 62.9 percent during the *Gall* period. In contrast, non-government sponsored below range rates were 11.9 percent during the *Koon* period, 6.5 percent during the PROTECT Act period, 14.6 percent during the *Booker* period, and 21.1 percent during the *Gall* period.

As with drug trafficking offenses, firearms offenses have shown consistency in the extent of the reduction below the guideline minimum. During the *Koon* period, the average extent of the reduction in government sponsored below range sentences was 26 months (51.0% below the average guideline minimum), and in the *Gall* period the average extent of reduction was 28 months (45.2% below the average guideline minimum). Firearms offenses have also shown consistency in the extent of the reduction below the guideline minimum for non-government sponsored below range sentences. The average non-government sponsored below range reduction was 18 months (42.2% below the average guideline minimum) during the *Koon* period and 17 months (39.4% below the average guideline minimum) during the *Gall* period.

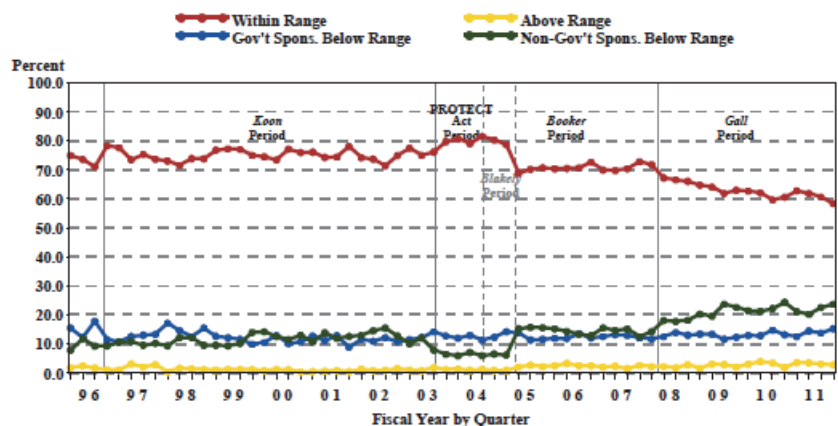
Quarterly Data for Within-Range and Out-of-Range Sentences
Methamphetamine Trafficking Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Methamphetamine was the only drug type for which rates of government sponsored below range sentences have exceeded rates of within range sentences. This first occurred in fiscal year 2009. The rate of government sponsored below range rates has been relatively stable, whereas the rate of non-government sponsored below range sentences has increased more markedly, causing most of the reduction in within range rates.

Quarterly Data for Within-Range and Out-of-Range Sentences
Firearms Offenses
Fiscal Years 1996-2011



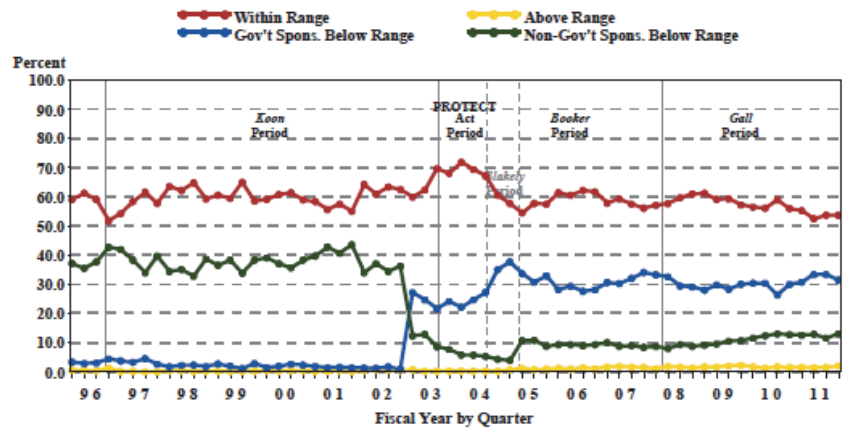
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

⁴⁰³ See *supra*, discussion at 53-54.

In illegal entry offenses, the rate of within range sentences has decreased most notably during the PROTECT Act period, and to a lesser degree during the *Gall* period. However, the rates of government sponsored below range sentences have substantially increased because of EDP departures, accounting for the large change during the PROTECT Act period. The marked increase in the rate of government sponsored below range sentences in illegal entry offenses between fiscal years 2002 and 2003, and the corresponding decrease in non-government sponsored below range sentences, were attributable to the increased use of EDP programs, as well as to the change in the way the Commission reported its departure data beginning in the first quarter of fiscal year 2003 to account for this.⁴⁰⁴

As with drug trafficking and firearms offenses, illegal entry offenses have shown consistency in the extent of the reduction below the guideline minimum. During the *Koon* period, the average extent of the reduction in government sponsored below range sentences was 13 months (28.7% below the average guideline minimum), and in the *Gall* period the average extent of the reduction was 10 months (30.4% below the average guideline minimum). Illegal entry offenses also show consistency in the extent of the reduction below the guideline minimum for non-

Quarterly Data for Within-Range and Out-of-Range Sentences
Illegal Entry Offenses
Fiscal Years 1996-2011



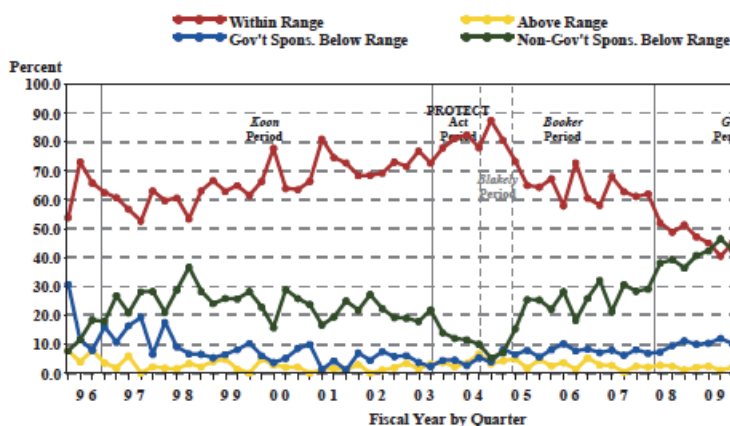
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

government sponsored below range sentences. The average non-government sponsored below range reduction was 16 months (33.2% below the average guideline minimum) during the *Koon* period and 12 months (35.7% below the average guideline minimum) during the *Gall* period.

Sentencing in child pornography non-production offenses has been markedly different from any other offense type. In recent years, the rates of non-government sponsored below range sentences have exceeded within range rates. During the *Gall* period, 41.1 percent of sentences were within the range, and 44.0 percent of sentences were non-government sponsored below range sentences.

As Congress has enacted higher penalties for child pornography non-production offenses, the average extent of the reduction for both government sponsored and non-government sponsored below range sentences has increased substantially in terms of months (but not as a percentage reduction below the guideline minimum). The average extent of the reduction for government sponsored below range sentences was 16 months (57.2% below the average guideline minimum) during the *Koon* period, but increased to 47 months (42.2% below the average guideline minimum) during the *Gall* period. For non-government sponsored below range sentences in

Quarterly Data for Within-Range and Out-of-Range Sentences
Child Pornography Non-Production Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

⁴⁰⁴ See *supra* at 53-54 (discussing changes in Commission collection methodology).

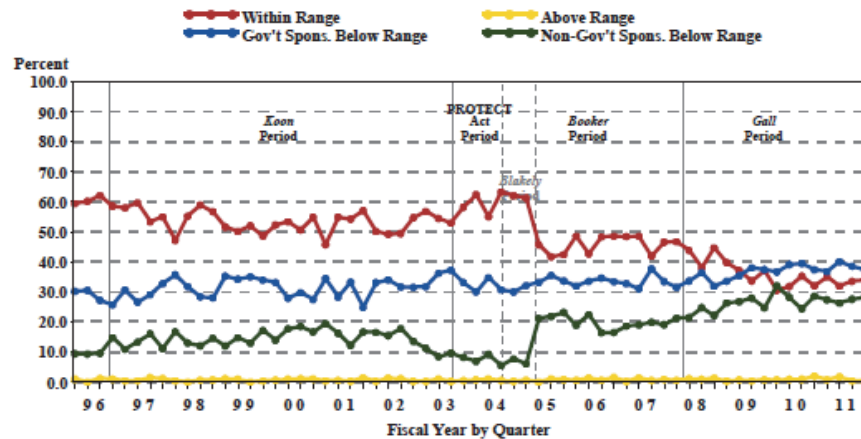
child pornography non-production offenses, the average reduction was 15 months (55.7% below the

average guideline minimum) during the *Koon* period, but was 44 months (40.4% below the average guideline minimum) during the *Gall* period.

The within range rate for career offenders has decreased substantially since *Booker*. More than one-third (36.7%) of career offenders received government sponsored below range sentences during the *Gall* period, and more than one-quarter (26.4%) received

non-government sponsored below range sentences. The extent of the reduction for career offenders was also substantial. Government sponsored below range sentences led to average reductions of 96 months (43.1% below the guideline minimum), and non-government sponsored below range sentences led to average reductions of 69 months (32.4% below the guideline minimum) in the *Gall* period.

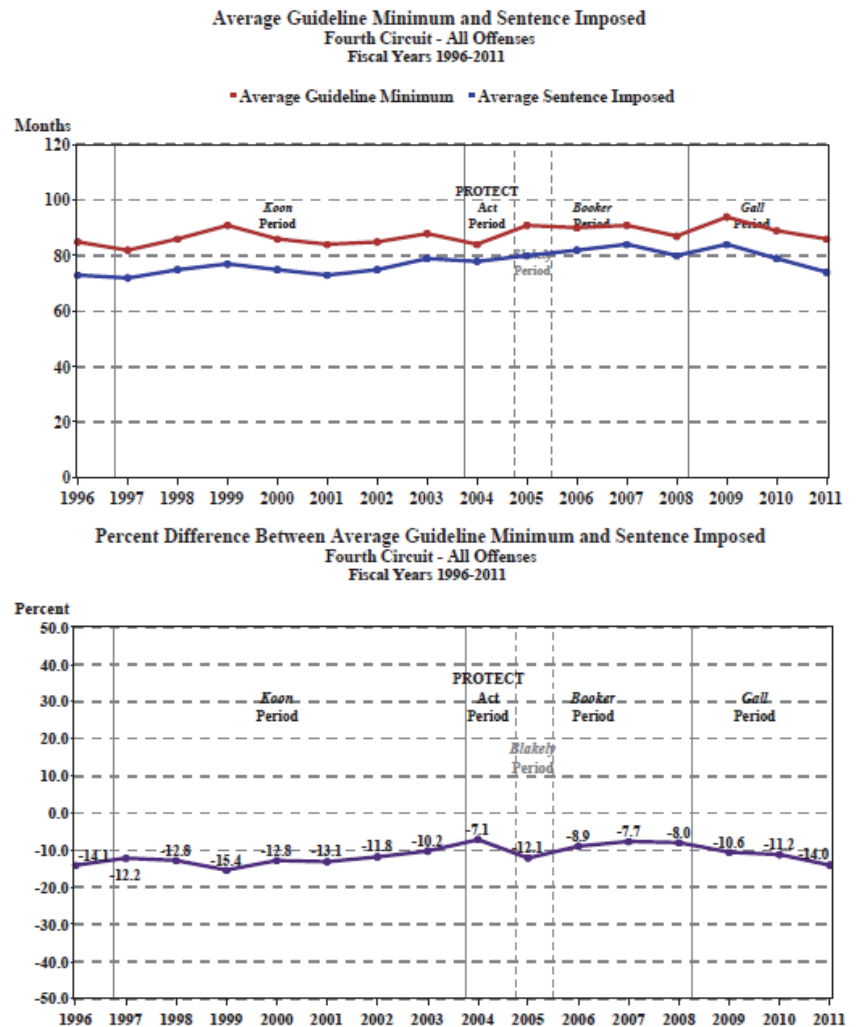
Quarterly Data for Within-Range and Out-of-Range Sentences
Career Offenders
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

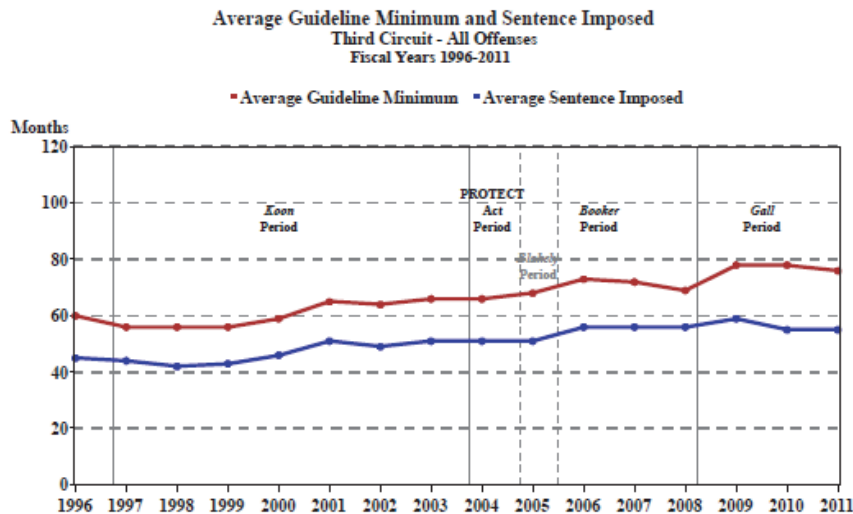
The influence of the guidelines, as measured by the relationship between the average guideline minimum and the average sentence, has varied by circuit.

For offense types in the aggregate, the average sentence largely has paralleled the average guideline minimum in the majority of circuits, but the degree of divergence between the two has varied from circuit to circuit.⁴⁰⁵ The line graphs illustrate the different trends. For example, in the Fourth Circuit, average sentences have generally paralleled average guideline minimums.

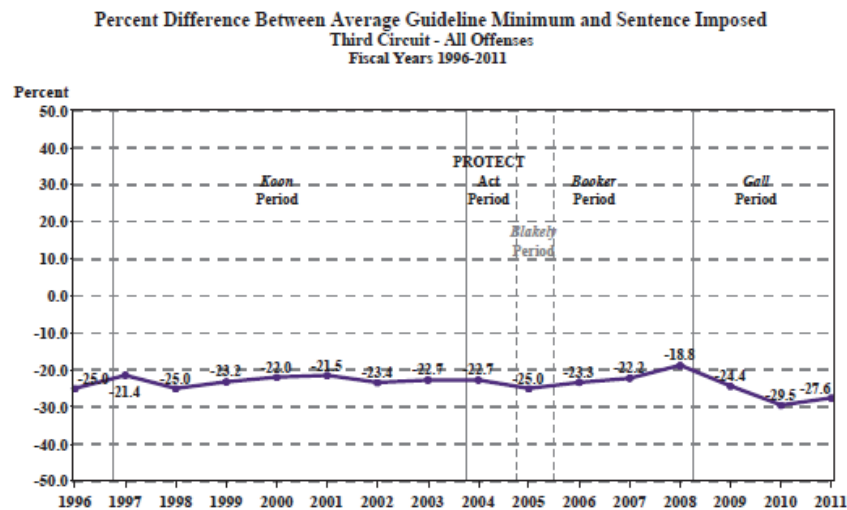


SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

⁴⁰⁵ The sentencing scale for all circuit level analyses is consistent within each offense type, although it varies from offense type to offense type. For instance, the top of the scale for the chart that depicts all offenses is 120 months in order to accommodate the circuit with the highest average guideline minimum or average sentence. The top of the scale for fraud, however, is 50 months because average sentences are lower in fraud offenses. Using the same scale for the same offense type facilitates comparisons between the circuits.



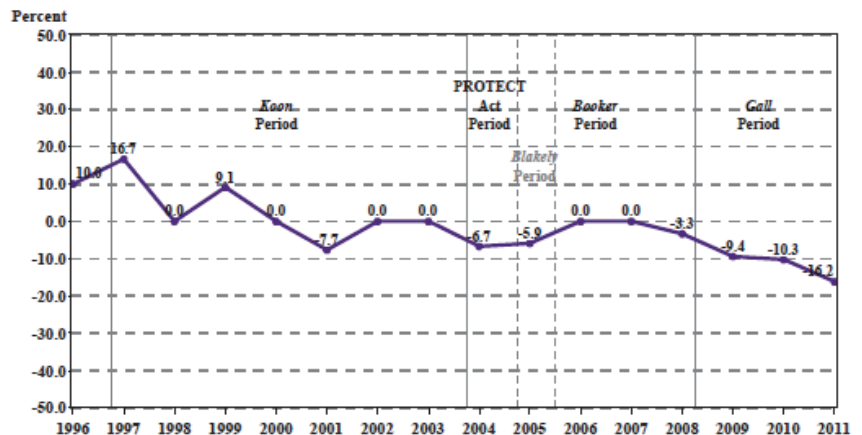
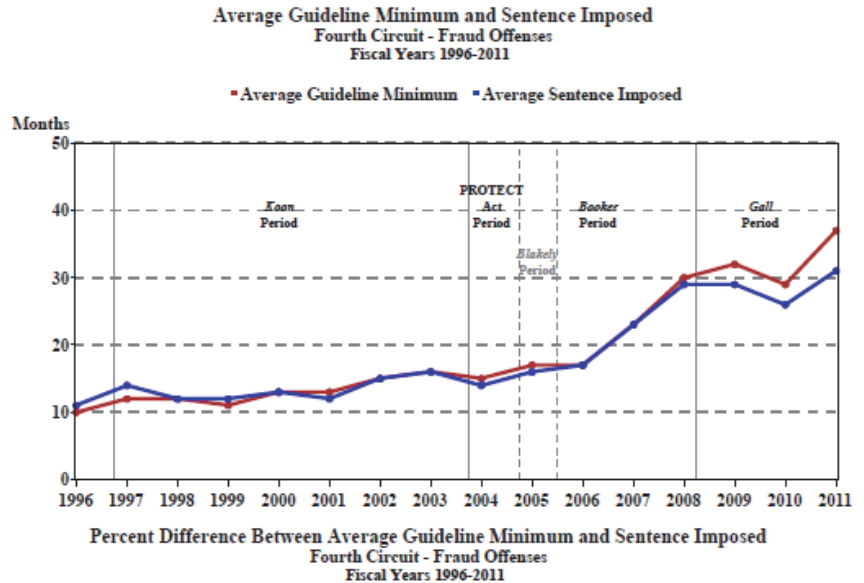
However, in the Third Circuit a greater divergence between average guideline minimums and average sentences appeared between fiscal years 2008 and 2009, when a sharp increase in the average guideline minimum was met with only a modest increase in average sentence length.⁴⁰⁶



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

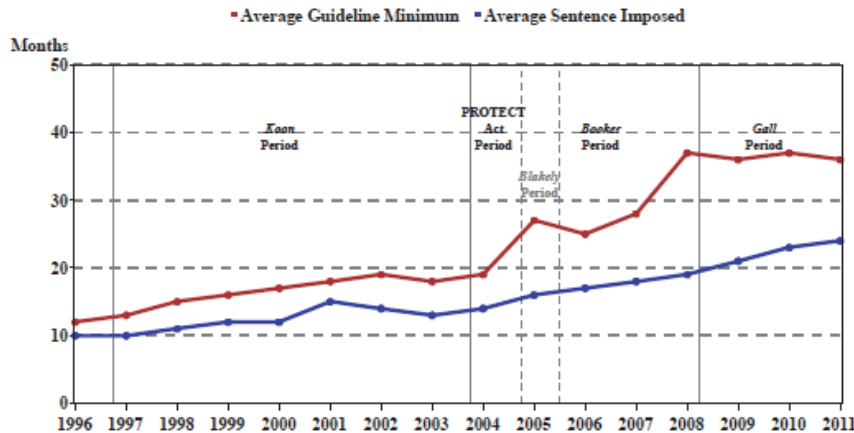
⁴⁰⁶ Charts depicting the percentage difference between the average guideline minimum and the average sentence imposed for each circuit by offense type are provided in Part C, available online.

