The Problem With TRAC

Much ado has been made about the new data file available to researchers and Congress (according to the Transactional Records Access Clearinghouse (TRAC), which allows for research to be done on individual judges. For the purposes of this article, it is best to forget the controversy over whether judges, who are given lifetime appointments so that they are more apt to make decisions outside of the political arena, should be assessed in this manner. Instead, it is more important to concentrate on the information TRAC has promised to make available to researchers and Congress. Unfortunately, TRAC fails to deliver what is promised, and because of inadequacies in the data collected, customers of the these data could cause more problems than are currently experienced. David Burnham and Susan Long detail the advantages of TRAC data using the nomination of District Judge Dennis W. Shedd of South Carolina as a case in point, and I will use the same case in point to describe some of the problems with the TRAC data.

It should be noted that Congress already has use of federal data on all cases sentenced by any nominee who has a record in federal court. The United States Sentencing Commission (USSC) has a vast data collection where information on all criminal cases sentenced since 1989 is stored. As part of an agreement with the Administrative Office of the Courts (AO), the USSC may not release information about individual judges, without the judge’s permission. If the judge notifies the Commission that this information may be released to Congress, the Commission does so, and routinely does this for judges who are up for confirmation to higher courts. Thus, Congress had full opportunity to assess the record of Judge Shedd when he was up for confirmation.

USSC data over the time period that TRAC has done its analysis (1992 through 2001) shows some discrepancies with TRAC data. For example, Burnham and Long state that 410 individuals were sentenced during that time period by Judge Shedd. USSC data shows that Judge Shedd sentenced 45.8 percent more cases than being credited by TRAC! No analysis has been done as to whether there is a bias in the cases that TRAC could not identify, but at best, TRAC can only say that they have a sample of cases sentenced by each judge, and they cannot say with any certainty whether it is a biased sample or not. Thus, any statistics drawn from this analysis has to be read with increased skepticism.

It is very true the USSC data used to illustrate TRAC’s missing data is not easily accessible by outside researchers, but the example of Judge Shedd’s case reveals that TRAC data taken alone can be dangerously unreliable. Since the advent of the federal sentencing guidelines, federal sentencing has become very complex. In order to obtain as much of the pertinent information for each case, the USSC has the capacity to collect up to 4,700 bits of information on each case, ranging from the race and gender of the offender, to whether, for example, guideline §3B1.1 (Aggravating Role) was applied in each case. Without all the extremely pertinent information, it is virtually impossible to do credible research on any federal sentence.

As a way to highlight the type of data TRAC has made available, a special report was issued on February 4, 2003 entitled, “Federal Judges: Measuring their Sentencing Patterns.” This study used three years worth of data (2000 to 2002) in examining over 150,000 federal offenders and over 600 federal judges. The major finding of the study was that in some districts, judges have a wide range of median sentences over the time period. One district had a judge whose median sentence was 18 months while having another judge in the same district had a median of 99 months. Instead of providing a positive highlight, this report is a prime example of “science gone wrong” and also highlights some of the problems with TRAC data.

Imagine this headline in the Chicago Sun Times, “Sentences in Illinois Highest in the Nation” or this one in the San Diego Union-Tribune, “Judges in Southern California Most Lenient in the Nation.” The Editorial Boards on each of these papers would have copy for weeks! According to USSC data, during the three year period of 2000 through 2002 (the same time period that TRAC used for its special report), these statements are factually correct (for the 94 federal districts). Offenders sentenced in the Southern District of Illinois had the nation’s highest sentences (a median sentence of 75 months and a mean of 101 months) while offenders in the Southern District of California had the nation’s lowest sentences (a median sentence of 12 months and a mean of 19 months).

The problem with statistics like the ones stated above is a lack of true “science” in obtaining such numbers. By simply lumping three years worth of data and computing medians and means, authors have been able to obtain major headlines in major media outlets.
Though factually correct, these numbers are misleading, as a number of important factors were not controlled for. Factors such as the types of offenses sentenced in each district, the criminal histories of the offenders and the departure rate in each district should be examined or controlled for when examining such data. Unfortunately, headlines like those above have been seen in increasing numbers as sentencing data has become more readily available.

By taking a couple of extra steps, the headlines stated above could be very easily explained. Further analysis shows that Southern California has an extraordinarily high downward departure rate (51.7 percent compared to the national average during that time span of 17.3 percent) due to the high number of immigration cases (44.6 percent of the caseload), in which offenders are sentenced to deportation, which is usually a downward departure from the guidelines. In Southern Illinois, the downward departure rate is only 4.2 percent during that time period, and 65 percent of the cases sentenced in the district are drug trafficking cases, which are sentenced higher than the majority of other offense types.

It is hoped that the advance of knowledge in sentencing and not headlines would be the goal of any researcher. Unfortunately, it does not appear to be that way. Though there is some good in giving simplified information on a certain topic, it is usually done in the context of a larger work which examines what is occurring behind the numbers.

There are other problems with the special report (and hence the data) issued by TRAC. The first sentence of the TRAC report states, “a central goal of all courts is to treat similarly situated defendants in similar ways,” but unfortunately, the analysis by TRAC does not do this. The researchers attempt to compare similarly situated offenders by breaking down their analysis into two groups, drug violations and white collar offenses. Using these two elementary categories does not offer an analysis that compares similarly situated offenders. For example, drug violations include the large drug cartels, along with offenders convicted of simple possession offenses. So in other words, the offender with three marijuana joints in his ashtray at the United States/Mexican border is being compared to a drug kingpin who imports thousands of pounds of cocaine over the same border. The corporate executive who robs his company of millions is lumped in with the bank teller who embezzled a few hundred dollars.

The United States Sentencing guidelines are very complex, each sentence given involves a myriad of factors. The offender is not simply found guilty, and sentenced immediately by the court. Each offense has many items to consider. For example, for an offender convicted of a drug offense, the court, at the very least, must take into account how much drugs the offender was accountable for, whether a weapon was involved in the offense, how should multiple drug transactions be treated, whether a mandatory minimum is involved, what is the role of the offender in the offense, did the offender accept responsibility for his/her actions, what is the criminal history of the offender and should all of it be counted, and finally is this case within the heartland of drug cases and if not should the court depart.

The TRAC analysis does not take into any of the above factors. Context and control variables are needed. TRAC’s data does contain limited control information, for example, on the amount of drugs seized, the type of drug, and the amount of dollar loss in white collar offenses, but none of these factors were included in their analysis.

There have been two major studies that have looked at the issue of disparity of judges within the same cities or districts and both of these studies used rigorous statistical techniques and controls, and have found that inter-judge disparity has lessened since the advent of sentencing guidelines. Because of the numerous controls in these two studies, it would not be proper to state that the TRAC study has advanced the knowledge in this area from where these two studies started.

So, we go full circle. TRAC’s motives are noteworthy, making data available to the research community, Congress and other entities that are not available. TRAC does collect information on individual Assistant United States Attorneys, which even the USSC does not collect. The problem is, with respect to its criminal files, TRAC has barely half of the cases sentenced by one judge in particular (the only judge we have information for), and there is no good way of ascertaining whether there is any inherent bias in the cases either selected or missing from the data. In addition, TRAC’s data is missing hordes of the control variables needed in order to do “proper” research in the area of federal sentencing. Any findings from this data should be considered with all these problems inherent in the data.

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