





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

### **Increasing sentencing disparities based upon race and geography**

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

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

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

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