Greater differences appeared among the circuits when sentencing data was analyzed by offense type. For example, in fraud offenses, the percent difference between the average guideline minimum and the average sentence has varied. In the Fourth Circuit, average guideline minimums and average sentences for fraud offenses have continued to increase and decrease in tandem, with the exception of a small divergence beginning in fiscal year 2009.



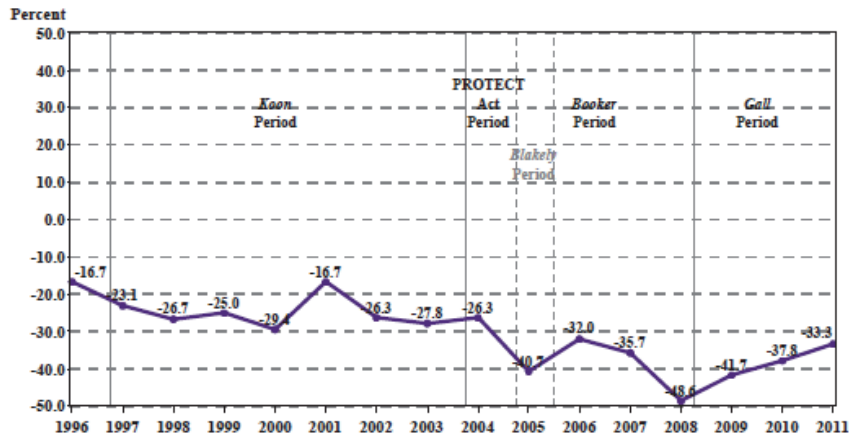
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Average Guideline Minimum and Sentence Imposed
Second Circuit - Fraud Offenses
Fiscal Years 1996-2011



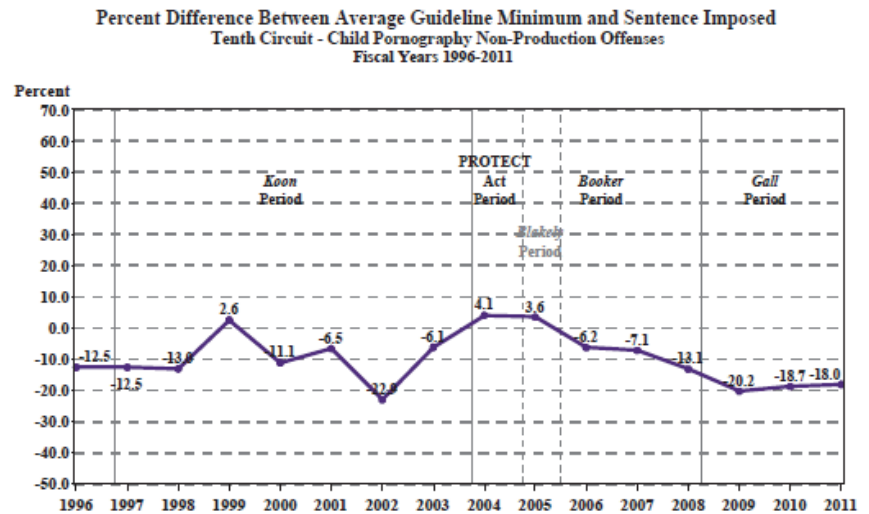
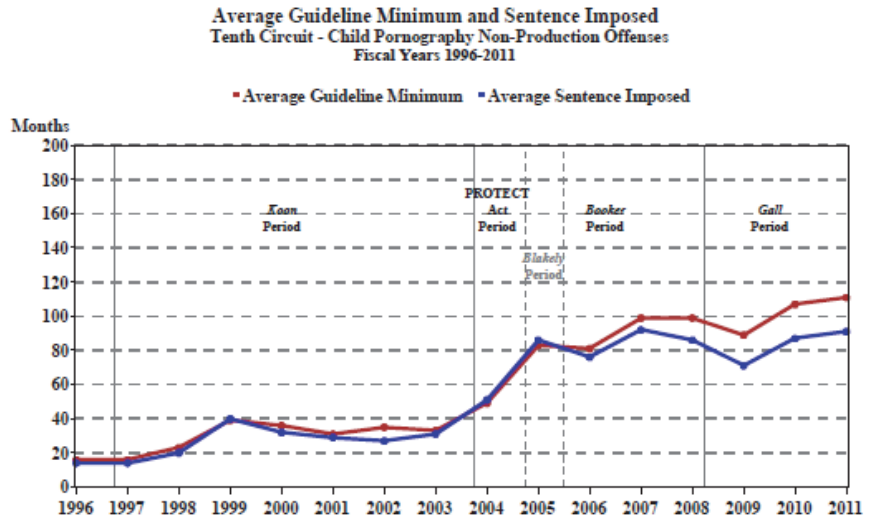
In contrast, in the Second Circuit, changes in averages sentences have not paralleled changes in average guideline minimums over time. Average guideline minimums have increased at a much greater rate than average sentences since fiscal year 2005. Moreover, in fiscal year 2011, the average guideline minimum decreased slightly, while the average sentence increased slightly.

Percent Difference Between Average Guideline Minimum and Sentence Imposed
Second Circuit - Fraud Offenses
Fiscal Years 1996-2011



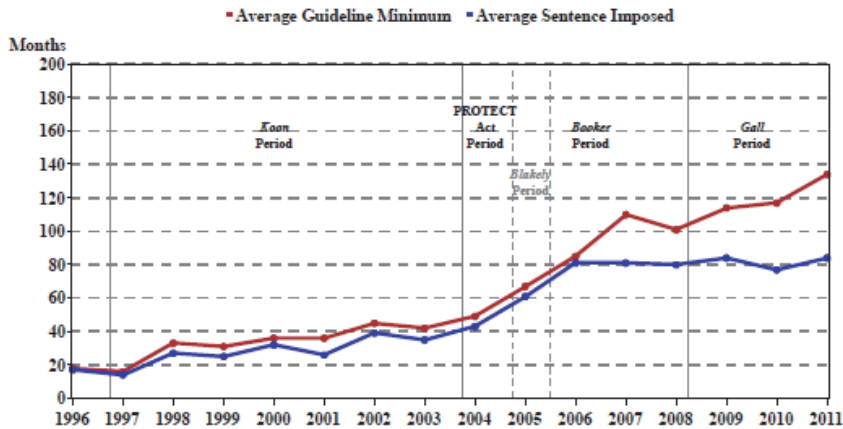
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In child pornography non-production offenses in the Tenth Circuit, the relationship between the average guideline minimum and the average sentence may be diminishing as average sentences have remained below the average guideline minimum since fiscal year 2006. Nonetheless, in the Tenth Circuit, average sentences have continued to track average guideline minimums.



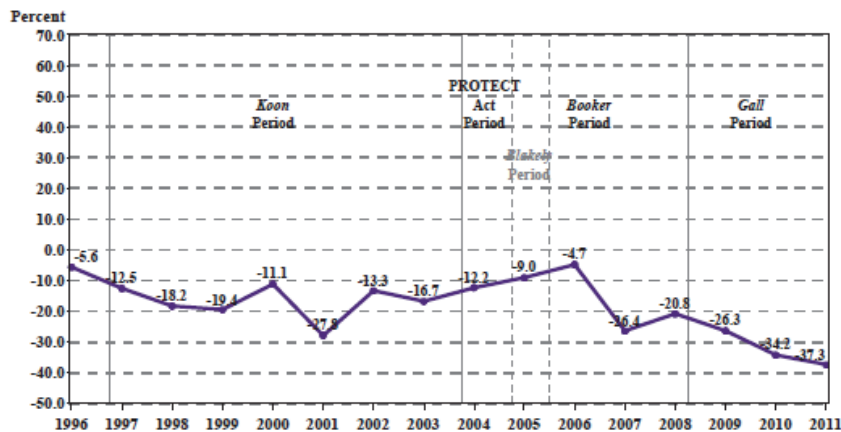
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Average Guideline Minimum and Sentence Imposed
Second Circuit - Child Pornography Non-Production Offenses
Fiscal Years 1996-2011



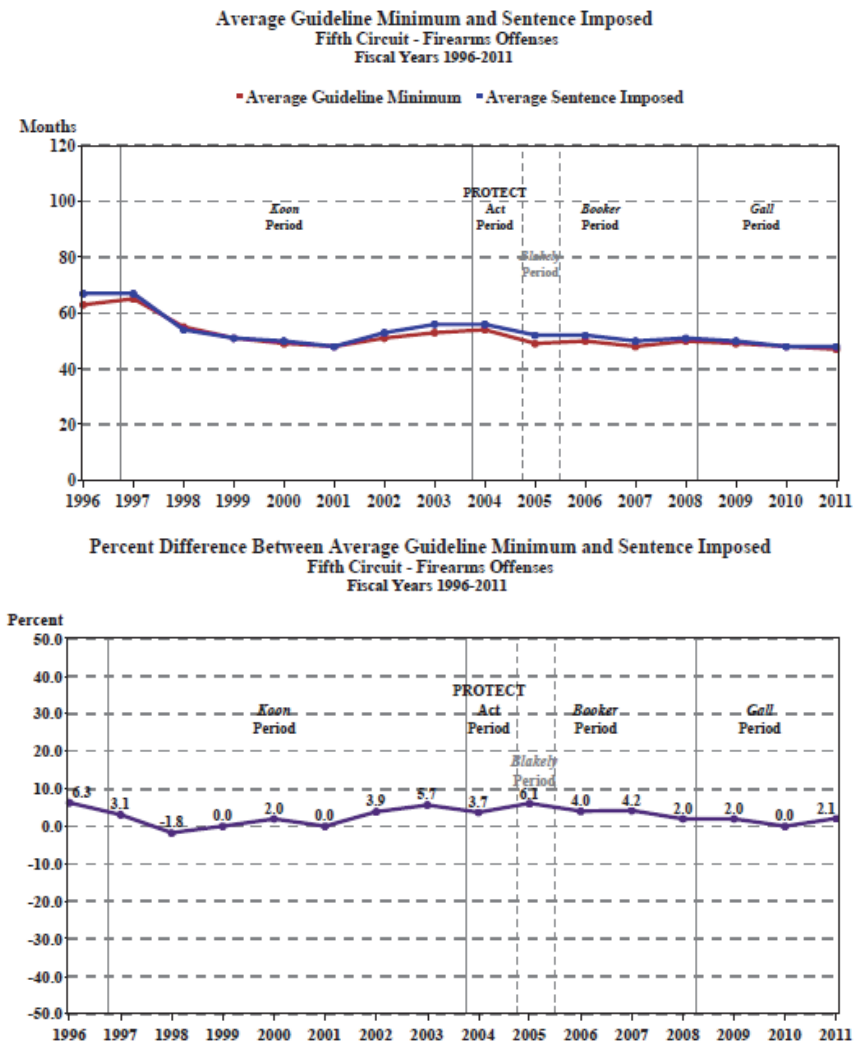
In all of the other circuits, average sentences have not increased to the same extent as average guideline minimums during the *Booker* period and continuing through the *Gall* period. In the Second Circuit, average sentences have demonstrated little relationship with average guideline minimums since fiscal year 2006.

Percent Difference Between Average Guideline Minimum and Sentence Imposed
Second Circuit - Child Pornography Non-Production Offenses
Fiscal Years 1996-2011

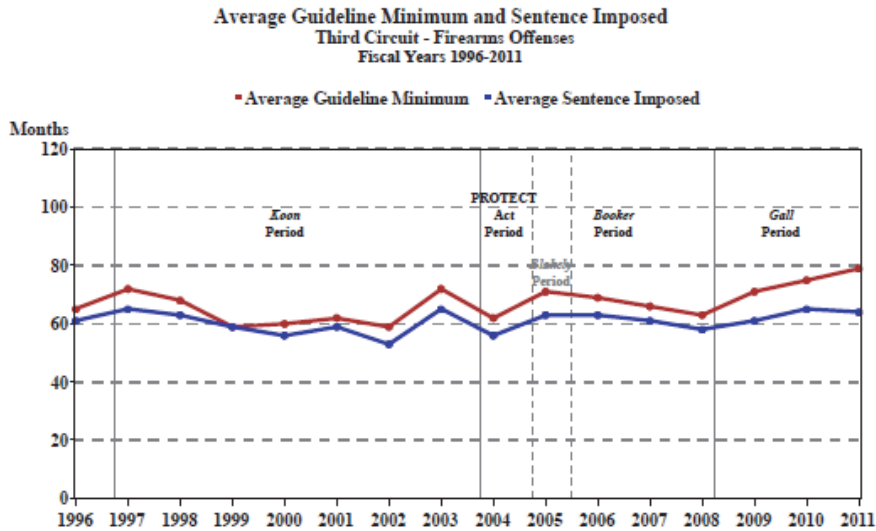


SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

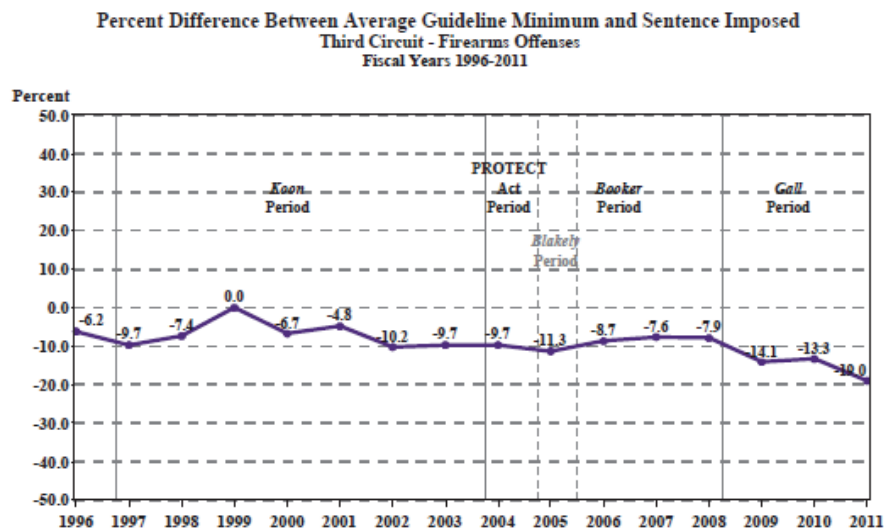
Even in firearms offenses, where the relationship between the average guideline minimum and average sentence has been relatively stable nationally, the degree of parallelism has varied by circuit. For example in the Fifth Circuit, average sentences have continued to track changes in average guideline minimums.



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

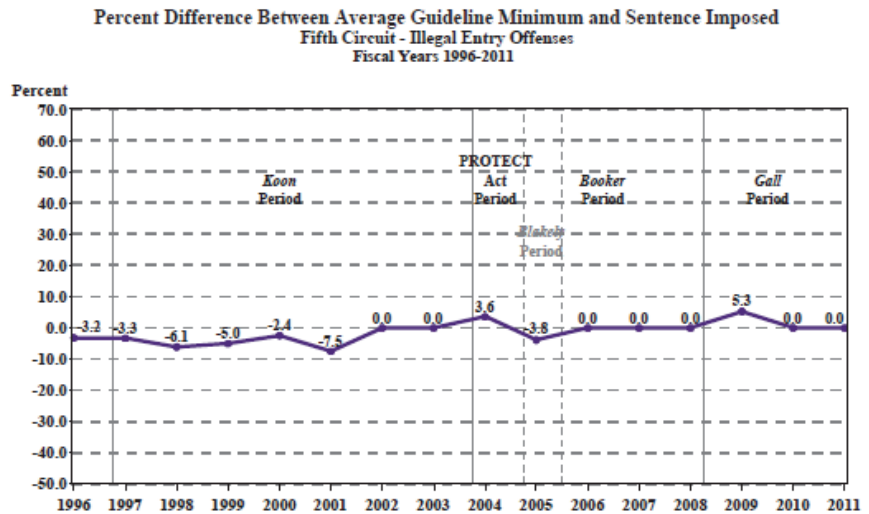
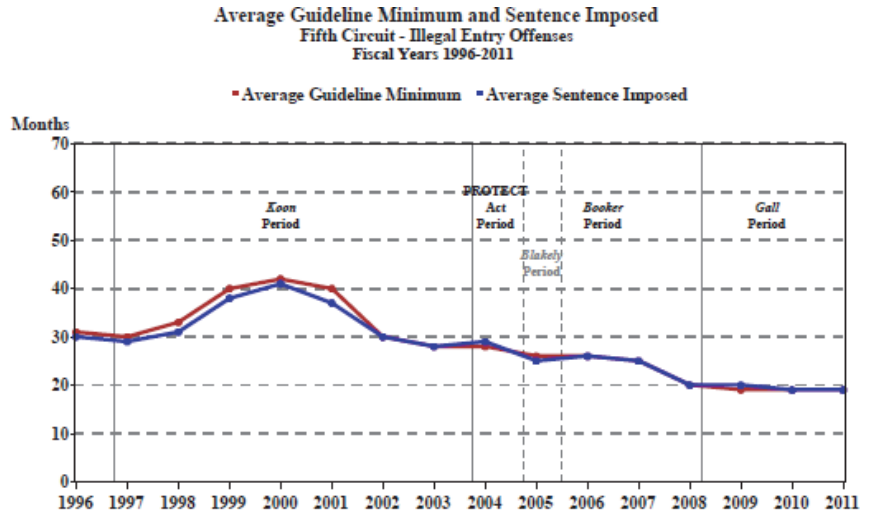


In contrast, in the Third Circuit average sentences have diverged from average guideline minimums since fiscal year 2009.



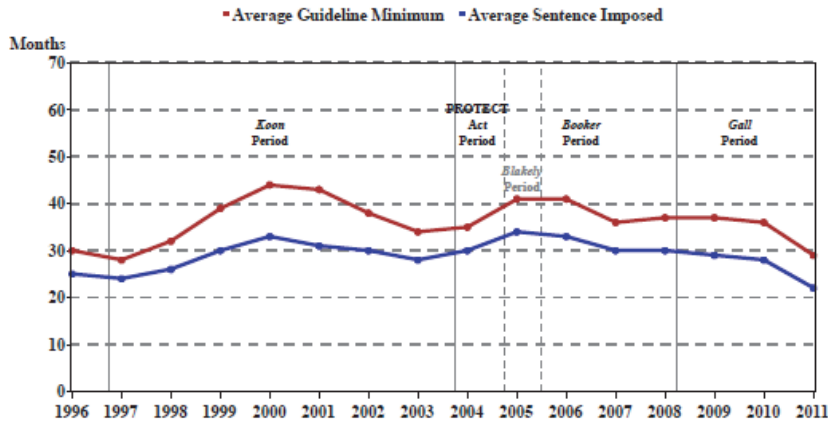
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In illegal entry offenses, the average guideline minimum and average sentence have been parallel in most circuits over time. Even so, differences can be seen in the Fifth and Ninth Circuits, which have large immigration caseloads. In the Fifth Circuit, average sentences have nearly equaled average guideline minimums during each fiscal year.



