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# Federal Criminal Litigation in 20/20 Vision

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# FEDERAL CRIMINAL LITIGATION IN 20/20 VISION

by  
Susan N. Herman\*

*In this Article, the author examines three snapshots of the history of criminal litigation in the federal courts, from the years 1968, 1988, and 2008, with a view to predicting the future course of federal criminal adjudication. The author examines three different aspects of federal criminal litigation at these different points in time: 1) the volume and nature of federal criminal cases, 2) constitutional criminal procedure rules, and 3) federal sentencing, highlighting trends and substantial changes in each of those areas. Throughout the Article, the author notes the ways in which the future of federal criminal litigation greatly depends upon the politics of the future, including potential nominations to the federal judiciary by President Barack Obama.*

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## I. INTRODUCTION

This Article was adapted from a speech given at the 40th anniversary celebration of the Federal Judicial Center, hosted by Lewis & Clark Law School in September, 2008, to congratulate the Federal Judicial Center on forty years of excellent work. I would like to thank the Federal Judicial Center too, personally as well as professionally. Over the past fifteen or twenty years, I have enjoyed the opportunity on a number of occasions to participate in programs run by Judge Rothstein and her fabulous staff. I hope that the Center and the staff will continue to thrive for decades to come.

In this Article, I look into the future of criminal litigation in the federal courts, forecasting what challenges might confront the federal

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courts and the Federal Judicial Center twenty years, or perhaps even forty years from today. In order to do that, the best way is to start by looking back into the past. The theme of the 40th anniversary celebration was 20/20 vision, and in this Article I proceed by comparing snapshots of federal criminal litigation in 1968, the year in which the Federal Judicial Center began, in 1988, twenty years later, and twenty years after that, in 2008, in three different areas: first, the volume and nature of federal criminal litigation; second, a few aspects of constitutional criminal procedure; and finally, federal criminal sentencing, an area where there have been very dramatic changes in recent years. If hindsight, as the saying goes, is always 20/20, studying the past should help us to project what the future may hold.

## II. CRIMINAL ADJUDICATION

The volume and nature of the criminal cases actually litigated in the federal courts, of course, has a tremendous impact on the kinds of challenges those courts will face. Recent data released by the Department of Justice show that the number of federal criminal prosecutions in fiscal year 2008, was 155,694.<sup>1</sup> This figure is about four and a half to five times the number of federal criminal cases prosecuted in 1968,<sup>2</sup> and about three and a half times the number of cases in 1988.<sup>3</sup>

The number and the types of cases that end up in the federal courts as criminal prosecutions depend on the fluctuating views of the political branches on what is appropriate or necessary for the federal government to do by way of federal criminal enforcement, as opposed to what is appropriately left to the states. Congress or the Department of Justice may choose to leave criminalization and enforcement decisions to the states, which of course handle the bulk of criminal law policy and enforcement, or may choose to enact and implement federal statutes criminalizing particular conduct that is considered, for one reason or another, to deserve or demand the attention of the federal government. To use a metaphor that ran through the 2008 Federal Judicial Center conference, federal judges may all be paddling their own canoes, but it is Congress that decides whether those canoes will sit on a pastoral pond or out on a wide and turbulent ocean.

The Constitution itself does not have very much to say about what kind of criminal enforcement is to be done by the federal government. Article I includes a few references to the idea that federal criminal prosecution might be required to address harmful conduct affecting federal interests—conduct like counterfeiting,<sup>4</sup> which threatens money

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<sup>1</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), PROSECUTIONS FOR 2008, <http://tracfed.syr.edu/results/9x2049ccd32e45.html> [hereinafter TRAC].

<sup>2</sup> 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS, June 1, 1990, at 27–29. (32,571 criminal cases filed in federal court in 1968).

<sup>3</sup> *Id.* (44, 585 criminal cases in federal court in 1988).

