

Judge-Specific Sentencing Data for the District of Nebraska



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This brief note describes the release of judge-specific sentencing data obtained from the United States Sentencing Commission by the judges of the United States District Court for the District of Nebraska. This paper is not about sentencing philosophy. Nor does it purport to suggest what other districts should do.

The author cannot and does not speak for anyone other than himself. No opinion is expressed explicitly or implicitly about pending or impending cases.

I. The Back Story

Congress mandated that similarly situated defendants should be sentenced similarly.¹ That principle is especially important for sentences that are imposed by different judges in the same court.

It may be surprising to some, but judges in the same court typically concern themselves with their own dockets rather than the dockets of their colleagues. There is, therefore, a substantial risk of sentencing disparity among judges of the same court. But, even if all the judges of the same court are concerned with questions of sentencing disparity, it is a gargantuan task to compile the data necessary to begin to address that issue intelligently.

The Sentencing Commission has good data for every federal district court in the nation, and it has the data for each judge who imposes a sentence. Notwithstanding that fact, the Sentencing Commission has not released judge-specific sentencing data to other judges (or the public) because it has entered into an agreement with the Administrative Office of the United States Courts that effectively prohibits the Sentencing Commission from doing so absent the consent of the judge about whom the data pertain or upon request of the chief judge.²

Following *Booker*, concerns about sentencing disparity—and particularly sentencing disparity among judges of the same court—grew.³ Judge Myron Bright, a highly regarded and long-serving judge on the Eighth Circuit Court of Appeals, suggested a practical method for addressing intra-district disparity concerns: he wanted judges to talk to each other.⁴ But, again, how would judges from the same court speak constructively if they did not have hard data about each other derived from the thousands of cases they considered? It is one thing to gab about anecdotes, and quite another thing to analyze information in a systematic manner.

In early March of 2012, the Transactional Records Access Clearinghouse (TRAC) released a report providing

judge-specific sentencing data derived from a variety of sources other than the Sentencing Commission.⁵ According to that report, Nebraska was (1) among the ten districts with the most judge-to-judge sentencing differences for drugs and (2) among the ten districts with the fewest judge-to-judge sentencing differences for white-collar crime. That data pertained to FY2007–2011.

A closer look at the underlying data from the TRAC report revealed problems with data-collection efforts that called into doubt at least some of the conclusions of the report. For example, after purchasing a subscription to the TRAC database, this author ran one query that showed that for the period 1986 through 2010, the TRAC data set could not determine the name of the judge or judges who sentenced 321 defendants, and those were the sentences that produced the highest median and average prison sentences.

Despite the data-collection problems, the TRAC report raised eyebrows. Internally, the judges of the District of Nebraska agreed to request judge-specific sentencing data from the Sentencing Commission. That data, for the fiscal years 2007 through 2011, were provided in late March of 2012. At a meeting in late April of 2012, the judges agreed that the data should be made available to the bar and to the public. The United States Attorney for the District of Nebraska, the Federal Public Defender for the District of Nebraska, the Criminal Justice Act panel attorney representative, and Judge Patti Saris, the Chairperson of the Sentencing Commission, were notified. The data, consisting of a separate report for the District of Nebraska and each judge, were placed on the court's external website on or about May 2, 2012.⁶

II. A Cursory Look at the Data

It is beyond the scope of this note to analyze the data. However, a few highlights provide a flavor.

Despite the rural character of Nebraska, drugs dominate the Nebraska criminal docket. Fifty percent (50 percent) of the Nebraska docket is comprised of drug cases, as compared with about 31 percent for the nation as a whole. Methamphetamine cases comprise about 58 percent of the Nebraska drug docket, as compared with 18 percent nationally. For all cases, Nebraska judges, when viewed as a group, imposed prison sentences—whether measured by mean or median months in prison—that exceeded the prison sentences typically imposed nationally. For drug

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cases, the same thing is true. For all cases, every Nebraska judge imposed sentences within the Guideline range more frequently than sentences typically imposed nationally. That is particularly true for drug cases. For drug cases, there appears to be a marked difference between sentences imposed in Lincoln (higher) and sentences imposed in Omaha (lower). An Appendix with additional information is presented at the end of this article.

III. Conclusion

The United States District Court for the District of Nebraska is a relatively small court with a relatively small bar. We are a collegial group. The data provided by the Sentencing Commission will hopefully assist both the bench and bar in constructively addressing concerns about sentencing disparity. Following Judge Bright's suggestion, the data will provide Nebraska judges with something concrete to talk about.

Notes

- ¹ 18 U.S.C. § 3553(a)(6).
² U.S. Sentencing Commission, *Public Access to Sentencing Commission Documents and Data*, 54 Fed. Reg. 51279 (Wed., Dec. 13, 1989), available at http://www.uscc.gov/Publications/19891213_Public_Access_Documents_Data.pdf.