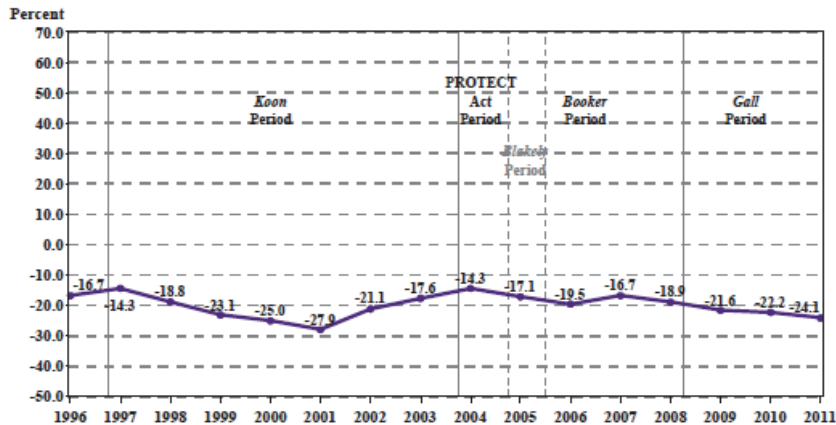
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Average Guideline Minimum and Sentence Imposed
Ninth Circuit - Illegal Entry Offenses
Fiscal Years 1996-2011



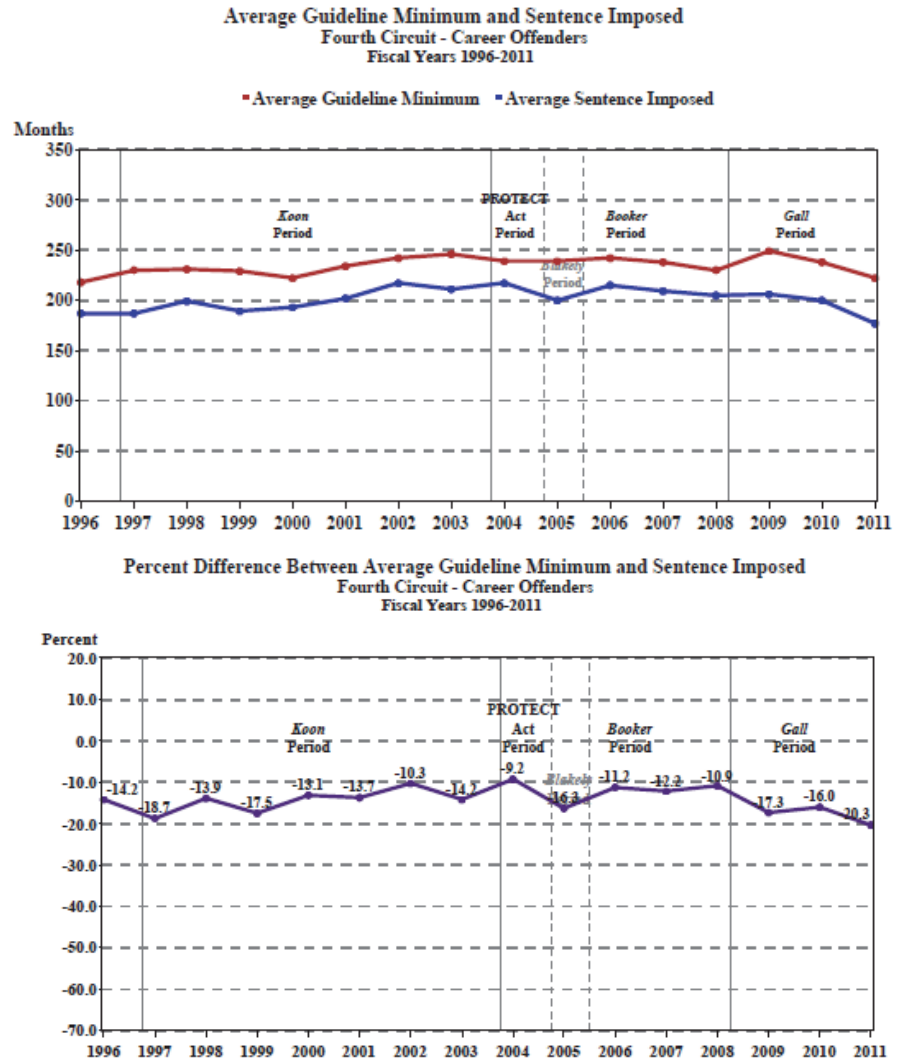
In contrast, in the Ninth Circuit, average sentences have been much lower than average guideline minimums. This was likely attributable to the fact that more districts with high immigration caseloads had EDP programs in the Ninth Circuit than in the Fifth Circuit.

Percent Difference Between Average Guideline Minimum and Sentence Imposed
Ninth Circuit - Illegal Entry Offenses
Fiscal Years 1996-2011



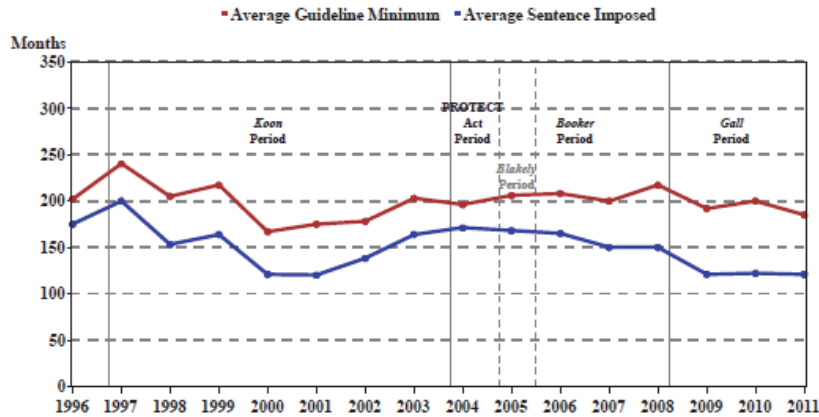
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In offenses sentenced under the career offender guideline, the relationship between the average guideline minimum and average sentence has fluctuated over time. In the Fourth Circuit, the relationship has been relatively stable.



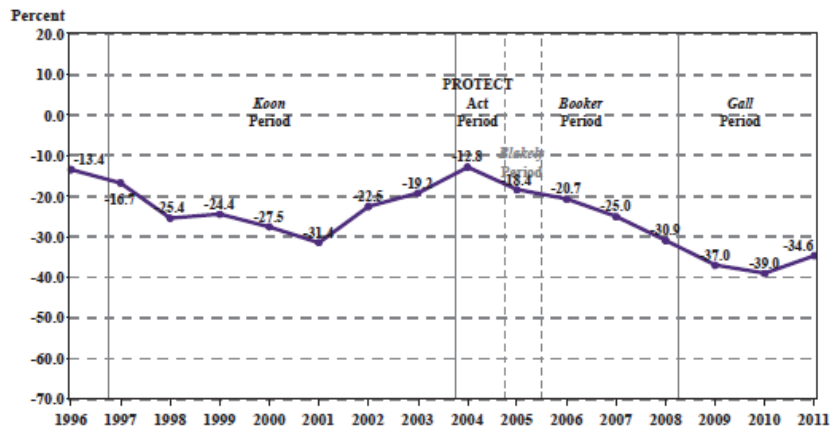
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Average Guideline Minimum and Sentence Imposed
First Circuit - Career Offenders
Fiscal Years 1996-2011



In the First Circuit, however, average sentences have not tracked average guideline minimums since fiscal year 2004.

Percent Difference Between Average Guideline Minimum and Sentence Imposed
First Circuit - Career Offenders
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

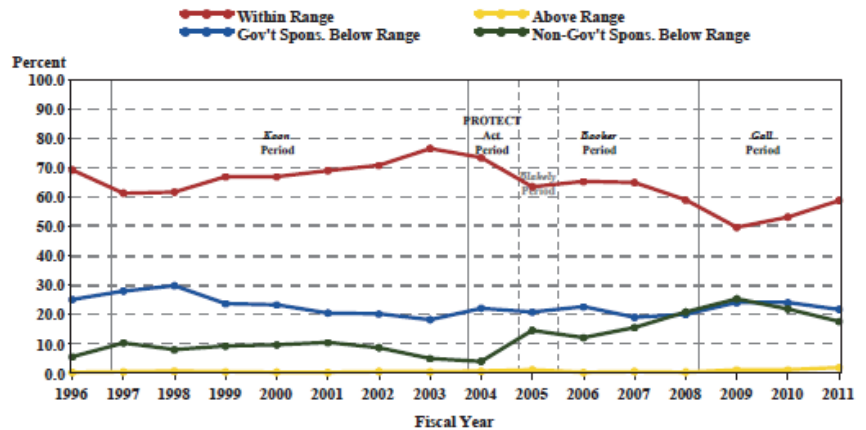
The influence of the guidelines, as measured by within range rates, has varied by circuit.

Although for most offense types the rates of within range sentences have decreased, the degree of decrease and the prevalence of non-government and government sponsored below range sentences have varied by circuit. For example, in the First Circuit, within range rates for drug trafficking offenses have consistently exceeded rates of both government and non-government sponsored below range sentences.

In contrast, in the Second Circuit, in fiscal year 2009 the within range rate for drug trafficking offenses was lower than both the government sponsored below range rate and non-government sponsored below range rate, primarily due to an increase in non-government sponsored below range sentences.

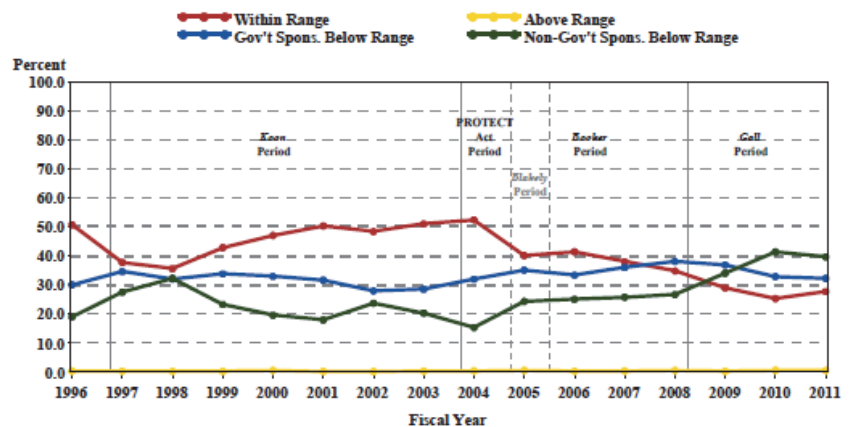
Likewise, in fraud and child pornography offenses, within range rates have also decreased in a non-uniform fashion across circuits. For fraud offenses in the First Circuit, the majority of sentences have been within range, whereas in the Second Circuit in fiscal year 2011, within range rates were less than 40 percent, and for the first time non-government sponsored below range rates exceeded within range rates.

Fiscal Year Data for Within-Range and Out-of-Range Sentences
First Circuit - Drug Trafficking Offenses
Fiscal Years 1996-2011



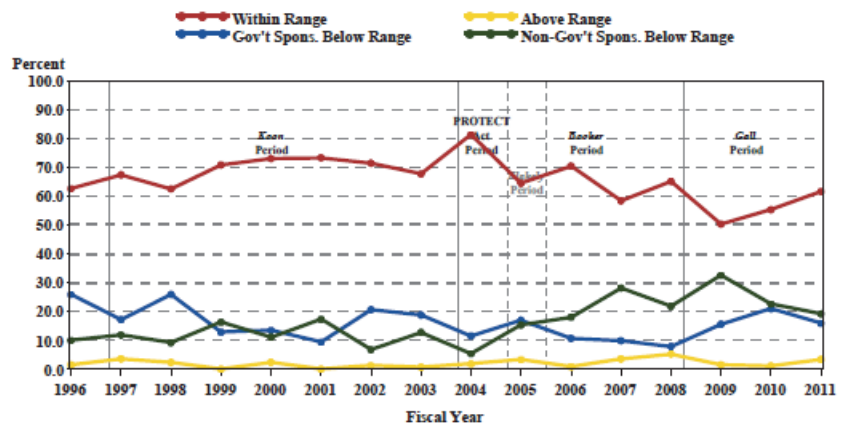
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Fiscal Year Data for Within-Range and Out-of-Range Sentences
Second Circuit - Drug Trafficking Offenses
Fiscal Years 1996-2011



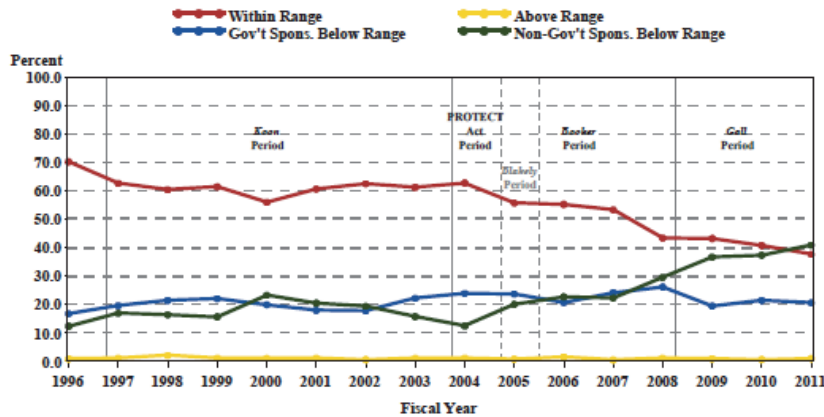
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Fiscal Year Data for Within-Range and Out-of-Range Sentences
First Circuit - Fraud Offenses
Fiscal Years 1996-2011



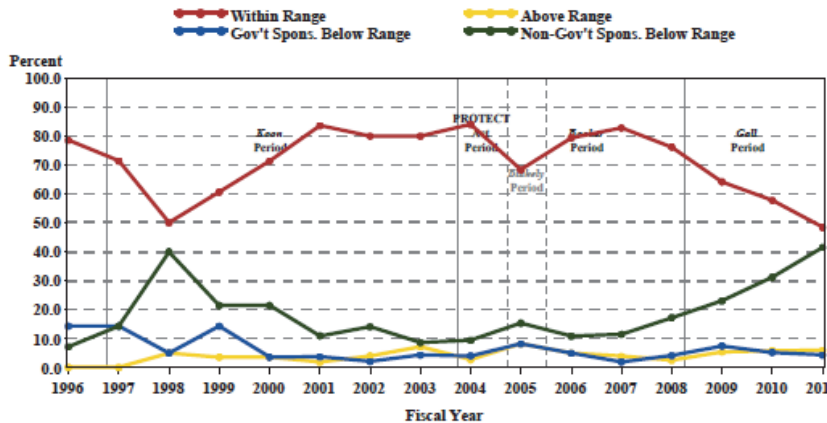
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Fiscal Year Data for Within-Range and Out-of-Range Sentences
Second Circuit - Fraud Offenses
Fiscal Years 1996-2011



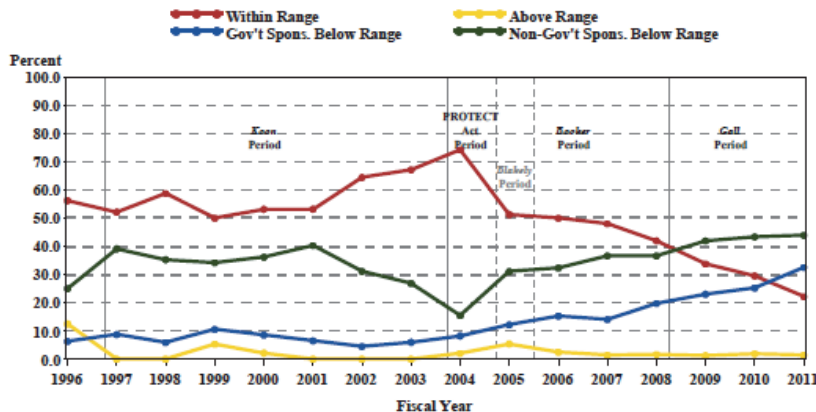
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Fiscal Year Data for Within-Range and Out-of-Range Sentences
Fifth Circuit - Child Pornography Non-Production Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Fiscal Year Data for Within-Range and Out-of-Range Sentences
Ninth Circuit - Child Pornography Non-Production Offenses
Fiscal Years 1996-2011



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

The Second Circuit was the only circuit in which non-government sponsored below range rates have exceeded within range rates in fraud offenses.

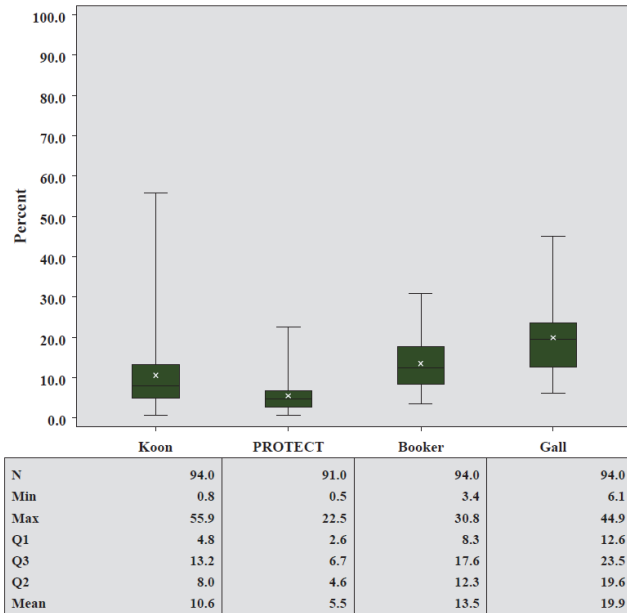
In child pornography non-production offenses (including receipt, trafficking and possession offenses) the Fifth Circuit was the only circuit in which the within range rate has exceeded the non-government sponsored below range rate throughout the entire *Gall* period. As reflected in the line graph, however, if the current trend continues, within range rates will be lower than non-government sponsored below range rates in the near future.

In all other circuits, non-government sponsored below range rates exceeded within range rates by the end of the *Gall* period. In the Ninth Circuit, non-government sponsored below range rates exceeded within range rates in fiscal year 2009.

In sum, differences among the circuits in the stability of the relationship between average sentences and average guideline minimums, and differences in within range sentencing rates, have demonstrated growing sentencing disparities.

The rates of non-government sponsored below range sentences have increased in most districts and the variation in such rates across districts for most offenses was greatest in the Gall period, indicating that sentencing outcomes increasingly depend upon the district in which the defendant is sentenced.

Spread of Rates of Non-Government Sponsored Below Range Sentences
All Offenses
Koon Period through Gall Period



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

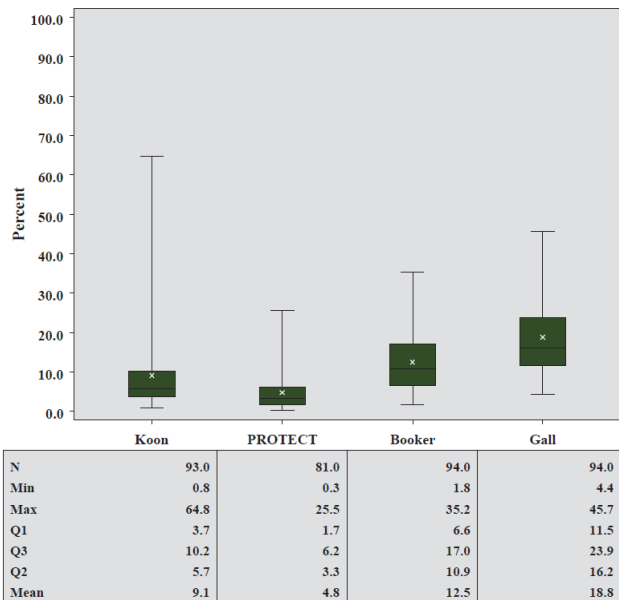
For most offense types, the spread in the rates of non-government sponsored below range sentences among districts was greatest during the *Gall* period, indicating growing disparity in district practices. The box plot of non-government sponsored below range rates for all offenses exhibits this pattern. The *Koon* period is not directly comparable to the other periods because during that period the Commission attributed some below range sentences to the court as “other downward departures,” whereas the sentencing documents indicated some benefit to the government. The Commission would now attribute such a sentence to the government according to the coding and reporting practices implemented just before enactment of the PROTECT Act.⁴⁰⁷

This trend of increasing spread in rates of non-government sponsored below range sentences was also apparent with respect to specific offense types. The

following box plots depict the spread among districts in rates of non-government sponsored below range sentences for drug trafficking and firearms offenses. The rising position of the box along the vertical axis in the plots reflects that non-government below range rates have increased over time for drug trafficking and firearms offenses. Further, the increasing size of the box shows that the *spread* in the rates has also increased over time, and was largest during the *Gall* period.