<sup>4</sup> U.S. CONST. art. I, § 8, cl. 6.

coined by the federal government, or piracy.<sup>5</sup> Early Congresses thought there was some role for the federal government to play in criminal enforcement under the Commerce Clause, but their view of the reach of the Commerce Clause was quite limited. When I do research into early cases about search and seizure, many of the cases involve ships on navigable waters, because that was one of the few places where international or interstate commerce was clearly involved. In those circumstances, Congress believed that there was a role for the federal government to play, even a century or two ago. Similarly, if counterfeiting took place within the borders of some state, the federal government would undertake responsibility for investigating and prosecuting such crimes rather than allowing the states to address this conduct in whatever manner they chose, because federal interests set out in Article I itself were clearly involved.

The tremendous explosion in the federal criminal presence since those early days is largely due to expansion in the reach of the Commerce Clause during the twentieth century. This is standard history that all law students learn in their first year of Constitutional Law. Congress moved from deeming it a Commerce Clause matter if the federal government wished to protect ships on navigable waters, to creating a sheaf of statutes that punished a wide range of activities where there was some tangible interstate nexus, like stolen securities or prostitutes crossing state lines.<sup>6</sup> This type of conduct also came to be treated as involving special federal interests not adequately addressed by the states. The expansion of federal criminal jurisdiction did not end there. In today's world, the federal government can enforce its drug laws, for example, even in circumstances where the drugs involved never left the state. After a brief period during which the Supreme Court evinced a desire to rein in federal criminalization under the Commerce Clause,<sup>7</sup> the Court recently endorsed this expansive view in the case of *Gonzales v. Raich*.<sup>8</sup> This was the medical marijuana case, which involved marijuana plants being grown in the State of California and sold to California neighbors pursuant to a state plan to dispense marijuana when a doctor believed it was medically useful—to alleviate a glaucoma or cancer patient's symptoms, for example. The Supreme Court ruled that it is permissible for the federal government to use the Commerce Clause as a basis for intervention, even where the controlled substance in question remained at all times within the state of California, on the theory that any marijuana transactions might potentially have an impact on a national

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<sup>5</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>6</sup> See Securities Act of 1933, ch. 38, 48 Stat. 74, 87 (codified as amended at 18 U.S.C. § 77 (2006)); White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2006)).

<sup>7</sup> See *United States v. Lopez*, 514 U.S. 549, 551 (1995); *United States v. Morrison*, 529 U.S. 598, 598 (2000).

<sup>8</sup> *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

marketplace for marijuana.<sup>9</sup> This enormous expansion in the scope of federal drug enforcement is attributable partially to Congress passing new statutes criminalizing drug offenses, and partially to expansive prosecutorial ideas about what kind of enforcement should be done under federal drug laws. Not only the politics in Congress, but the politics of the current President and Attorney General affect the flow of drug cases in federal court.

Another political decision that has a tremendous impact on what will happen in the federal courts in an area like drug enforcement is the composition of the federal budget. For example, when the Drug Enforcement Agency (DEA) was created in 1973, it started with 1,470 drug enforcement agents.<sup>10</sup> Today there are 5,235 drug enforcement agents.<sup>11</sup> It is axiomatic that the more investigation you buy, the more prosecutions you will yield. So Congress can decide to increase the number of drug prosecutions by budgeting more money for the DEA; or the agency itself can decide to increase or reduce the number of drug prosecutions by tailoring its own conduct.

Drug enforcement has been my chief example of federal crime so far because it has been one of the major components of growth in the federal docket. From comprising a rather small percentage of the federal docket in 1968, by the 1980's, drug cases amounted to about twenty-one percent of the federal criminal docket.<sup>12</sup> More recently, they amounted to about thirty-five percent of the federal criminal docket.<sup>13</sup> So decisions made by Congress, not only about what to criminalize in the statutes themselves, but also about resources allocated to investigation and prosecution, combined with the agency's and prosecutors' enforcement decisions, have caused the federal courts to experience a tremendous and growing volume of drug cases—currently amounting to about seventeen percent of the federal criminal docket.<sup>14</sup> However, a new trend seems to be emerging that may be rivaling drug enforcement in having a major impact on the kinds of cases federal judges confront. There were some 155,694 federal criminal cases in fiscal year 2008.<sup>15</sup> Analysis shows that many of those new cases were referrals from the Department of Homeland Security (DHS).<sup>16</sup> Just when federal drug prosecutions seem to be settling down, immigration enforcement is on the rise, evidently fueling a twenty-seven and a half

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<sup>9</sup> *Id.* at 2

<sup>10</sup> U.S. Drug Enforcement Administration, *DEA History*, <http://www.usdoj.gov/dea/history.htm>.