- ³ See, e.g., Frank O. Bowman, *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 Fed. Sent'g Rep., text at nn.33-35 (2012) ("Whatever may be said about regional disparity, one of the acknowledged accomplishments of the Guidelines was that they reduced the degree of disparity between sentences imposed by different judges in the same district. As with regional disparity, there is not as yet definitive evidence of the effect of *Booker* on inter-judge disparity, but preliminary indications are consistent with the intuition that judges freed of appellate control will sentence more idiosyncratically than those subject to enforceable rules. The one rigorous study conducted in the District of Massachusetts showed that in the years following *Booker*, *Kimbrough*, and *Gall*, the effect of judge identity on sentencing outcome more than doubled. Now that the Transactional Records Access Clearinghouse has succeeded in creating a sentencing database with judge identifiers, it would be surprising indeed if similar results were not replicated in other districts.")
⁴ *United States v. Ayala*, 610 F.3d 1035, 1037 (8th Cir. 2010) (Bright J., concurring) ("I suggest that federal sentencing judges, particularly those in multi-judge districts, examine and institute sentencing councils similar to those that existed before the guidelines.")
⁵ TRAC Reports, *Surprising Judge-to-Judge Variations Documented in Federal Sentencing* (Mar. 5, 2012), available at <http://trac.syr.edu/tracreports/judge/274/>.
⁶ Available at <http://www.ned.uscourts.gov/> (search for "Judges' Sentencing Data").
⁷ *Id.*

APPENDIX

The tables that follow were prepared by the author from data provided by the Sentencing Commission for the fiscal years 2007 through 2011.⁷ Table numbers correspond with table numbers in the reports submitted by the Sentencing Commission. Judge John Gerrard was not included due to his recent appointment. Abbreviations are as follows: Chief Judge Laurie Smith Camp (LSC), Judge Joseph Bataillon

(JFB), Senior Judge Warren Urbom (WKU), Senior Judge Lyle Strom (LES), Senior Judge Richard Kopf (RGK). Judges Urbom and Kopf sit in Lincoln, and the other judges sit in Omaha. There is a separate criminal docket for Lincoln and a separate criminal docket for Omaha. The Omaha and Lincoln courthouses are about sixty miles apart. The tables presented below represent a preliminary examination of the data and are necessarily subject to revision.

Part A. Imprisonment Imposed

All Cases (2007–2011) (Table 7)

Months	National	Nebraska (n. 2,897)	LSC (n. 981)	JFB (n. 815)	WKU (n. 95)	LES (n. 374)	RGK (n. 627)
Mean	54	69	69	54	91	67	89
Median	30	60	60	37	87	60	77

Drug Trafficking (2007–2011) (Table 7)

Months	National	Nebraska (n. 1,547)	LSC (n. 535)	JFB (n. 353)	WKU (n. 64)	LES (n. 222)	RGK (n. 373)
Mean	80	95	93	76	117	87	116
Median	60	78	70	60	120	64	120

Firearms (2007–2011) (Table 7)

Months	National	Nebraska (n. 423)	LSC (n. 131)	JFB (n. 142)	WKU (n. 7)	LES (n. 57)	RGK (n. 85)
Mean	89	57	59	50	49	46	75
Median	60	36	33	30	24	36	51

Fraud (2007–2011) (Table 7)

Months	National	Nebraska (n. 129)	LSC (n. 50)	JFB (n. 42)	WKU (n. 1)	LES (n. 11)	RGK (n. 24)
Mean	29	19	22	17	—	18	19
Median	18	12	21	12	—	12	15

Immigration (2007–2011) (Table 7)

Months	National	Nebraska (n. 437)	LSC (n. 144)	JFB (n. 160)	WKU (n. 9)	LES (n. 44)	RGK (n. 80)
Mean	19	21	20	22	19	20	20
Median	13	12	12	12	13	12	12

Child Pornography (2007–2011) (Table 7)

Months	National	Nebraska (n. 99)	LSC (n. 38)	JFB (n. 27)	WKU (n. 1)	LES (n. 8)	RGK (n. 25)
Mean	121	90	96	80	—	90	94
Median	78	72	84	60	—	78	60

Part B. “Compliance”

Departures and Variances—All Cases (2007–2011) (Table 8)

Position relative to Guideline range—% (number)	National %	Nebraska % (n. 3,156)	LSC % (n. 1,053)	JFB % (n. 906)	WKU % (n. 98)	LES % (n. 394)	RGK % (n. 680)
Within range	57.1	64.4 (n. 2,032)	65.7 (n. 692)	59.1 (n. 535)	74.5 (n. 73)	64.5 (n. 254)	67.6 (n. 460)
All above	1.7	2.2	1.8	3.2	0.0	1.3	2.2
Prosecutor-motivated below*	25.6	13.8	12.1	16.6	11.2	10.9	15.0
Total Judge-motivated below	15.5	19.6 (n. 620)	20.4 (n. 215)	21.2 (n. 192)	14.3 (n. 14)	23.4 (n. 92)	15.1 (n. 103)
Judge-motivated below via departure	3.4	2.8 (n. 89)	2.4 (n. 25)	4.1 (n. 37)	2.0 (n. 2)	1.5 (n. 6)	2.8 (n. 19)
Judge-motivated below via variance	12.1	16.8 (n. 531)	18 (n. 190)	17.1 (n. 155)	12.2 (n. 12)	21.8 (n. 86)	12.4 (n. 84)

* Note that the Commission’s statistics do not capture Rule 35(b) reductions.

Percent of Sentences Within Guidelines Range—Specific Case Types (2007–2011) (Table 10)

Offense—% within Guidelines	Nat'l %	Nebraska %	LSC %	JFB %	WKU %	LES %	RGK %
Drug trafficking	48.6	70.8 (n. 1,115)	71.4 (n. 387)	57.9 (n. 210)	82.8 (n. 53)	71.9 (n. 161)	79.7 (n. 303)
Firearms	63.4	69.5 (n. 315)	71.4 (n. 100)	64.5 (n. 98)	62.5 (n. 5)	63.8 (n. 37)	78.7 (n. 74)
Fraud	58.9	57.7 (n. 105)	64.5 (n. 40)	62.3 (n. 38)	100.0 (n. 1)	52.6 (n. 10)	37.8 (n. 14)
Immigration*	60.4	48.5 (n. 230)	50.0 (n. 77)	56.6 (n. 99)	33.3 (n. 3)	54.3 (n. 25)	28.9 (n. 26)

* Nebraska has long been a “fast track” court.