In drug trafficking offenses, courts imposed non-government sponsored below range sentences in 81 districts during the PROTECT Act period, and in all 94 districts during both the *Booker* and *Gall* periods. The spread was smallest, and the rates of non-government sponsored below range sentences were lowest, during the PROTECT Act period. During the PROTECT Act period, for example, among the districts with the lowest rates within the box was Middle Pennsylvania, which had a non-government sponsored below range rate of 1.8 percent. Among the districts with the highest rates within the box was Minnesota, with a rate of 5.3 percent. Both districts sentenced just over 220 drug trafficking offenders during this period, and the difference in the rates was 3.5 percentage points. The spread was greatest, and the rates of non-government sponsored below range rates were highest, during the *Gall* period. Southern Mississippi, for example, sentenced 320 drug

Spread of Rates of Non-Government Sponsored Below Range Sentences
Drug Trafficking Offenses
Koon Period through Gall Period



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

⁴⁰⁷ See *supra* at 53-54 (discussing changes in Commission collection methodology).

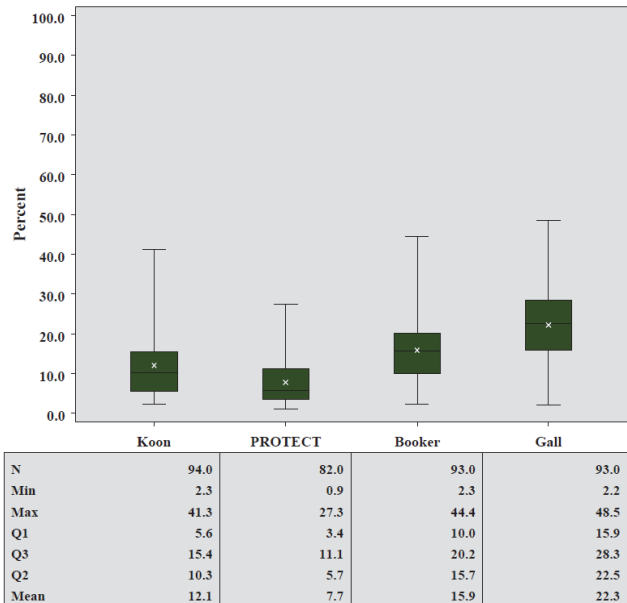
trafficking offenders during the *Gall* period and had a rate of 11.6 percent non-government sponsored below range sentences, whereas Western Michigan sentenced 519 drug offenders during that same period and had a rate of 22.2 percent non-government sponsored below range sentences, a 10.6 percentage point difference.

Large increases in the rates of non-government sponsored below range sentences within individual districts have contributed to the increasing spread in non-government sponsored below range rates in drug trafficking offenses. For example, in Southern Ohio, rates of non-government sponsored below range sentences were 6.1 percent during the PROTECT Act period, 14.1 percent during the *Booker* period, and 23.0 percent during the *Gall* period. In Middle Pennsylvania, the non-government sponsored below range rates were 1.8 percent during the PROTECT Act period, 10.4 percent during the *Booker* period, and 20.3 percent during the *Gall* period. In Eastern Tennessee, a district with relatively low rates of non-government sponsored below range sentences in drug trafficking offenses, rates increased from 2.2 percent during the PROTECT Act period, to 6.8 percent during the *Booker* period, and 12.4 percent during the *Gall* period.

In firearms offenses courts imposed non-government sponsored below range sentences in 82 districts during the PROTECT Act period, and in 93 districts during the *Booker* and *Gall* periods. Both the spread and the rates among the middle 50 percent of districts were greatest during the *Gall* period. During the PROTECT Act period, for example, among the districts with the lowest rates within the box was Western Virginia, which had a non-government sponsored below range rate of 3.6 percent. Among the districts with the highest rates within the box was Wyoming, with a rate of 9.4 percent. Western Virginia sentenced 84 firearms offenders during the PROTECT Act period, Wyoming sentenced 64, and the spread between the two districts was 5.8 percentage points. During the *Gall* period, Northern Oklahoma, for example, sentenced 162 firearms offenders and had a rate of 16.0 percent non-government sponsored below range sentences, whereas Wyoming sentenced 156 firearms offenders during that same period and had a rate of 26.9 percent non-government sponsored below range sentences, nearly 11 percentage points higher than the rate in Northern Oklahoma.

Substantial increases in the rates of non-government sponsored below range sentences within

Spread of Rates of Non-Government Sponsored Below Range Sentences
Firearms Offenses
Koon Period through Gall Period



SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

individual districts have contributed to an increased spread in rates in firearms offenses. For example, in Eastern Michigan, rates of non-government sponsored below range sentences were 8.0 percent during the PROTECT Act period, 18.2 percent during the *Booker* period, and 26.9 percent during the *Gall* period. In Western Virginia, the rates were 3.6 percent during the PROTECT Act period, 12.3 percent during the *Booker* period, and 24.5 percent during the *Gall* period. In Eastern Pennsylvania, the rates were 4.0 percent during the PROTECT Act period, 19.2 percent during the *Booker* period, and 28.3 percent during the *Gall* period. In contrast, in South Carolina, a district with relatively low rates of non-government sponsored below range sentences in firearms offenses, rates increased from 1.3 percent during the PROTECT Act period, to 10.9 percent during the *Booker* period, and 16.6 percent during the *Gall* period. South Carolina sentenced 534 firearms offenders during the *Booker* period and 699 firearms offenders in the *Gall* period.

The same trend was evident in fraud offenses⁴⁰⁸ where the number of districts with non-government sponsored below range sentences increased from 69 districts in the PROTECT Act period, to 92 districts in the *Booker* period, to 93 districts in the *Gall* period. During the *Gall* period,

⁴⁰⁸ Box plots for fraud offenses are in Part C, available online.

the middle 50 percent of districts had higher non-government sponsored below range rates and more variation than in previous periods. In Northern Georgia, for example, rates of non-government sponsored below range sentences more than tripled from the PROTECT Act period to the *Gall* period. In the PROTECT Act period, the rate was 8.3 percent, in the *Booker* period it was 17.1 percent, and in the *Gall* period, it was 27.5 percent. Likewise, rates of non-government sponsored below range sentences in fraud offenses in the district of Utah increased tremendously, from 4.0 percent during the PROTECT Act period, to 18.5 percent in the *Booker* period, to 27.7 percent in the *Gall* period.

In illegal entry offenses,⁴⁰⁹ the spread in the rates of non-government sponsored below range sentences also was greatest in the *Gall* period. Further, the increase in the number of districts reporting non-government sponsored below range sentences was more marked: 54 districts in the PROTECT Act period, 79 districts in the *Booker* period, and 92 districts during the *Gall* period. Similar increases in the number of districts reporting non-government sponsored below range sentences occurred in career offender cases: there were 52 districts in the PROTECT Act period, 86 districts in the *Booker* period, and 89 districts in the *Gall* period.

In child pornography non-production offenses (including trafficking, receipt, and possession offenses)⁴¹⁰ a relatively small number of districts (N=39) reported non-government sponsored below range sentences during the PROTECT Act period, when Congress enacted broad restrictions on below range sentences in these types of cases. In contrast, during the *Gall* period, 91 districts reported non-government sponsored below range sentences.⁴¹¹

⁴⁰⁹ Box plots for illegal entry offenses are in Part C, available online.

⁴¹⁰ Box plots for child pornography non-production offenses are in Part C, available online.

⁴¹¹ During the PROTECT Act period, judges in 39 districts imposed non-government sponsored below range sentences, whereas judges in many more districts did so during the other periods. (*Koon* period N=88; *Booker* period N=83; *Gall* period N=91). This may reflect the fact that Congress specifically prohibited departures in child sexual exploitation cases in the PROTECT Act period. The PROTECT Act amended 18 U.S.C. § 3553(b) to permit the sentencing court to impose a sentence below the applicable

Of all of the offense types studied, child pornography non-production offenses had the highest rates of non-government sponsored below range sentences among the middle 50 percent of districts. Furthermore, of the offense types studied, child pornography non-production offenses had the greatest spread among the middle 50 percent of districts, at 24.3 percentage points in the *Gall* period.⁴¹² This compared to spreads of 19.8 percentage points in illegal entry offenses, 12.6 percentage points in fraud offenses, and 12.4 percentage points in firearms offenses and drug trafficking offenses.

For offenses in the aggregate, the average extent of the reduction for non-government sponsored below range sentences has been approximately 40 percent below the guideline minimum during all periods (amounting to average reductions of 17 to 21 months); however, the extent of the reduction has varied by offense type.

For offenses in the aggregate, the extent of non-government sponsored below range reductions has remained relatively constant over time, hovering near a 40 percent reduction below the guideline minimum during all four periods: 41.8 percent (17 months below the guideline minimum) during the *Koon* period; 40.0 percent (17 months below the guideline minimum) during the PROTECT Act period; 39.1 percent (20 months below the guideline minimum) during the *Booker* period; and 40.7 percent (21 months below the guideline minimum) during the *Gall* period.

When analyzed by offense type, the extent of the reduction has varied over time and by offense type.

sentencing guideline range only if the court finds that there exists a mitigating circumstance of a kind or to a degree that has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements, taking account of any amendments to such sentencing guidelines or policy statements by Congress. 18 U.S.C. § 3553(b)(2) (Child crimes and sex offenses) (2003). In addition, the PROTECT Act directly amended several policy statements to specifically prohibit their application to child sexual exploitation cases. Furthermore, the PROTECT Act period was the shortest of the four periods, and had the smallest number of cases.

⁴¹² The spread is the difference between the bottom of the box (Q1=31.3%) and the top of the box (Q3=55.6%).

In child pornography non-production offenses, for example, the average reduction in months increased from 15 months (55.7% below the guideline minimum) in the *Koon* period to 18 months (50.4% below the guideline minimum) in the PROTECT Act period, 28 months (38.8% below the guideline minimum) during the *Booker* period, and 44 months (40.4% below the guideline minimum) during the *Gall* period. In contrast, reductions in illegal entry offenses held steady at 12 months during the PROTECT Act, *Booker*, and *Gall* periods. The 12-month reduction has translated into a reduction of 28.1 to 35.7 percent below the guideline minimum depending on the period.

As a percentage below the guideline minimum, fraud offenses have had the largest reductions of all offense types, more than 50 percent below the guideline minimum during three out of four periods: 56.1 percent (nine months below the guideline minimum) during the *Koon* period, 53.4 percent (10 months below the guideline minimum) during the PROTECT Act period, 52.6 percent (11 months below the guideline minimum) during the *Booker* period, and 49.3 percent (13 months below the guideline minimum) during the *Gall* period. In firearms offenses, the extent of the reduction has varied little, between 38.0 percent (16 months below the guideline minimum) in the *Booker* period and 42.2 percent (18 months below the guideline minimum) in the *Koon* period. In months, career offenders have received the largest reductions below the guideline minimum across the periods, varying between 63 months (32.0% below the guideline minimum) in the PROTECT Act period and 72 months (37.3% below the guideline minimum) in the *Koon* period.

Average Extent of Non-Government Sponsored Below Range Reduction by Offense Type
Koon Period through Gall Period

OFFENSE TYPE	<i>Koon</i> Period (6/13/96 - 4/30/03)	PROTECT Act Period (5/1/03 - 6/24/04)	<i>Booker</i> Period (1/12/05 - 12/10/07)	<i>Gall</i> Period (12/11/07-9/30/11)
	Percent (Months)	Percent (Months)	Percent (Months)	Percent (Months)
All Offenses	41.8 (17)	40.0 (17)	39.1 (20)	40.7 (21)
Drug Trafficking	40.4 (22)	35.7 (26)	30.9 (30)	34.3 (28)
Firearms	42.2 (18)	41.5 (16)	38.0 (16)	39.4 (17)
Fraud	56.1 (9)	53.4 (10)	52.6 (11)	49.3 (13)
Child Pornography Non-Production	55.7 (15)	50.4 (18)	38.8 (28)	40.4 (44)
Illegal Entry	33.2 (16)	28.1 (12)	31.4 (12)	35.7 (12)
Career Offenders	37.3 (72)	32.0 (63)	30.7 (67)	32.4 (69)

SOURCE: U.S. Sentencing Commission, 2011 *Booker* Report Datafiles.

Government sponsored below range sentences have contributed to increasing variation in sentencing.

The decrease in within range sentence rates for offenses in the aggregate was attributable to increases in the rates of both non-government sponsored and government sponsored below range sentences. Specifically, rates of government sponsored below range sentences for all offenses were 19.8 percent in the *Koon* period, 23.4 percent in the PROTECT Act period, 26.1 percent in the *Booker* period, and 26.8 percent in the *Gall* period. By comparison, rates of non-government sponsored below range sentences were 15.4 percent in the *Koon* period, 5.7 percent in the PROTECT Act period, 12.6 percent in the *Booker* period, and 17.4 percent in the *Gall* period.⁴¹³ The analysis categorized the rates of government sponsored below range sentences as one of three types: substantial assistance (pursuant to USSG §5K1.1); EDP (pursuant to §5K3.1); or other.

Substantial assistance below range sentences are specifically authorized in 18 U.S.C. § 3553(e). This section provides limited authority to impose a sentence below the statutory minimum in a case in which the defendant provides substantial assistance to the government in the investigation and prosecution of another person who has committed an offense. Further, section 994(n) of title 28, United States Code, requires the Commission to “assure that the guidelines reflect the general appropriateness” of imposing a reduced sentence on a defendant who has provided substantial assistance. The Commission implemented this directive in USSG §5K1.1 (Substantial Assistance).

EDP departures were authorized by Congress in the PROTECT Act of 2003,⁴¹⁴ but had been operating before then in a number of districts and had

generally been reported by the Commission as “other downward departures.” Therefore, EDP rates are reported only for the PROTECT Act, *Booker*, and *Gall* periods. The vast majority of EDP departures occur in illegal entry offenses, because “fast-track programs originated in southwestern border districts with an exceptional volume of immigration cases.”⁴¹⁵ However, the Department of Justice recently expanded eligibility for EDP departures, stating that “[t]he existence of these programs in some, but not all, districts has generated a concern that defendants are being treated differently depending on where in the United States they are charged and sentenced,”⁴¹⁶ and noting that “USAOs in non-fast track districts routinely face motions for variances based on fast-track programs in other districts.”⁴¹⁷ The revised policy establishes “baseline eligibility requirements for any defendant who qualifies for fast-track treatment, regardless of where that defendant is prosecuted,” meaning that all districts that prosecute illegal reentry offenses under 8 U.S.C. § 1326 are now required to implement early disposition programs for offenders who meet the criteria.⁴¹⁸ Nonetheless, the criteria for qualifying for the EDP departure, and the amount of the reduction (within the 4-level-reduction limit in USSG §5K3.1) remain within the discretion of the United States Attorney for each district; therefore, regional differences in the programs may continue.

Unlike substantial assistance and EDP, other government sponsored below range sentences are not

⁴¹³ The sharp decrease in non-government sponsored below range rates between the *Koon* and PROTECT Act periods reflects in part the change in the way the Commission collected departure data. See *supra* at 53-54 (discussing changes in Commission collection methodology).

⁴¹⁴ See section 401(m)(2)(B) of the PROTECT Act, Pub. L. No. 108-21 (directing the Commission to formulate a guideline providing up to a 4-level reduction pursuant to an early disposition program authorized by the Attorney General of the United States).

⁴¹⁵ Memorandum of James M. Cole, Deputy Attorney General, *Department Policy on Early Disposition or “Fast-Track” Programs* (Jan. 31, 2012) available at <http://www.justice.gov/dag/fast-track-program.pdf>. [hereinafter Cole Memorandum] See also Memorandum of David W. Ogden, Deputy Attorney General, *Authorization of Certain Early Disposition Programs*, at 1 (May 29, 2009) [hereinafter Ogden Memorandum].

⁴¹⁶ Cole Memorandum at 2.

⁴¹⁷ *Id.* See also Ogden Memorandum (authorizing certain early disposition program and listing the classes of cases to which they apply).

⁴¹⁸ Cole Memorandum, *supra* note 415 (“Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326)—the largest category of cases authorized for fast-track treatment—shall implement an early disposition program in accordance with the following requirements and the exercise of prosecutorial discretion by the United States Attorney”).

specifically authorized by statute and have not been incorporated into the *Guidelines Manual* through any specific guideline or policy statement. In this respect, other government sponsored below range sentences are more similar to non-government sponsored below range sentences. Department of Justice policy on charging and sentencing notes that “[i]n the typical case, the appropriate balance among [the statutory purposes of sentencing] will continue to be reflected by the applicable guidelines range,” and advises prosecutors to “generally continue to advocate for a sentence within that range,” because “[t]he advisory guidelines remain important in furthering the goal of national uniformity throughout the federal system.”⁴¹⁹ However, the policy goes on to note that “consistent with the Principles of Federal Prosecution and given the advisory nature of the guidelines, advocacy at sentencing—like charging decisions and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case.”⁴²⁰ By its terms, the memorandum permits government sponsored below range sentences that are based on neither substantial assistance nor EDP programs.

The rates of substantial assistance sentences have decreased over time for offenses in the aggregate, from 19.1 percent in the *Koon* period, to 16.6 percent during the PROTECT Act period, to 15.2 percent during the *Booker* period, to 12.9 percent during the *Gall* period, and this trend was observed for most offense types. The extent of the reduction below the guideline minimum, however, has been generally consistent, ranging from 49.9 percent below the guideline minimum in the *Booker* period to 52.4 percent below the guideline minimum in the *Koon* period. This has been fairly comparable to the extent of the reductions below the guideline minimum in non-government sponsored below range sentences, which ranged from 39.1 percent below the guideline minimum in the *Booker* period to 41.8 percent below the guideline minimum in the *Koon* period.

In terms of months, however, the reductions in substantial assistance sentences have been nearly twice as long as reductions in non-government

sponsored below range sentences. The extent of the reduction in substantial assistance sentences ranged from 41 months during the *Koon* and PROTECT Act periods to 44 months and 45 months during the *Booker* and *Gall* periods, respectively. By comparison, the extent of the reduction in non-government sponsored below range sentences was 17 months in the *Koon* and PROTECT Act periods, and 20 and 21 months in the *Booker* and *Gall* periods, respectively. This difference in the extent of the reduction as measured in months reflects the fact that substantial assistance departures have generally applied to offenders with higher guideline minimums than offenders who received non-government sponsored below range sentences.

In contrast to substantial assistance rates, the rates of EDP departures have increased over time. The rates of EDP departures for illegal entry offenses, which constituted nearly one-third of fiscal year 2011 offenses in this analysis⁴²¹ (31.3% of all federal offenses), increased from 7.1 percent in the PROTECT Act period, to 26.2 percent in the *Booker* period, to 26.8 percent in the *Gall* period. Now that EDP departures are available in all districts prosecuting illegal entry offenses, these rates will likely increase. Further, some districts make EDP available in drug trafficking offenses. For example, in Southern California, 69.6 percent of 1,991 marijuana traffickers received EDP departures during the *Gall* period. Marijuana trafficking offenders in New Mexico and Arizona received EDP departures at rates of 43.6 percent (out of 1,472 offenders) and 37.7 percent (out of 3,707 offenders), respectively. It is unclear whether the new Department of Justice policy regarding EDP departure policies in illegal entry offenses will affect the rates of EDP departures for other offense types.

⁴¹⁹ Memorandum of Eric H. Holder, Jr., Attorney General, *Department Policy on Charging and Sentencing*, at 2 (May 19, 2010).

⁴²⁰ *Id.* at 2-3.