<sup>11</sup> *Id.*

<sup>12</sup> Bureau of Justice Statistics Drug and Crime Facts: Drug Law Violations and Pretrial Release, Prosecution and Adjudication, <http://www.ojp.usdoj.gov/bjs/dcf/ptrpa.htm#Fedpros>.

<sup>13</sup> Transactional Records Access Clearinghouse (TRAC), *Prosecutions for 2008*, <http://trac.syr.edu/tracreports/crim/198>.

<sup>14</sup> TRAC, *supra* note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

percent increase in one year in the number of immigration offense cases on the federal docket, which has greatly contributed to the overall increase in the federal criminal caseload.<sup>17</sup> As Dean Erwin Chemerinsky remarked at the 2008 conference, certain aspects of the approach of the DHS in its anti-terrorism efforts are challenging our model of criminal jurisdiction.<sup>18</sup> Instead of being backward looking, waiting for someone to commit a crime and then prosecuting him or her for the crime, the DHS aims to prevent terrorism-related crime. Most DHS cases that end up as federal prosecutions are not prosecutions under terrorism-related statutes, but are prosecutions for immigration violations.<sup>19</sup> The DHS seems to be focusing on immigration enforcement as part of its forward-looking strategy to prevent terrorism. Whether or not this strategy is effective can be debated; that the strategy has an impact on the work of the federal courts is not debatable.

It is obvious in some respects how the types of cases being prosecuted will change the types of challenges that arise for the federal courts, and also for the Federal Judicial Center in doing the backup work the courts will need. There are also less transparent ways in which the changing nature of litigation can have pragmatic consequences for the federal courts. One example may be an impact on plea rates. Judith Resnik presented a chart during the conference showing how the number of trials in federal court has gone down dramatically in the criminal area, as well as the civil.<sup>20</sup> In 1968, the year of the birth of the Federal Judicial Center, about fifteen percent of criminal cases went to trial.<sup>21</sup> By 1988, that figure had gone down slightly, to about thirteen and a half percent. Today the trial rate for defendants in federal criminal cases is less than four percent.<sup>22</sup> The fact that only four percent of criminal cases go to trial has consequences, as Professor Resnik discussed, for our very concept of the public administration of justice.<sup>23</sup> It appears that there may be a correlation between plea rates and the types of offenses charged. According to recent figures, defendants in drug cases go to trial about three percent of the time.<sup>24</sup> Defendants charged with

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<sup>17</sup> James C. Duff, Administrative Office of the United States Courts, *2008 Annual Report of the Director*, 226 tbl.D-2 (2009), available at <http://www.uscourts.gov/judbus2008/appendices/D02Csep08.pdf>.

<sup>18</sup> Erwin Chemerinsky, Founding Dean of the University of California, Irvine, Law School, Address at Lewis & Clark Law School at the Conference Celebrating the 40th Anniversary of the Federal Judicial Center (Sep. 18, 2008).

<sup>19</sup> TRAC, *supra* note 1.

<sup>20</sup> Judith Resnik, Arthur Liman Professor of Law, Yale Law School, Address at Lewis & Clark Law School at the Conference Celebrating the 40th Anniversary of the Federal Judicial Center (Sep. 18, 2008); Judith Resnik, *Whither and Whether Adjudication?* 86 B.U. L. REV. 1101, 1128 (2006).

<sup>21</sup> David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 140 (1981).

<sup>22</sup> COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1998, at 31 tbl.3.1 (1992); Duff, *supra* note 17, at 244 tbl.D-4.

<sup>23</sup> Resnik, Address, *supra* note 20.

<sup>24</sup> Duff, *supra* note 17, at 245 tbl.D-4.

violent offenses, on the other hand, go to trial seven percent of the time.<sup>25</sup> That may not be an enormous difference in terms of absolute numbers, but people who are charged with violent crimes go to trial two to three times as often as people who are charged with drug offenses. It would be interesting to study whether the much commented on death of the trial is related, in some way, to the kinds of criminal cases that end up predominating in federal criminal court.

Another pragmatic challenge that the federal courts are already experiencing is the growth of multilingual proceedings. Given the increase in the number of cases involving immigration offenses, and also given the demographic trends in the population of this country, the federal courts are likely to continue to experience many more cases in which they will need the services of translators.<sup>26</sup> Statistics from fiscal year 2008 show a fifteen percent increase over the previous year in court events that require the use of interpreters.<sup>27</sup> That is a substantial increase. The statistics also show that the number of different languages spoken by people in federal court who might require interpreters has gone up to a recent high of 115.<sup>28</sup> I talked about this problem with one federal judge who sits in Orlando, Florida. He said that he really had no problem with obtaining the services of interpreters because every time he needs an interpreter, all he has to do is send over to Epcot Center. For judges who do not sit near Epcot Center, access to qualified interpreters may pose more of a challenge. And even when interpreters are accessible, the Courtroom of Babel presents tremendous administrative challenges.

Another fact worthy of note is that the immigration cases are not proportionately distributed throughout the country. Judges in the Southwest are dealing with more of the immigration cases, and so are experiencing more expansion of their dockets, and perhaps more multilingual proceedings, than judges in most other parts of the country.<sup>29</sup> This disproportionate growth presents a different kind of

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<sup>25</sup> Duff, *supra* note 17, at 224 tbl.D-2. .

<sup>26</sup> The docket for fiscal year 2007 shows that forty-three percent of federal criminal defendants were Hispanic. Out of the noncitizens, about eighty percent were Hispanic. As the immigration docket started increasing, the percentage of defendants with a less than high school education has increased again. UNITED STATES SENTENCING COMMISSION, CHANGING FACE OF FEDERAL SENTENCING (2008), *available at* [http://www.ussc.gov/general/20081230\\_Changing\\_Face\\_Fed\\_Sent.pdf](http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf).

<sup>27</sup> Press Release, Administrative Office of the United States Courts, Court Interpreting Events Increased in 2008, <http://www.uscourts.gov/newsroom/2009/interpreters.cfm>.

<sup>28</sup> *Id.* This marks an increase over even the past decade in the number of languages requiring the use of interpreters in the federal courts. In 1999, district courts reported needing interpretation for 103 foreign languages. Leonidas Ralph Meacham, Administrative Office of the United States Courts, *2000 Annual Report of the Director* 16 (2000), *available at* <http://www.uscourts.gov/library/dirrpt00/2000.pdf>.

<sup>29</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), BUSH ADMINISTRATION'S IMMIGRATION PROSECUTIONS SOAR: TOTAL OF ALL FEDERAL FILINGS REACH NEW HIGH, <http://trac.syr.edu/tracreports/crim/201>.

administrative challenge to the federal courts and to the Federal Judicial Center in providing appropriate support.

### III. CONSTITUTIONAL CRIMINAL PROCEDURE

In 1968, the year the Federal Judicial Center began, the Warren Court was still going strong. By that year, the Warren Court had already nationalized many provisions of the Bill of Rights and required the states to provide the kinds of criminal procedure that the federal courts, for the most part, had already been providing. The Court decided, in *Mapp v. Ohio*, in 1961, to require the states to employ the exclusionary rule as a remedy for violations of the Fourth Amendment.<sup>30</sup> *Gideon v. Wainwright*, in 1963, required the states to provide assigned counsel to indigent criminal defendants charged with a felony.<sup>31</sup> *Miranda v. Arizona*, in 1966, recognized a constitutional right to remain silent and protected that right by requiring police to advise suspects of their rights before commencing a custodial interrogation.<sup>32</sup>