⁴²¹ Immigration offenses include smuggling, transporting or harboring an unlawful alien, and unlawfully entering or remaining in the United States. These offenses are sentenced under USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and USSG §2L1.2 (Unlawfully Entering or Remaining in the United States). The Commission has previously reported that beginning in fiscal year 2009 immigration cases became the most common serious federal crime. *See* U.S. SENT’G COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009, at 1-2 (December 2010) (noting immigration cases comprised 32.2 % of the federal caseload while drugs comprised 30.3%). That analysis was based on the defendant’s statute of conviction, not on the guideline applied at sentencing.

The extent of the reduction in terms of months and percentage below the guideline minimum in EDP sentences was relatively small compared to substantial assistance and non-government sponsored reductions. Average reductions for EDP departures in illegal entry offenses were ten months (25.3% below the guideline minimum) in the PROTECT Act period, nine months (26.1% below the guideline minimum) in the *Booker* period, and ten months (30.0% below the guideline minimum) in the *Gall* period.⁴²²

The rates of other government sponsored below range sentences were substantially lower than the rates of substantial assistance and EDP departures.⁴²³ Other government sponsored below range sentences for all offenses were first collected and reported by the Commission during the PROTECT Act period, when the rate was 5.1 percent. The rate decreased to 3.3 percent during the *Booker* period, then increased to 4.2 percent in the *Gall* period. These rates have varied depending on the type of offense.

Although rates of other government sponsored below range sentences have remained relatively low, they have occurred in more districts over time and may contribute to increased variation in sentencing in the future. During the PROTECT Act period, for offenses in the aggregate, such sentences were imposed in 73 districts, compared to 93 districts in the *Booker* period, and all 94 districts in the *Gall* period. This increase has occurred for a number of offense types. For example, in drug trafficking offenses, other government sponsored below range sentences were imposed in 51 districts in the PROTECT Act period, compared to 81 districts in the *Booker* period, and 87 districts in the *Gall* period. Similarly, in firearms offenses, other government sponsored below range sentences occurred in 28 districts in the PROTECT Act period, compared to 72 districts in the *Booker* period, and 81 districts in the *Gall* period. In fraud

offenses, the number of districts with other government sponsored below range sentences increased from 31 districts in the PROTECT Act period, to 70 districts in the *Booker* period, to 82 districts in the *Gall* period. The same trend existed for child pornography non-production offenses and for fraud offenses. The number of districts with other government sponsored below range sentences in child pornography non-production offenses increased from six in the PROTECT Act period, to 45 in the *Booker* period, to 70 districts in the *Gall* period. The number of districts with other government sponsored below range sentences in fraud offenses increased from 31 in the PROTECT Act period, to 70 in the *Booker* period, to 82 districts in the *Gall* period.

The rate of other government sponsored below range sentences has varied depending on the offense type. *Gall* period rates were very similar for several offenses types: 4.1 percent for drug trafficking offenses, 4.3 percent for firearms offenses, and 3.9 percent for fraud offenses. For other offenses, rates of other government sponsored below range sentences were higher. The highest rates were in child pornography offenses: 11.7 percent for production offenses and 10.4 percent for non-production offenses. In career offender cases, the other government sponsored below range rate was 9.3 percent. As seen in the table on the next page, when other government sponsored below range sentences were imposed, the extent of the reduction was similar to the extent of the reduction for non-government sponsored below range sentences.

⁴²² See Table, “Selected Sentencing Characteristics – Illegal Entry Offenses,” in Part C, available online.

⁴²³ Box plots depicting the spread in average rates of substantial assistance and EDP departures, and other government sponsored below range sentences are in Part C, available online. The spread in the rates of substantial assistance sentences for all offenses in the aggregate has remained relatively stable across the periods, with the smallest spread in the *Koon* period. The spread in the rates of EDP departures has increased over time, likely reflecting the fact that this departure is a congressionally authorized departure intended for use in limited circumstances.

Average Extent of Reduction by Offense Type
Koon Period through *Gall* Period

OFFENSE TYPE	<i>Koon</i> Period (6/13/96 - 4/30/03)	PROTECT Act Period (5/1/03 - 6/24/04)	<i>Booker</i> Period (1/12/05 - 12/10/07)	<i>Gall</i> Period (12/11/07-9/30/11)
Type of Below Range Sentence	Percent (Months)	Percent (Months)	Percent (Months)	Percent (Months)
ALL OFFENSES				
All Gov't Sponsored Below Range	51.8 (41)	44.9 (33)	42.5 (31)	42.8 (29)
Substantial Assistance (USSG §5K1.1)	52.4 (41)	50.5 (41)	49.9 (44)	51.4 (45)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	29.8 (10)	30.7 (10)	32.4 (10)
Other Gov't Sponsored Below Range	n/a (n/a)	31.1 (13)	36.3 (22)	40.5 (26)
Non-Gov't Sponsored Below Range	41.8 (17)	40.0 (17)	39.1 (20)	40.7 (21)
DRUG TRAFFICKING				
All Gov't Sponsored Below Range	49.2 (51)	45.3 (47)	44.1 (45)	45.2 (46)
Substantial Assistance (USSG §5K1.1)	49.3 (52)	46.8 (52)	46.5 (53)	48.4 (54)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	37.8 (9)	39.5 (13)	38.4 (13)
Other Gov't Sponsored Below Range	n/a (n/a)	36.5 (19)	31.2 (34)	34.8 (39)
Non-Gov't Sponsored Below Range	40.4 (22)	35.7 (26)	30.9 (30)	34.3 (28)
FIREARMS				
All Gov't Sponsored Below Range	51.0 (26)	49.9 (24)	46.9 (25)	45.2 (28)
Substantial Assistance (USSG §5K1.1)	51.1 (26)	50.9 (24)	49.5 (27)	48.0 (32)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	36.4 (29)	35.6 (9)	36.9 (11)
Other Gov't Sponsored Below Range	n/a (n/a)	41.2 (25)	39.9 (22)	39.8 (20)
Non-Gov't Sponsored Below Range	42.2 (18)	41.5 (16)	38.0 (16)	39.4 (17)
FRAUD				
All Gov't Sponsored Below Range	63.6 (11)	62.5 (13)	61.4 (17)	58.8 (20)
Substantial Assistance (USSG §5K1.1)	63.6 (11)	63.0 (13)	62.1 (17)	60.4 (21)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	-	80.0 (11)	33.1 (7)
Other Gov't Sponsored Below Range	n/a (n/a)	50.0 (9)	55.8 (14)	53.6 (15)
Non-Gov't Sponsored Below Range	56.1 (9)	53.4 (10)	52.6 (11)	49.3 (13)
CHILD PORNOGRAPHY NON-PRODUCTION				
All Gov't Sponsored Below Range	57.2 (16)	45.4 (22)	38.9 (36)	42.2 (47)
Substantial Assistance (USSG §5K1.1)	57.4 (17)	46.4 (22)	42.3 (41)	44.0 (59)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	73.6 (45)	41.6 (23)	35.0 (19)
Other Gov't Sponsored Below Range	n/a (n/a)	33.5 (12)	35.7 (32)	41.8 (45)
Non-Gov't Sponsored Below Range	55.7 (15)	50.4 (18)	38.8 (28)	40.4 (44)
ILLEGAL ENTRY				
All Gov't Sponsored Below Range	28.7 (13)	24.0 (10)	26.4 (9)	30.4 (10)
Substantial Assistance (USSG §5K1.1)	35.0 (17)	32.9 (13)	36.6 (14)	41.4 (16)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	25.3 (10)	26.1 (9)	30.0 (10)
Other Gov't Sponsored Below Range	n/a (n/a)	22.9 (9)	26.2 (7)	32.8 (8)
Non-Gov't Sponsored Below Range	33.2 (16)	28.1 (12)	31.4 (12)	35.7 (12)
CAREER OFFENDERS				
All Gov't Sponsored Below Range	45.4 (101)	41.1 (92)	41.6 (94)	43.1 (96)
Substantial Assistance (USSG §5K1.1)	45.5 (101)	41.3 (93)	42.9 (99)	44.1 (102)
Early Disposition Program (USSG §5K3.1)	n/a (n/a)	15.1 (13)	29.3 (31)	35.9 (57)
Other Gov't Sponsored Below Range	n/a (n/a)	41.8 (88)	36.6 (74)	40.6 (82)
Non-Gov't Sponsored Below Range	37.3 (72)	32.0 (63)	30.7 (67)	32.4 (69)

SOURCE: U.S. Sentencing Commission, 2011 *Booker* Report Datafiles.

Differences in prosecutorial practices, such as charging and plea agreement practices, have contributed to unwarranted disparity in sentencing.

A defendant's sentence is a product not only of decisions made by the court at sentencing, but also of decisions made earlier in the process. Prosecutorial decision making, including, for example, the choice of which crime to charge and the negotiation of various aspects of plea agreements, impacts the applicable statutory and guideline penalties, and therefore the ultimate sentence. Some of these decisions are reflected in Commission data, but the Commission does not have information on others and therefore cannot analyze their impact. One area of prosecutorial decision making that the Commission has studied is the decision to charge crimes that carry mandatory minimum penalties.

In its 2011 report to Congress on mandatory minimum penalties, the Commission studied drug offenses and mandatory minimum penalties.⁴²⁴ In drug trafficking offenses, the applicable statutory mandatory minimum penalty increases when a drug offender is convicted of a second or subsequent felony drug offense *and* the prosecutor files a notice of enhancement prior to plea or trial. Using sample groups from fiscal years 2006, 2008, and 2009, the Commission found significant variation in the manner in which prosecutors applied the enhancement provision. For example, in six districts, more than 75 percent of eligible defendants received the increased statutory mandatory minimum penalty as an enhancement. In contrast, in eight districts, none of the eligible drug offenders received the enhanced penalty. Interviews of prosecutors confirmed this regional disparity with respect to filing the notice of enhanced penalties in drug trafficking offenses. In interviews conducted in 13 districts, prosecutors reported wide variations in the practices surrounding the filing of notices seeking enhanced statutory mandatory minimum penalties in drug trafficking offenses.⁴²⁵ The Commission's interviews also

revealed divergent practices relating to the filing of multiple charges under 18 U.S.C. § 924(c), involving the use of a firearm during a crime of violence or drug trafficking felony,⁴²⁶ as well as inconsistencies in charging and plea agreement practices relating to child pornography and whether to charge receipt of child pornography, which carries a five-year statutory mandatory minimum, or possession, which does not.⁴²⁷

negotiations. In two districts, prosecutors advised that they filed the notice triggering the enhanced penalties in every applicable case and did not withdraw the notice under any circumstances. In another district, prosecutors suggested that office policy required section 851 notices to be filed in every applicable case, absent supervisory approval to withhold the filing of the notice. These prosecutors noted, however, that the timing of the filing was left to discretion of the individual prosecutor handling the case. These prosecutors also related that they might withdraw the section 851 notice if the offender agreed to provide substantial assistance. Finally, in one district, the prosecutors advised that they rarely filed the notices. The prosecutors in this district described the enhanced penalties as a "hammer for the worst offenders," but otherwise too harsh for low-level drug offenders.

⁴²⁶ *Id.* at 113-114. This offense carries a consecutive penalty of at least five years; second and subsequent violations are subject to a 25-year consecutive penalty. In most districts, the prosecutors generally charged multiple section 924(c) violations in violent offenses. By contrast, in two districts prosecutors advised that they rarely charge multiple violations. Further, the charge bargaining practices for multiple section 924(c) counts were inconsistent. Prosecutors in some districts would dismiss all but one section 924(c) count in exchange for a guilty plea. Others require a plea to at least two section 924(c) counts. In another, prosecutors require offenders that they consider especially violent to plead to at least three counts. Not only did the practices differ among districts, but the respondents interviewed also noted that the practice sometimes varied within districts, either by division or by individual prosecutor.

⁴²⁷ *Id.* at 114. A common inconsistency in prosecutorial charging decisions in child pornography offenses related to whether to charge possession, which carries no mandatory minimum penalty, or receipt, which carries a five-year mandatory minimum penalty. Interviews revealed that in a few districts, offenders who offered to plead guilty to a child pornography possession charge early in the case would have their receipt charges either dismissed or never filed. In at least one other district, if an offender successfully passed a polygraph examination establishing that no additional steps had been taken beyond viewing child pornography (*i.e.*, the

⁴²⁴ 2011 MANDATORY MINIMUM REPORT, *supra* note 17, at 252-261.

⁴²⁵ *Id.* at 111-113. In nine districts, prosecutors related that they did not file the notice automatically in every applicable case. In each of those districts, the prosecutors advised that they delayed filing the notice while engaging in plea

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.

The Commission examined the sentencing practices of individual judges within each district to determine the extent of variation among judges within the same district. This analysis was aimed at exploring differences in the rates of non-government sponsored below range sentences within each district. The Commission analyzed these rates by district because judges within the same district generally are more likely than judges across districts to preside over similar cases to the extent the district's cases are randomly distributed among the judges. Furthermore, United States Attorneys' prosecutorial practices within one district are more likely to be similar than across various districts. The Commission recognizes, however, that caseload composition may differ substantially across divisions within the same district.⁴²⁸ For this reason and others, including all the districts' judges in one analysis may not account for all relevant differences within a district and may limit the Commission's analysis. Nonetheless, for the purpose of analyzing differences among sentencing judges' practices, examining each district separately reduces, though does not eliminate, differences that may be attributable to caseload composition and prosecutorial practices, and reveals substantial differences in sentencing practices.

offender had not touched a child), that offender would be permitted to plead to possession of child pornography. In yet another, prosecutors typically agreed to enter into a binding plea agreement allowing the offender to plead guilty to a possession charge and requiring a specific sentence if the forensic examination of the offender's computer would be considerably delayed if the case were to go to trial.

⁴²⁸ For example, Western North Carolina has one division (Charlotte) with a larger urban population, another district (Asheville) with substantial federal property, and yet another district (Bryson City), with a substantial American Indian population. Different types of cases arise in each of these divisions, and one judge may be assigned more cases from a certain division than other judges due to caseload management issues.

The Commission reviewed data from all 94 districts, which are available online in Part D of this report, to determine whether any patterns emerged.⁴²⁹ In this review, the Commission examined the entire spread of judges' non-government sponsored below range rates. All judges (magistrate or district) who sentenced at least one offender convicted of a felony or a Class A misdemeanor offense were included in the plots. However, in determining whether the spread in the rates had expanded or contracted over time, it was important to distinguish whether the judge represented by the bubble sentenced a few or many offenders. A judge with the highest or lowest rate of non-government sponsored below range sentences may have sentenced one offender because he or she was a visiting or senior-status judge. Therefore, when the judge's bubble was a small pinpoint, indicating that the judge sentenced one or a very small number of offenders relative to the other judges in the district, the Commission did not consider that judge in its assessment of whether the spread of rates generally increased or decreased during that period in order to avoid overstating the spread during any period.

In the majority of districts (n=64) the spread in the rates of non-government sponsored below range sentences was smallest during the PROTECT Act period and greatest during the *Gall* period. In other words, in two-thirds of districts, judges' rates of non-government sponsored below range sentences were most uniform during the PROTECT Act period, and were the most varied during the *Gall* period. The spread of the rates in a much smaller number of districts (n=16) either did not change, or did not contract during the PROTECT Act period as compared to the *Koon* period.⁴³⁰ In 14 districts any difference in the spread between the *Koon* and PROTECT Act periods was too subtle to discern.⁴³¹ In those 14

⁴²⁹ Bubble plots for each of the 12 circuits and each of the 94 districts are in Part D, available online.

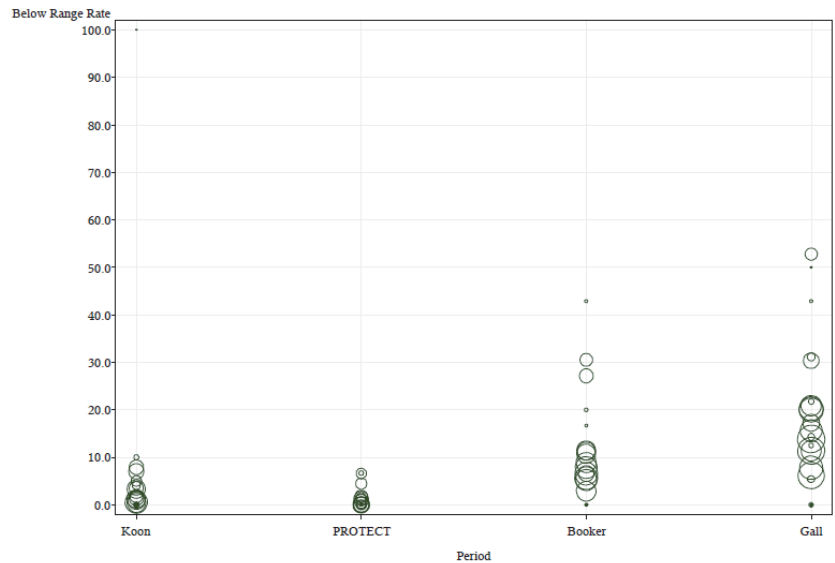
⁴³⁰ The 16 districts in which the spread either did not change or expanded between the *Koon* and PROTECT Act periods were, New Hampshire, Connecticut, Delaware, Maryland, Eastern Virginia, Northern Mississippi, Eastern Kentucky, Southern Ohio, Eastern Wisconsin, Southern Iowa, Eastern Missouri, Nebraska, Guam, Northern Mariana Islands, Utah, and Northern Georgia.

⁴³¹ The 14 districts in which changes between the *Koon* and PROTECT Act periods were too subtle to discern were Puerto Rico, Rhode Island, Eastern New York, Western

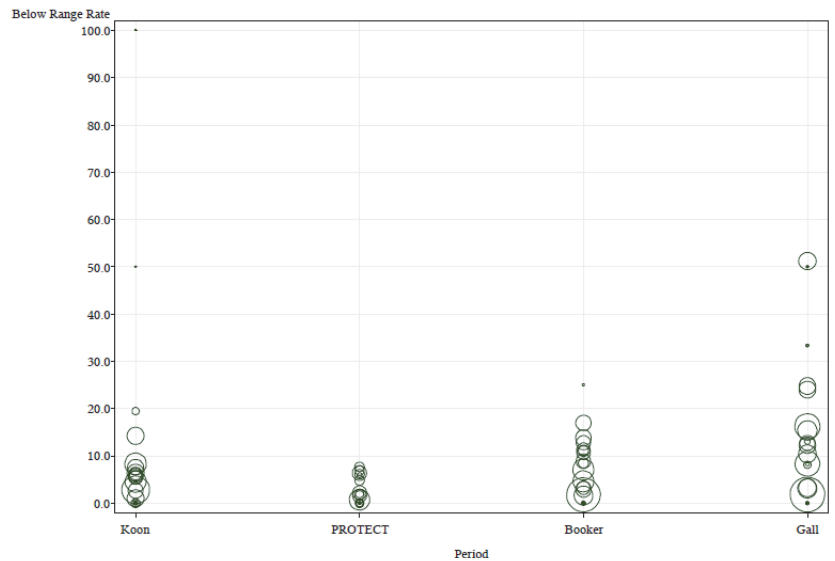
districts, there may have been some contraction in the rates among most judges, but one or more outlier judges with comparably sized caseloads made it difficult to classify the change as either an expansion or a contraction in the spread.

South Carolina and Northern Texas provide clear examples of the pattern in the majority of districts: the plots show contraction in the spread from the *Koon* period to the PROTECT Act period, when judges' discretion was circumscribed, then an expansion in the spread from the PROTECT Act period to the *Booker* period, when judges had greater discretion. The expansion continued from the *Booker* period to the *Gall* period.

Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
South Carolina



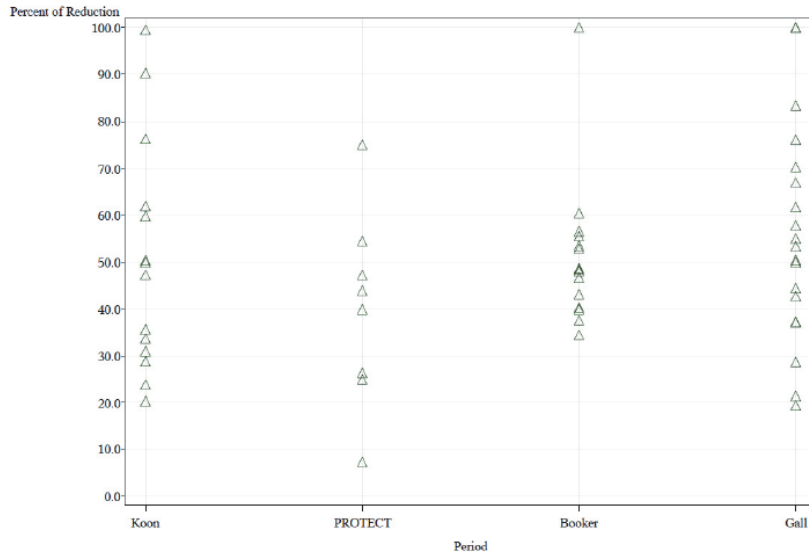
Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Texas, Northern



Cases missing information relevant to this analysis were excluded from the plot.
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

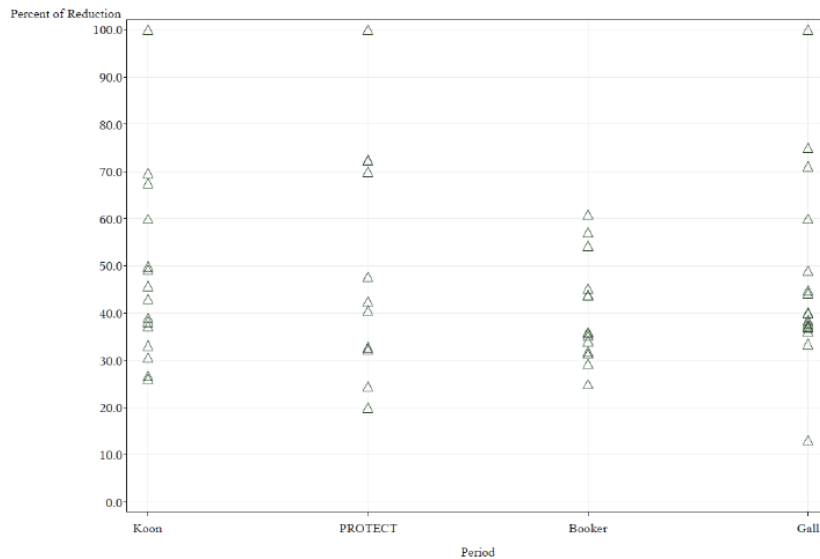
New York, New Jersey, Eastern Pennsylvania, Western Pennsylvania, Virgin Islands, Middle North Carolina, Western North Carolina, Western Virginia, Northern Ohio, North Dakota, and Nevada.

Average Extent of Reduction for Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
South Carolina



As seen in these scatter plots, the average extent of the reduction below the guideline minimum varied broadly during each period, and did not appear to have been affected by legislation or Supreme Court decisions.

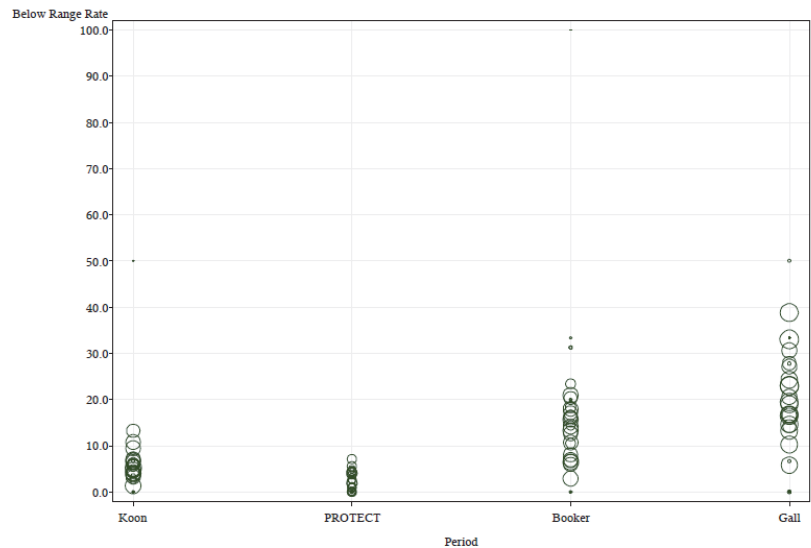
Average Extent of Reduction for Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Texas, Northern



Cases missing information relevant to this analysis were excluded from the plot.
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In most districts, judges with similarly sized caseloads imposed non-government sponsored below range sentences at very different rates. The following plot of Southern Florida shows that the non-government sponsored below range rates among judges with similar-size caseloads varied from under ten percent to just below 40 percent in the *Gall* period. The judges with the highest and lowest rates of non-government sponsored below range sentences had small caseloads relative to the other sentencing judges in the district.

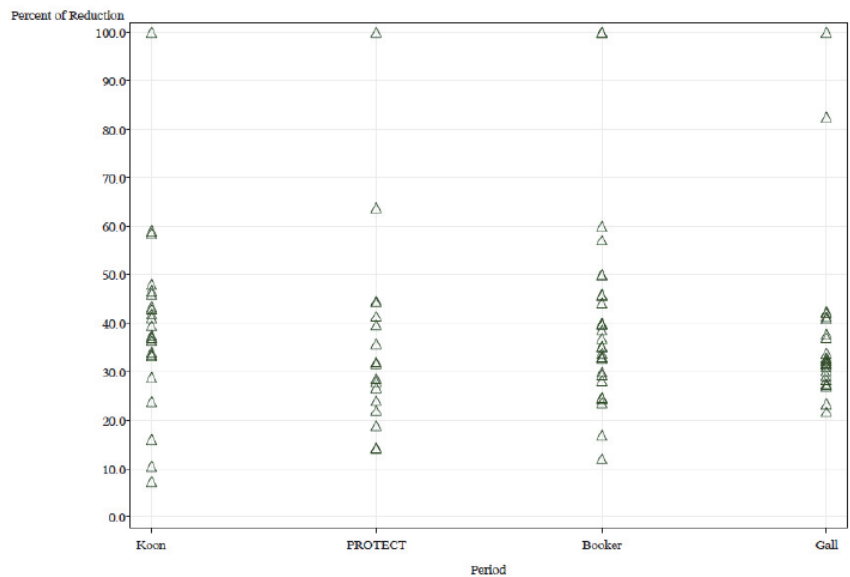
Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Florida, Southern



As the scatter plot reflects, the extent of the reduction in Southern Florida, as in most districts, varied during all four periods and did not appear to be affected by Supreme Court decisions or legislation.

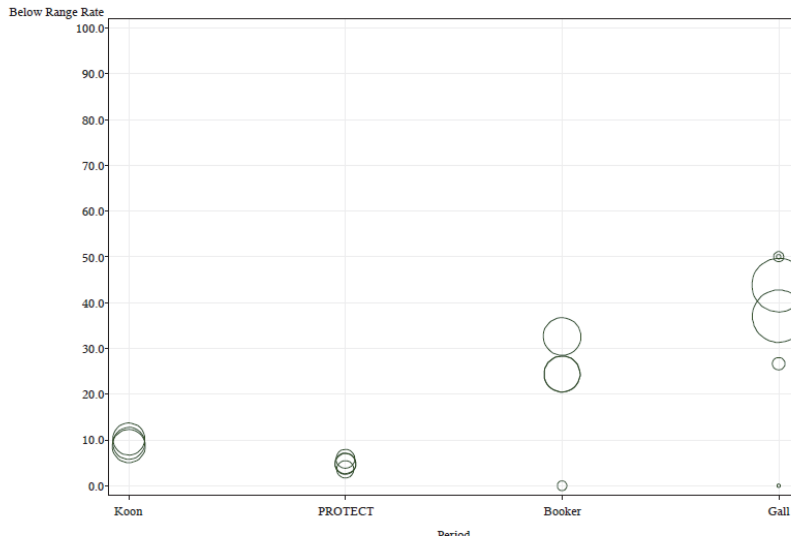
A reduction of 100 percent likely reflects a sentence of probation reduced from a guideline minimum recommending incarceration.

Average Extent of Reduction for Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Florida, Southern



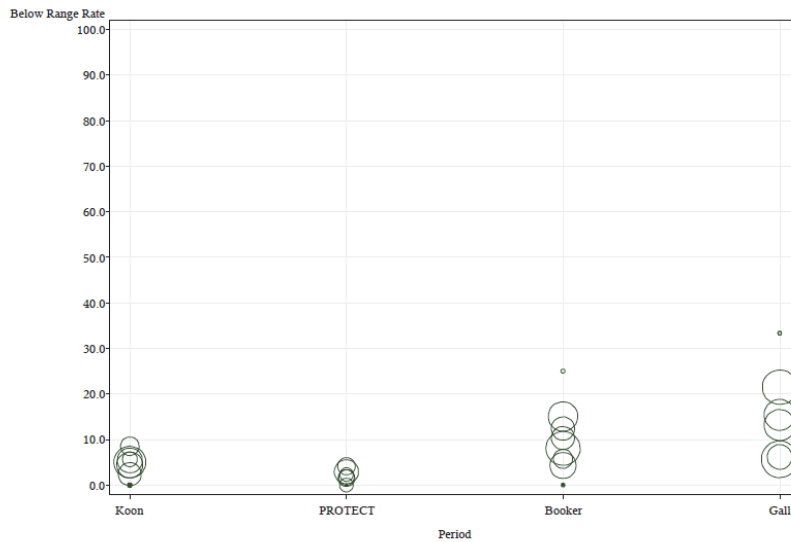
Cases missing information relevant to this analysis were excluded from the plot.
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Rhode Island



In the district of Rhode Island, two of the judges with high rates of non-government sponsored below range sentences had the two largest caseloads in the district during the *Gall* period.

Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Illinois, Southern

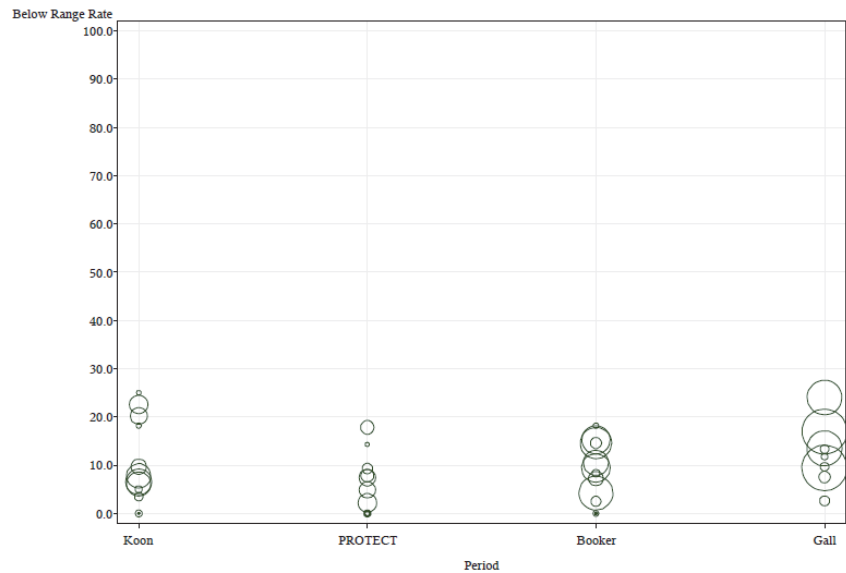


In contrast, in Southern Illinois judges imposed non-government sponsored below range sentences at generally lower rates. Five out of six Southern Illinois judges had rates of approximately 25 percent and under.

Cases missing information relevant to this analysis were excluded from the plot.
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

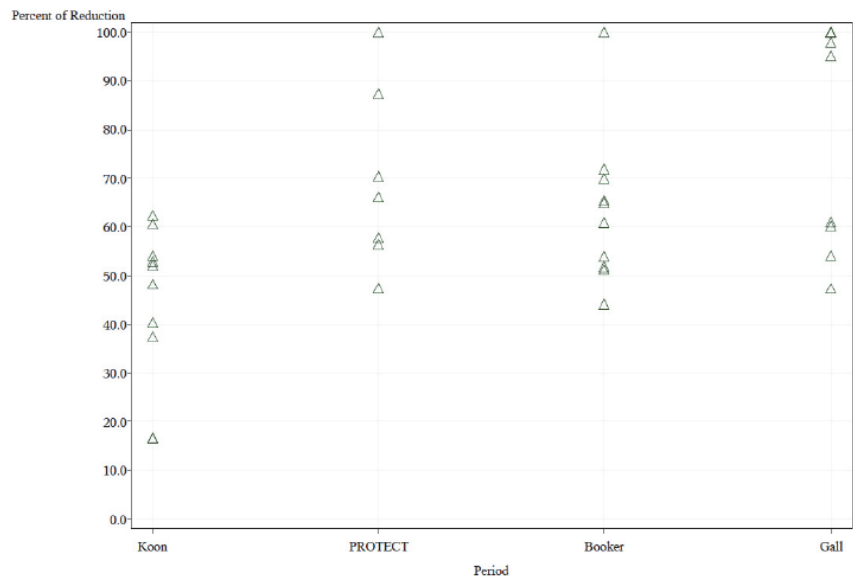
Western New York is an example of a district in which the spread in the rates was similar during all four periods. The bubble plot shows a slight increase in the height of the bubbles during the *Gall* period, indicating an increase in the rate of non-government sponsored below range sentences and a small increase in the spread. The size of the bubbles also shows that during the *Gall* period, the two judges with the highest rates of non-government sponsored below range sentences had sizeable caseloads.

Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
New York, Western



On average, judges in Western New York granted reductions of more than 40 percent below the guideline minimum during the PROTECT Act, *Booker*, and *Gall* periods. However, there was a relatively large amount of variation among judges.

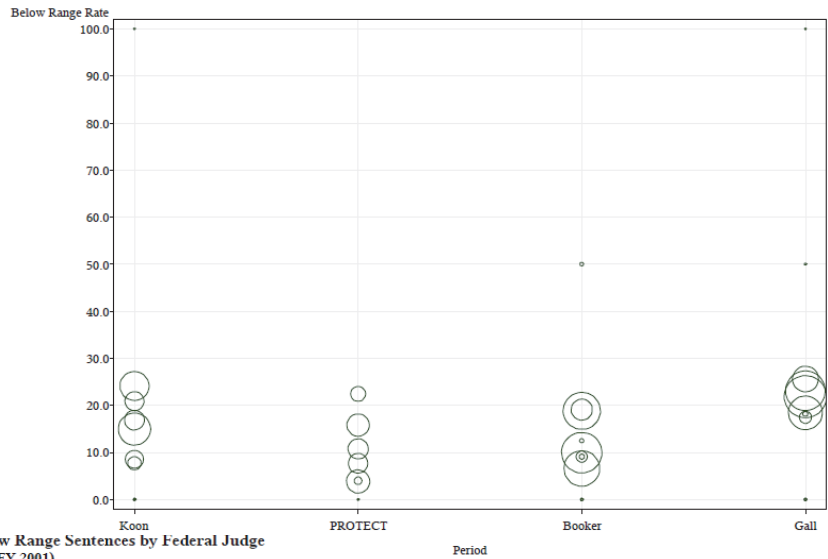
Average Extent of Reduction for Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
New York, Western



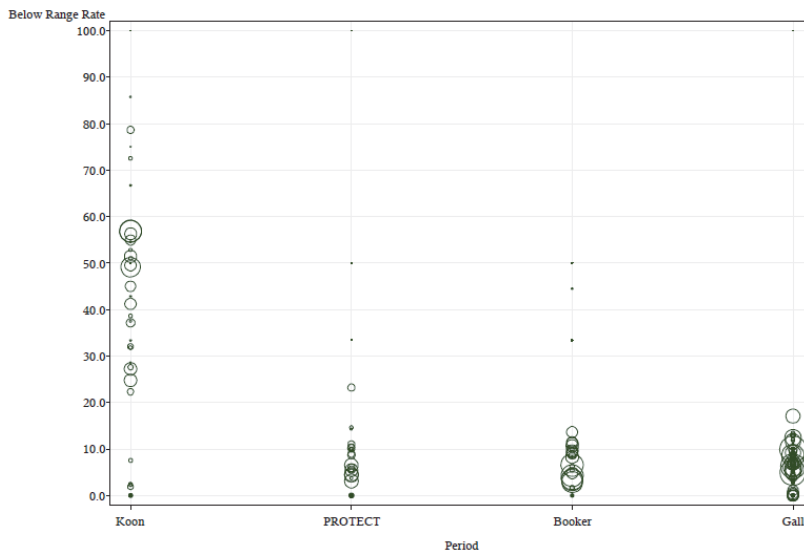
Cases missing information relevant to this analysis were excluded from the plot.
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In some districts, the spread in the rates of non-government sponsored below range sentences was smallest during the *Gall* period. In the District of Nebraska, for example, the spread contracted considerably during the *Gall* period compared to the *Booker* period because a number of judges with relatively large caseloads increased their non-government sponsored below range rates.

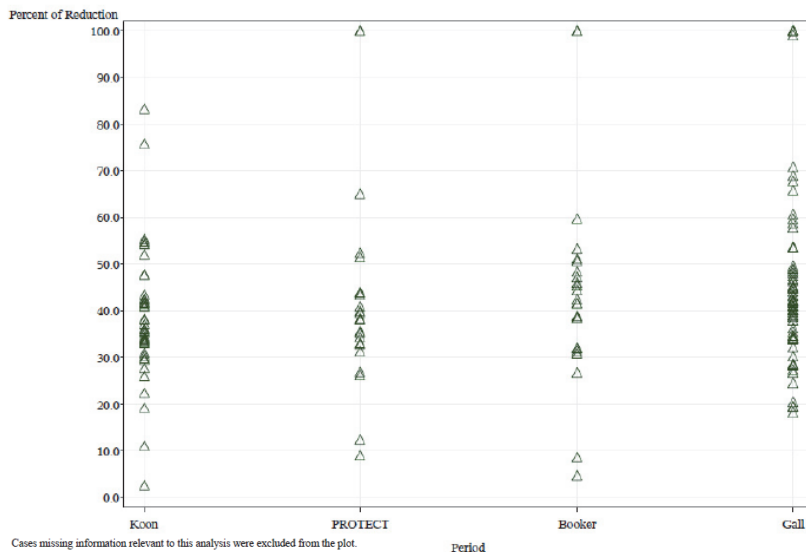
Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Nebraska



Relative Caseload and Rate of Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Arizona



Average Extent of Reduction for Non-Government Sponsored Below Range Sentences by Federal Judge
Koon Period through Gall Period (Post FY 2001)
Arizona



Cases missing information relevant to this analysis were excluded from the plot.
SOURCE: U.S. Sentencing Commission, 2011 Booker Report Datafiles.

In other districts (for example several districts along the Southwest border) the spread in the rates of non-government sponsored below range sentences contracted during the *Gall* period, likely reflecting the impact of government sponsored EDP departures. The District of Arizona plot illustrates this pattern. As in other districts, the extent of the reduction from the guideline minimum in the District of Arizona has remained relatively constant over time.

In sum, whether the spread in the rates of non-government sponsored below range sentences has expanded, contracted, or remained consistent over time has varied by district; however, in two-thirds of districts the spread in the rates of non-government sponsored below range sentences was smallest during the PROTECT Act period and greatest during the *Gall* period. This increased intra-district variation in non-government sponsored below range rates indicates that sentencing outcomes increasingly depend upon the judge to whom the case is assigned, within and across districts, and signals diminishing certainty and uniformity in federal sentencing.

Appellate review has not promoted uniformity in sentencing to the extent the Supreme Court anticipated in Booker.

In *Booker*, the Supreme Court excised the portion of the sentencing statutes setting forth a *de novo* standard of review of sentences on appeal. The Court effectively restored the pre-PROTECT Act standard of review, which provided for review of sentences for reasonableness. The Court acknowledged that appellate review of sentences for reasonableness would not “provide the uniformity that Congress originally sought to secure,” but nonetheless anticipated that appellate review “would tend to iron out sentencing differences.”⁴³² Appellate review, however, has not promoted uniformity in sentencing to the extent anticipated in *Booker*, and the Commission has identified several reasons for this result.

First, and most significantly, offenders with similar offense conduct and similar criminal history increasingly have received different sentences, and reasonableness review on appeal has not ironed out these substantive differences. A review of case law reveals that, in the wake of *Booker*, sentencing judges apply the section 3553(a) factors differently. Some judges give substantial weight to the characteristics of the offender, including those that, consistent with section 994 of Title 28, the Commission has deemed ordinarily not relevant at sentencing.⁴³³ Some judges view certain characteristics as grounds for decreasing the sentence, while others do not.⁴³⁴ Other judges consider such factors, but accord greater weight to the Commission’s guidelines and policy statements.⁴³⁵

⁴³² *Booker*, 543 U.S. at 263.

⁴³³ See, e.g., *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (reviewing the district court’s decision to take into account the defendant’s employment history in reducing his sentence for tax fraud).

⁴³⁴ See, e.g., *United States v. Feemster*, 572 F.3d 455, 465-66 (8th Cir. 2009) (Riley, J., concurring), 467-96 (Colloton, J., concurring).

⁴³⁵ Compare *United States v. Jackson*, 300 F. App’x 428 (7th Cir. 2008) (affirming district court decision to sentence defendant within advisory guideline range after rejecting his request to vary from career offender guideline, where the district court concluded that the defendant was “young and impulsive and very dangerous” and “very much deserve[d]” the characterization of career offender), with *United States*

Still other judges categorically reject certain guidelines and policy statements.⁴³⁶

The fact that judges hold different views with respect to the importance of various sentencing factors raises a host of reasonableness issues at the appellate stage; indeed according to Commission data, reasonableness issues constituted a significant proportion of all sentencing issues raised on appeal in fiscal year 2011.⁴³⁷ Consistent with recent Supreme Court case law, appellate courts have afforded district court decisions great deference and have rarely reversed sentences on substantive reasonableness

v. Maloney, 446 F.3d 663 (8th Cir. 2006) (reversing district court decision to sentence the defendant, which the court had concluded was a career offender and an armed career criminal, below the guideline range based on the defendant’s youthful age of 22 years and the court’s view that “a longer sentence would undermine his chances at rehabilitation”). See also *Feemster*, 572 F.3d at 468 (Colloton, J., concurring) (“The [sentencing] judge in this case thought Feemster’s ‘troubled youth’ was largely mitigating, and elected to impose the statutory minimum sentence. Other reasonable federal judges will believe that the Sentencing Commission was correct to declare a policy that age, including youth, is ordinarily not relevant to sentencing, USSG §5H1.1, and that a relatively youthful drug trafficking offender with a serious criminal history should be sentenced at or near the statutory maximum in accordance with the career offender guideline. The offender’s punishment in these career offender cases . . . will depend substantially on the luck of the judicial draw.”) (internal citations omitted).

⁴³⁶ See, e.g., *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (affirming district court’s categorical disagreement with USSG §2G2.2); *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (concluding that a district court may vary based on disagreement with the career offender guideline: “Because §4B1.1 is just a Guideline, judges are as free to disagree with it as they are with §2D1.1(c) (which sets the crack/powder ratio). No judge is required to sentence at variance with a Guideline, but every judge is at liberty to do so.”).

⁴³⁷ Out of 13,085 discrete sentencing issues raised by defendants, 4,547 were related to reasonableness, and 1,405 were related to the section 3553(a) factors. Out of a total of 92 discrete sentencing issues raised by the government and decided by the circuit courts in fiscal year 2011, 18 related to reasonableness issues, and 11 related to the section 3553(a) factors. See Part B, available online, for a full explanation of how the Commission collects appeals data.

grounds. Furthermore, a case review of certain offense types suggests that the substantive outcome of the appeals that address reasonableness has differed depending on the circuit. In child pornography and fraud appeals, panels of judges in different circuits have reached different outcomes regarding the reasonableness of similar sentences.⁴³⁸

Differences in appellate review procedures among the circuits further limit the appellate courts' ability to iron out sentencing differences. Some circuits have applied a presumption of reasonableness to review of within range sentences, and others have not.⁴³⁹ Some circuits have required district courts to address guideline departure arguments, while other

circuits have not. One circuit has declared departures "obsolete," while the other circuits have continued to view proper federal sentencing practice as a three-step process.

Finally, the role appellate review can play in promoting nationwide uniformity in sentencing is limited because only a small percentage of sentences are appealed. As seen in the figure on the next page, while the number of offenders sentenced has increased, the number of sentencing appeals decided each year has remained relatively flat, and has been less than 10 percent since *Booker*.⁴⁴⁰ Even more significantly, the number of government-initiated appeals has declined since *Booker*.⁴⁴¹

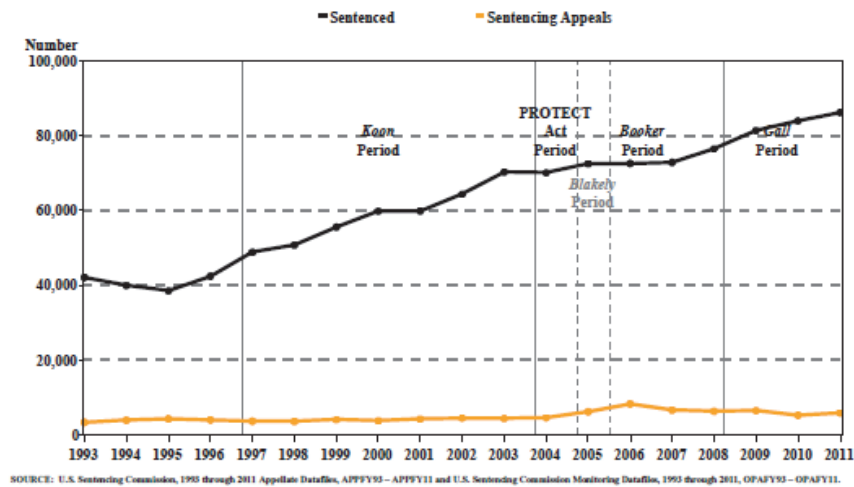
⁴³⁸ In child pornography non-production offenses, *compare* *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009) (affirming as substantively reasonable below range sentence of five years of probation for possession of child pornography, where the guidelines range was 41-51 months of imprisonment), *with* *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (reversing as substantively unreasonable below range sentence of five years of probation for possession of child pornography, where the guidelines range was 97-120 months of imprisonment). For fraud offenses, *compare* *United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010) (affirming as substantively reasonable below range sentence of five years of probation, where the guidelines range was 27-33 months of imprisonment for the defendant's crimes of bankruptcy fraud and making a false statement to a bank), *with* *United States v. Givens*, 443 F.3d 642 (8th Cir. 2006) (reversing below range sentence of supervised release including 12 months of house arrest for bank fraud defendant facing 24-30 months of imprisonment).

⁴³⁹ *Compare* *United States v. Dorcelly*, 454 F.3d 366 (D.C. Cir. 2006) (applying presumption of reasonableness); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006) (same); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006) (same); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006) (same); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005) (same); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005) (same); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006), *with* *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (declining to apply presumption of reasonableness); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006), abrogated on other grounds as recognized in *United States v. Wells*, 279 F. App'x 100 (3d Cir. 2008); *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008); *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006).

⁴⁴⁰ See also Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, *supra* note 365 ("Based on interviews and an analysis of data coded from 971 randomly selected cases sentenced under the United States Sentencing Guidelines, the study's findings include (1) in nearly two-thirds of the cases settled by plea agreement, the defendants waived their rights to review[.]").]

⁴⁴¹ At the Commission's regional public hearings, several prosecutors testified that the government has curtailed its appeal of low sentences because of the deferential standard of review. *U.S. Sent'g Comm'n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable B. Todd Jones, United States Attorney, District of Minnesota, transcript at 155-56); *U.S. Sent'g Comm'n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable David M. Gaouette, United States Attorney, District of Colorado, transcript at 166); *U.S. Sent'g Comm'n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois, transcript at 247); *U.S. Sent'g Comm'n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Dana Boente, United States Attorney, District of Eastern District of Virginia, transcript at 315-16); *U.S. Sent'g Comm'n Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, NY (July 9-10, 2009) (Testimony of the Honorable Benton J. Campbell, United States Attorney, Eastern District of New York, transcript at 317-18). Prosecutors voiced concerns about the ability of the reasonableness standard of review to prevent disparities in sentencing. See, e.g., *U.S. Sent'g Comm'n Public Regional Hearing on the 25th Anniversary of the*

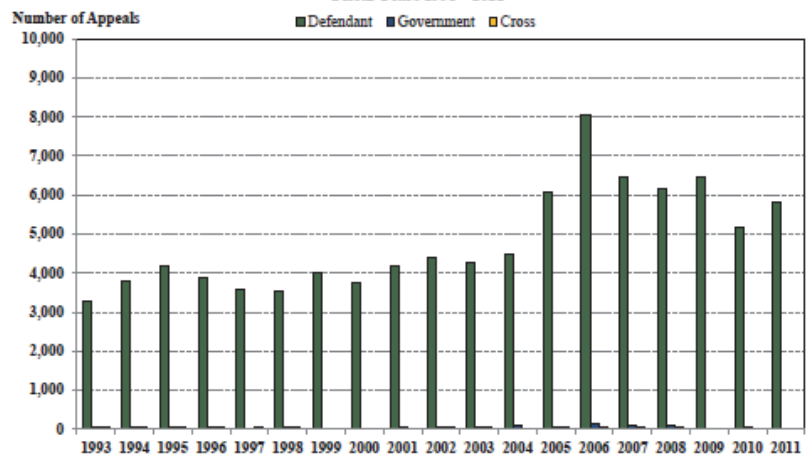
Number of Defendants Sentenced and Sentencing Appeals
Fiscal Years 1993 - 2011



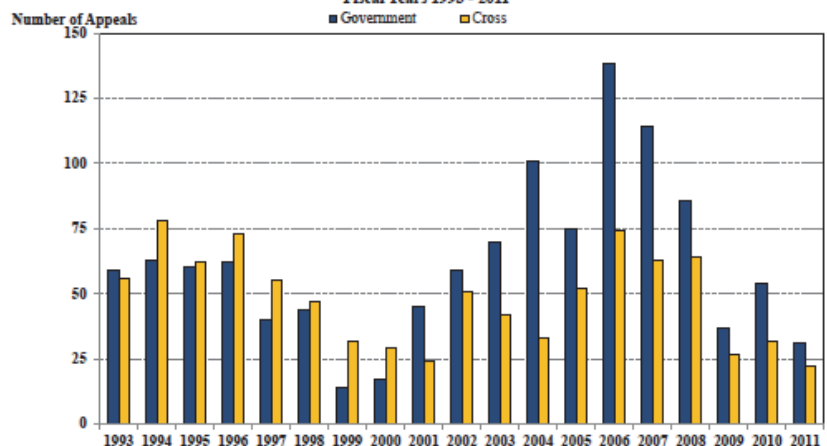
In each year, defendant-initiated appeals far outnumber both government-initiated appeals and cases in which cross appeals were filed. The bars depicting government-initiated appeals and cross appeals are barely visible on the first bar chart, which has been scaled to accurately depict defendant-initiated appeals. The second bar chart shows government-initiated and cross appeals only on a different scale to make the government-initiated and cross appeals visible.

In sum, at least four factors significantly limit the role of appellate review post-*Booker* in promoting national uniformity in sentencing: the different views held by judges with respect to the importance of various factors, including offender characteristics and the guidelines, under section 3553(a); the deferential standard of review; the lack of uniform procedures among the circuits; and the relatively low number of sentencing appeals.

Number of Defendant, Government and Cross Appeals Raising Sentencing Issues
Fiscal Years 1993 - 2011



Number of Government and Cross Appeals Raising Sentencing Issues
Fiscal Years 1993 - 2011



SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APFFY93 - APFFY11.

Passage of the Sentencing Reform Act of 1984, Austin, TX (Nov. 19-20, 2009) (Statement of the Honorable Joyce W. Vance, United States Attorney, Northern District of Alabama, written statement at 2-3).

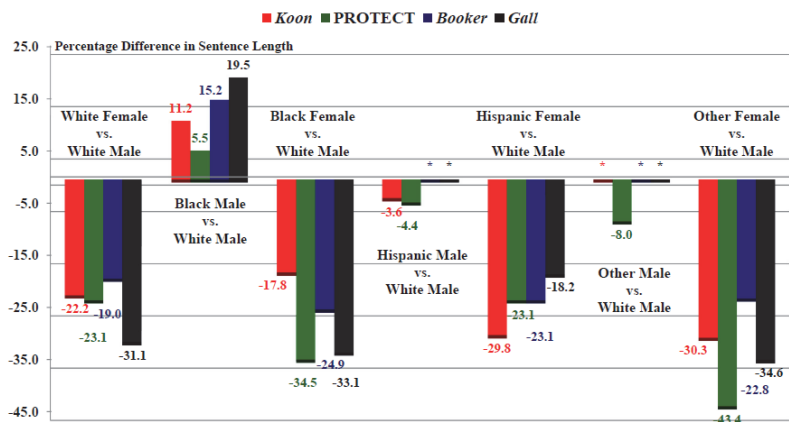
Demographic factors (such as race, gender, and citizenship) were associated with sentence length at higher rates in the Gall period than in previous periods.

The Commission's multivariate regression analyses, updated with data through fiscal year 2011 for this report, showed that sentence length has been associated with some demographic factors.⁴⁴² For example, sentence length for Black male offenders exceeded sentence length for White male offenders by 19.5 percent in the *Gall* period. In contrast, the difference was 15.2 percent in the *Booker* period, and 5.5 percent during the PROTECT Act period. For Hispanic male offenders and Other Race⁴⁴³ male offenders sentenced during the *Gall* period, there was no statistically significant difference in sentence length compared to White male offenders.

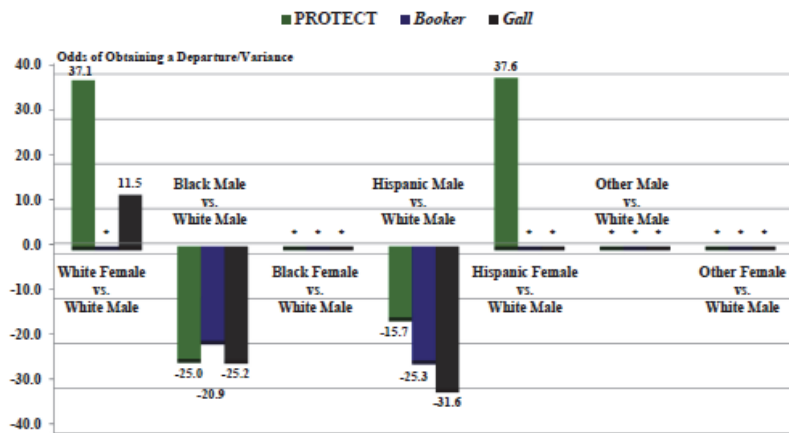
Female offenders of all races received shorter sentences than White male offenders during all four periods studied. Sentences for White female offenders were 31.1 percent shorter than for White male offenders during the *Gall* period. Sentences for Black female offenders were 33.1 percent shorter than sentences for White male offenders during the *Gall* period. For Hispanic females the difference was 18.2 percent, and for Other Race females, the difference was 34.6 percent.

Additional analysis also showed demographic differences in the likelihood of receiving a non-government sponsored below range sentence. During the PROTECT Act, *Booker*, and *Gall* periods, Black male offenders were at least 20 percent less likely to

Multivariate Analysis
Differences in Sentence Length for Demographic Factors
Results of Multivariate Analysis
All Cases
Koon Period through Gall Period



Odds of Obtaining a Non-Government Sponsored Below Range Sentence
PROTECT Act Period through Gall Period



*Indicates that the difference between the two groups was not statistically significant.
SOURCE: U.S. Sentencing Commission, 1999-2011 Datafile, USSCPY99-USSCPY11.

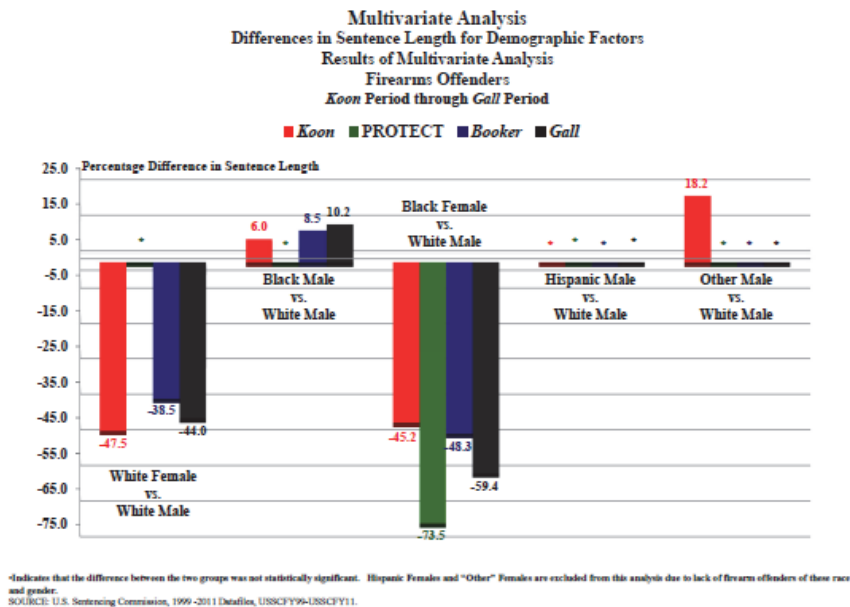
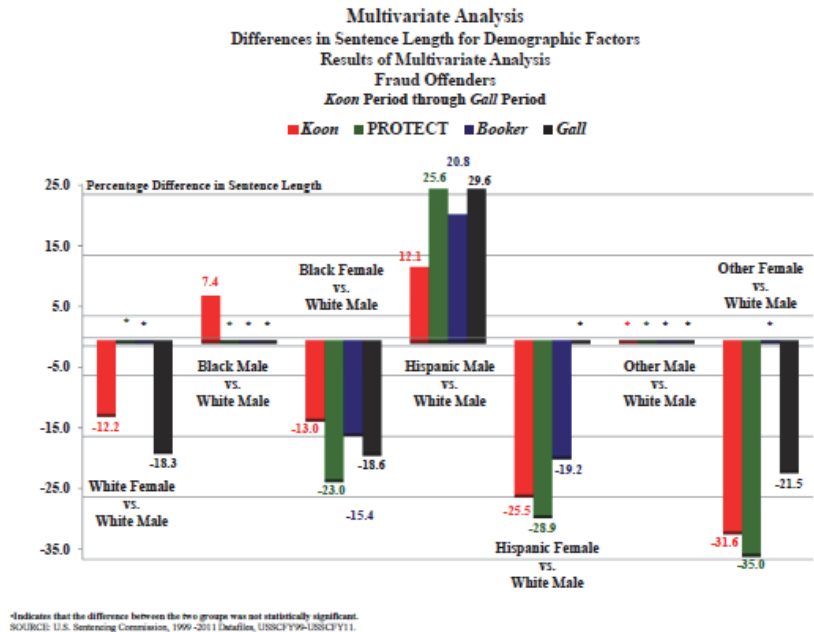
receive a non-government sponsored below range sentence than White male offenders. However, when Black male offenders did receive a non-government sponsored below range sentence during the *Gall* period, there was no statistically significant difference in sentence length.⁴⁴⁴ Hispanic male offenders were also less likely to receive a non-government sponsored below range sentence in all periods, and were 31.6 percent less likely to do so in the *Gall* period.⁴⁴⁵

⁴⁴² See *supra* at 57 for a discussion of the limitations of multivariate regression analysis and examples of factors for which no data is readily available in the Commission's datasets.

⁴⁴³ "Other Race" includes American Indians and Alaskan Natives, Asians and Pacific Islanders, Multi-racial, Non-US American Indians (e.g., Canadian Indians), and other non-specified races.

⁴⁴⁴ During the *Booker* period, the sentences of Black male offenders receiving non-government sponsored below range sentences were 12.3% longer than those of White male offenders receiving non-government sponsored below range sentences. There was no statistically significant difference during any other period. The graph depicting this analysis is in Part E, available online.

Demographic differences also were observed in sentence length for specific offense types (only fraud, firearms, and drug trafficking offenses had sufficient case numbers in each of the various demographic groups studied to conduct the analysis), but the differences did not follow a uniform pattern. In fraud offenses, for example, there was no statistically significant difference in sentence length for Black male and White male offenders during the *Gall* period. Differences in sentence lengths between White, Black, and Hispanic female fraud offenders and White male fraud offenders were significant in some, but not all of the periods studied.



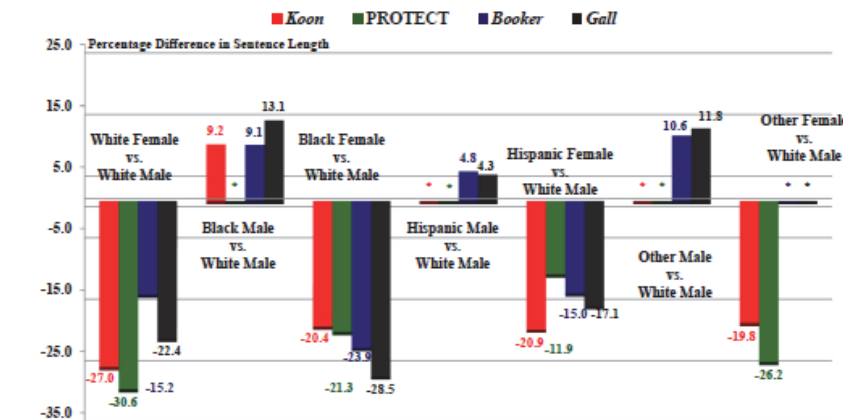
In contrast, in firearms offenses, sentences for Black male offenders were 10.2 percent longer than sentences for White male offenders.

⁴⁴⁵ During the *Gall* period, the sentences of Hispanic male offenders receiving non-government sponsored below range sentences were 9.3% longer than those of White male offenders receiving non-government sponsored below range sentences. There was no statistically significant difference during any other period.

Statistically significant differences in sentence length for Black male and White male drug trafficking offenders were present during the *Koon* and *Booker* periods, but the greatest difference occurred during the *Gall* period. White female, Black female, and Hispanic female drug trafficking offenders received shorter sentences than White male drug trafficking offenders during all four periods.

The Commission's analysis of changes in sentence length for each race and gender pairing across periods revealed some demographic differences. For example, White male and female offenders, Black male and female offenders, Hispanic male offenders, and Other Race male offenders all received shorter sentences during the *Gall* period than during the *Booker* period, whereas the sentences for Hispanic female offenders and Other Race female offenders did not decrease. The decreases in sentence length during the *Gall* period also were not evenly distributed among race/gender pairs. The sentences for White female offenders were 14.9 percent shorter during the *Gall* period compared to the *Booker* period, whereas the sentences for White male offenders were 5.5 percent shorter. The sentences for Black female offenders were 11.8 percent shorter during the *Gall* period compared to the *Booker* period, while the sentences of Black male offenders were 3.6 percent shorter during the *Gall* period.

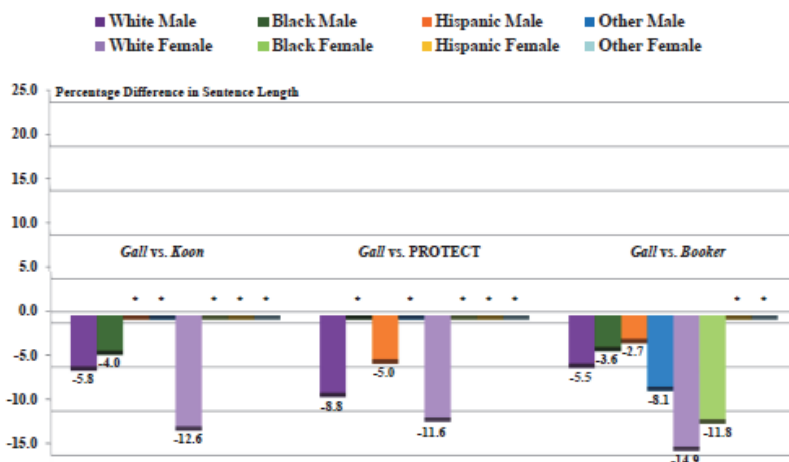
Multivariate Analysis
Differences in Sentence Length for Demographic Factors
Results of Multivariate Analysis
Drug Trafficking Offenders
Koon Period through Gall Period



*Indicates that the difference between the two groups was not statistically significant.
SOURCE: U.S. Sentencing Commission, 1999-2011 Datafiles, USSCFY99-USSCFY11.

In conclusion, although sentence length for both Black male and female offenders and White male and female offenders have decreased over time, White offenders' sentence length has decreased more than Black offenders' sentence length. Additionally, while Black male offenders received sentences that were not statistically different from those of White male offenders when both groups received non-government sponsored below range sentences, Black male offenders have been at least 20 percent less likely to receive a non-government sponsored below range sentence in the first instance. Hispanic male offenders also have been less likely than White male offenders to receive a non-government sponsored below range sentence.

Change in Sentence Length for Each Race and Gender Pairing
Koon Period through Gall Period



*Indicates that the difference between the two groups was not statistically significant.
SOURCE: U.S. Sentencing Commission, 1999-2011 Datafiles, USSCFY99-USSCFY11.

Recommendations

The Commission continues to believe that a strong and effective guidelines system best serves the purposes of the SRA. The importance of achieving the goals of the SRA is heightened as the number of federal offenders steadily increases over time. In fiscal year 1996, there were 37,091 federal offenders, compared to 76,216 in fiscal year 2011. The number of inmates housed by the federal BOP has more than doubled, from just below 100,000 in 1996, to more than 200,000 in 2011.⁴⁴⁶ Of note, post-*Booker*, most federal offenders have continued to receive substantial sentences of imprisonment without any alternative to incarceration. In fiscal year 2011, 87.8 percent of federal offenders were sentenced to serve a term of imprisonment only, compared to 76.9 percent in fiscal year 1996.

The continued importance and influence of the guidelines on sentencing decisions is evident from both Supreme Court decisions and sentencing data, as the overwhelming majority of offenders – 80.7 percent in the *Gall* period – still received a sentence either within the guideline range or below the guideline range for a reason sponsored by the government (most often, but not always, congressionally authorized reductions for substantial assistance to the government or an expedited guilty plea pursuant to an EDP approved by the Attorney General).

However, consistent with Supreme Court precedent, sentencing decisions increasingly depend upon consideration of the section 3553(a) factors other than the guidelines (section 3553(a)(4)) and policy statements (section 3553(a)(5)). The Commission's review of sentencing decisions suggests that judges view similar circumstances and weigh the section 3553(a) factors differently, in particular individual offender characteristics, much as they did during the

years leading up to the SRA. In the wake of these changes, the Commission has observed both increasing inconsistencies in sentencing practices – nationally, locally, and by offense type – and widening demographic differences in sentencing. The Commission is concerned about these developments. In reaching its recommendations in this report, the Commission reviewed various alternative proposals for sentencing reform and the criticisms levied against those proposals, including the calls by some for maintaining the status quo.⁴⁴⁷ The Commission believes the trends demonstrated in this report are troubling and should be addressed. At this time, the Commission makes the following recommendations to strengthen and improve the sentencing guidelines system.

DEVELOP MORE ROBUST SUBSTANTIVE APPELLATE REVIEW

The Commission proposes that Congress enact a more robust appellate review standard. Appellate review was a key component of sentencing reform in the SRA. Congress envisioned that appellate review of sentences would provide the Commission valuable information on federal sentencing and ensure certain, fair, and more uniform sentences. Since *Booker*, where the Court anticipated that appellate review would tend to “iron out” sentencing differences, the role of appellate review remains unclear, the standards inconsistent, and its effectiveness in achieving uniformity in sentencing is increasingly questionable.

⁴⁴⁶ See *supra* note 393.

⁴⁴⁷ Many commentators have made alternative proposals for sentencing reform. Some of these proposals and the criticisms against them are discussed in detail in Part F, available online.

The Commission recommends that Congress revitalize appellate review in three ways.

Require a Presumption of Reasonableness for Within Range Sentences on Appeal

Appellate courts should be required to presume within range sentences to be substantively reasonable. The Supreme Court permits a presumption of reasonableness for within range sentences only on appeal. The SRA requires that similarly situated defendants be treated similarly, and this is hindered by the current appellate review dichotomy between those circuits that have adopted the presumption of reasonableness and those that have not. It is already the practice in the majority of circuits, including the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits. Requiring the presumption of reasonableness in all circuits would promote national sentencing uniformity by facilitating review of sentences as the SRA contemplated. An appellate review standard that presumes within range sentences to be reasonable reflects the fact that the Commission's process for promulgating guidelines results in "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice."⁴⁴⁸

Require Greater Justification for Sentences Substantially Outside the Guideline Range

Congress should require sentencing courts to provide greater justification for sentences imposed the further the sentence is from the otherwise applicable guideline range.⁴⁴⁹ The greater a sentencing judge's variance from a guideline, the more compelling should

be the judge's justification for the variance.⁴⁵⁰ This reform aligns with Supreme Court doctrine as stated in *Gall v. United States*: it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one."⁴⁵¹ Such explanation would ensure that the vision of a transparent system remains intact and would help ensure that appellate review remains robust.⁴⁵² As the Court noted in *Rita*, "The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."⁴⁵³ Any legislative proposal to strengthen the guidelines system should require heightened justification for a sentence substantially outside the guidelines.

Require Heightened Review of Sentences Based on Policy Disagreements with the Guidelines

Congress should create a heightened standard of review for sentences imposed based on a "policy disagreement" with the guidelines. The Supreme Court permitted policy-based variances in *Kimbrough* and *Spears*. However, the Commission believes that the current lack of rigorous appellate review of policy disagreements undermines the role of the guidelines system and risks increasing unwarranted sentencing disparity as judges substitute their own policy judgments for the collective policy judgments of Congress and the Commission. Even in the course of declaring that individual judges may categorically disagree with the Commission's policy decisions, the Court recognized that "closer review may be in order when the sentencing judge varies from the guidelines based solely on the judge's view that the guideline range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case."⁴⁵⁴ Judges have varied backgrounds and policy preferences, and

⁴⁴⁸ *Rita*, 551 U.S. at 350. See also *Booker*, 543 U.S. at 263-264 (noting that "[t]he Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process. . . . the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.").

⁴⁴⁹ See *Gall*, 552 U.S. at 50.

⁴⁵⁰ See, e.g., *United States v. Castillo*, 695 F.3d 672 (7th Cir. 2012).

⁴⁵¹ *Gall*, 552 U.S. at 50.

⁴⁵² See *Rita*, 551 U.S. at 357-358.

⁴⁵³ *Id.* at 356.

⁴⁵⁴ *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 352).

reducing unwarranted disparity requires that policy-based variances be subject to heightened scrutiny.

RECONCILE THE STATUTES THAT RESTRICT THE COMMISSION’S CONSIDERATION OF CERTAIN OFFENDER CHARACTERISTICS WITH STATUTORY INTERPRETATIONS THAT REQUIRE COURTS TO CONSIDER MORE EXPANSIVELY THOSE SAME OFFENDER CHARACTERISTICS.

Section 994 of Title 28 requires the Commission to restrict the manner in which certain offender characteristics can be considered in the guidelines. In contrast, section 3553(a) of Title 18 has been interpreted as instructing courts to give broad consideration to some of the same offender characteristics restricted by Title 28. The Commission recommends that Congress clarify the relationship between 28 U.S.C. § 994 and 18 U.S.C. § 3553(a). In *Rita*, the Supreme Court recognized that “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.”⁴⁵⁵

In the SRA, Congress specifically directed the Commission to limit the role certain offender characteristics would play at sentencing. Section 994(e) of Title 28 directs the Commission to “assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”⁴⁵⁶ Even where certain offender characteristics may be relevant, Congress directed the Commission to take them into account “only to the

extent that they do have relevance.”⁴⁵⁷ Accordingly the Commission adopted several policy statements limiting the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range in Chapter Five, Parts H and K of the *Guidelines Manual*. The Commission determined that the factors listed in 28 U.S.C. § 994(e) “are not ordinarily relevant” to the determination of whether a sentence should be outside the applicable guideline range, but did not foreclose them from consideration in an exceptional case or from consideration for determining where to sentence the offender within the guideline range.

The Commission recognized that the guidelines could not capture every possible circumstance about the offense or the offender, and instead intended the guidelines to describe “a set of typical cases embodying the conduct that each guideline describes.” Offender characteristics could always be considered to determine where within the range to sentence an offender. Moreover, in the SRA, Congress explicitly permitted sentences outside the guideline range in cases in which “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”⁴⁵⁸ Courts could always choose to depart “where conduct significantly differs from the norm.”⁴⁵⁹ However, current law as interpreted by the Supreme Court directs courts to consider broadly offender characteristics (except those that would violate constitutional principles) and judges increasingly sentence offenders outside the range based on characteristics such as education, employment history, and family and community ties that not only fail to distinguish the case from the norm, but, to the contrary, are often present in the typical case.

Further, the fact that judges weigh section 3553(a)(1) factors differently results in substantial sentencing disparities. Both the historical underpinnings of the SRA and current case law demonstrate that judges weigh factors differently and have widely divergent views about the relevance of

⁴⁵⁵ *Rita*, 551 U.S. at 348. Moreover, a statute must be given “‘the most harmonious, comprehensive meaning possible’ in light of the legislative policy and purpose,” *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (quoting *Clark v. Uebensee Finanz-Korp.*, 332 U.S. 480, 488 (1947)), and it is normally presumed “that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

⁴⁵⁶ 28 U.S.C. § 994(e).

⁴⁵⁷ 28 U.S.C. § 994(d).

⁴⁵⁸ See 18 U.S.C. § 3553(b); USSG §5K2.0.

⁴⁵⁹ USSG Ch.1, Pt.A(4)(b) (Apr. 13, 1987).

offender characteristics at sentencing. To the extent the interaction between the SRA's directives to the Commission and its instructions to judges is unclear, as is currently the case, unwarranted disparity becomes inevitable.

CODIFY THE THREE-STEP PROCESS

The Commission recommends that Congress codify the three-step sentencing process in which sentencing courts begin by calculating the guideline range, proceed to evaluate departures within the guidelines, and only then consider the sentencing factors listed at section 3553(a). Codification of the three-step process would have the dual benefit of working in concert with the substantial weight amendment recommended below and of promoting uniformity. Currently the Seventh Circuit does not support the three-step process and instead has declared departures "obsolete." In other circuits, case law does not state clearly whether the second step is necessary, or states that consideration of departures is unnecessary as long as the sentence is reasonable. Codification of the three-step process would promote uniformity in sentencing and may reduce unwarranted disparity.

The importance of the second step, which requires consideration of departure policy statements, is often overlooked by parties and courts. This development both deprives the courts from benefitting from the Commission's expertise provided in the departure provisions and diminishes the quality of feedback from the courts to the Commission regarding offense severity, consideration of offender characteristics, and other aspects of the guidelines. The Commission finds that as courts increasingly rely on the broad section 3553(a) factors without providing the same level of specificity as required by departure provisions, its ability to discern and respond to specific areas of concern to the courts is hindered and transparency is lessened. The Commission believes that this trend is unlikely to be reversed unless the three-step process is formally codified.

RESOLVE THE UNCERTAINTY ABOUT THE WEIGHT TO BE GIVEN TO THE SENTENCING GUIDELINES

Finally, the Commission believes that Congress should require that courts give the guidelines substantial weight. In *Booker*, the Supreme Court said that courts must "consider" the properly determined guideline range, but did not express exactly how much weight the guidelines should be given. In *Pepper v. United States*, the Supreme Court noted that the guidelines are due "respectful consideration," but, citing *Gall*, declined to distinguish the guidelines and policy statements as deserving any greater weight than any of the other section 3553(a) factors.⁴⁶⁰ As a result, the Commission is concerned that judges may give insufficient weight to the guidelines relative to the other section 3553(a) factors, which would contribute to increasing sentencing disparity. The Commission suggested in its October 2011 testimony that Congress statutorily require district courts to give "substantial weight" to the guidelines. Other possibilities include "due regard" or the "respectful consideration" standard adopted by the Court in *Pepper*.⁴⁶¹

Regardless of the precise wording chosen, the Commission believes Congress should impose one uniform standard that conveys the importance of the guidelines at sentencing. The guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice" and they "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."⁴⁶² During the process of developing the initial set of guidelines and refining them throughout the ensuing years, the Commission has considered the factors listed in section 3553(a) that were cited with approval in *Booker*. By setting a uniform standard for sentencing judges and resolving existing uncertainty as to the weight sentencing judges

⁴⁶⁰ 131 S. Ct. 1229, 1241 (2011) ("Finally, we note that §§ 3553(a)(5) and (a)(6) describe only two of the seven sentencing factors that courts must consider in imposing sentence. At root, *amicus* effectively invites us to elevate two § 3553(a) factors above all others. We reject that invitation.").

⁴⁶¹ *Id.* at 1249.

⁴⁶² *Rita*, 551 U.S. at 350.

should afford the guidelines, Congress would continue to move sentencing policy in its preferred direction.



As envisioned by the SRA, the Commission will continue to refine the guidelines in response to feedback and information it receives, and remains uniquely positioned to provide Congress and the criminal justice community with advice and information that will help further the goals of sentencing. The guidelines will continue to be evolutionary in nature,⁴⁶³ as the Commission gathers and analyzes data from actual practice, receives feedback through testimony, sentencing and appellate decisions, and various forms of public comment, and revises the guidelines over time in response to this feedback. Below range sentences continue to be an important mechanism by which the Commission receives feedback from courts regarding the operation of the guidelines, and the Commission continues to examine below range sentence rates to determine whether the severity or proportionality of the guidelines for particular offenses or offenders should be adjusted. Such feedback from the courts enhances the Commission's ability to fulfill its ongoing statutory responsibility under the SRA to periodically review and revise the guidelines.⁴⁶⁴

The Commission continues to believe that a strong and effective guidelines system best serves the purposes of the SRA. The Commission believes that the recommendations described in this report, if adopted by Congress, would promote those goals, although it recognizes that more substantial reforms may be necessary in the future if unwarranted disparities persist despite such measures. The Commission stands ready to work with Congress, the

federal judiciary, the executive branch, and others in the federal criminal justice community to ensure certain and fair sentencing that avoids unwarranted sentencing disparities while maintaining sufficient flexibility to permit individualized sentences when warranted.⁴⁶⁵

⁴⁶³ USSG Ch.1, Pt.A, intro. comment. ("The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress."). *See also* Stephen Breyer, *Key Compromises*, *supra* note 138, at 8.

⁴⁶⁴ *See* 18 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

⁴⁶⁵ *See* 28 U.S.C. § 991(b)(1)(B).