As the times and the composition of the Court changed over the next twenty years, many predicted that the Warren Court's criminal procedure revolution would be dismantled.<sup>33</sup> But by 1988, it was clear that no real counter-revolution was occurring. The Supreme Court did not overrule *Mapp v. Ohio* and eliminate the exclusionary rule. The Court did not overrule *Miranda v. Arizona*, despite being given a clear opportunity to do so. In fact, Chief Justice Rehnquist himself eventually stabilized *Miranda* in the year 2000 in *Dickerson v. United States*, ruling that *Miranda* did indeed have a constitutional foundation.<sup>34</sup> Nor did the Court overrule *Gideon v. Wainwright* and excuse the states from paying for legal counsel for the indigent. Instead, there was evolution in all of these areas of criminal procedure, and in many others. The Supreme Court created exceptions, reducing the scope of a wide range of constitutional criminal procedure rights. Some blamed the incorporation of the Bill of Rights for the shrinkage of constitutional rights previously afforded federal criminal defendants. Justice Lewis Powell, in his opinion in *Johnson v. Louisiana*,<sup>35</sup> for example, predicted that the necessity of formulating constitutional criminal procedure rules for the whole country, and not just the federal courts, would lead the Supreme Court, given its concern for federalism, to under-interpret the rights the Bill of Rights had guaranteed federal criminal defendants.

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<sup>30</sup> 367 U.S. 643, 655 (1961).

<sup>31</sup> 372 U.S. 335, 344–45 (1963).

<sup>32</sup> 384 U.S. 436, 467 (1965).

<sup>33</sup> See, e.g., Stephen A. Saltzburg, *The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 154 (1980).

<sup>34</sup> 530 U.S. 428, 432 (2000).

<sup>35</sup> 406 U.S. 356, 375 (1972) (Powell, J., concurring); see also *Apodaca v. Oregon*, 406 U.S. 404 (1972).



It is difficult to predict what the next twenty years will bring, even after the historic presidential election of 2008. It remains to be seen how the composition of the Supreme Court will develop and precisely how these issues will be raised before the Court. Depending on these factors, the long predicted counter-revolution could still occur, especially in the Fourth Amendment area. In one recent case, *Hudson v. Michigan*, in 2006, four Justices of the Supreme Court expressed a great deal of doubt about the validity of the Fourth Amendment exclusionary rule.<sup>36</sup> In *Hudson v. Michigan*, the Court decided in one particular area, a violation of a constitutional knock and announce rule, that the exclusionary rule should not be applied as a remedy for the violation in question.<sup>37</sup> The reason that the Court limited its holding was Justice Anthony Kennedy. In an opinion concurring in part and concurring in the judgment, Kennedy declared that he was deciding only that one case and was not ready to dispense with the exclusionary rule.<sup>38</sup> A subsequent case, *Herring v. United States*<sup>39</sup>, confirmed that at least four current Justices are raising the volume of their criticism of the exclusionary rule.

If a fifth Justice were appointed who agreed with Justices Scalia and Thomas that the exclusionary rule should be thrown out, *Mapp v. Ohio* could disappear. The question for the federal courts would then be whether the pre-*Mapp v. Ohio* decision in *Weeks v. United States*, which applied the exclusionary rule to federal court proceedings in 1914,<sup>40</sup> would continue to govern in federal court, or whether Congress would be free to decide to adopt some other remedy instead. Federal criminal proceedings conducted in a world with no exclusionary rule, if that were to come to pass, would indeed be very different.

The election of Barack Obama may make that scenario less likely. If future nominees change the composition of the Supreme Court in the more liberal direction, the Court might rescind some of the post-Warren Court exceptions and broaden the scope of criminal procedure guarantees once again. If enough Justices shared Justice Powell's concern about the dilution of rights in federal court, another interesting alternative might be for the Supreme Court to adopt the two-tiered constitutional criminal procedure structure that the Warren Court rejected: full Bill of Rights protections for federal criminal defendants and a lesser threshold for state defendants (which could then be amplified by the individual states).

In terms of predictions, therefore, it is possible that the future will hold some sort of revolution—instead of just evolution—with respect to the constitutional criminal procedure legacy of the Warren Court.

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<sup>36</sup> 547 U.S. 586, 599–602 (2006).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 602–03 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>39</sup> 129 S. Ct. 695 (2009).

<sup>40</sup> 232 U.S. 383, 398 (1914).

It is also important to consider that the Warren Court did not have a monopoly on revolution in the criminal procedure area. Just in the past decade, the Supreme Court, under the leadership first of Chief Justice William Rehnquist and then under Chief Justice John Roberts, has revolutionized a number of criminal procedure rights, expanding them in ways that the Warren Court never even considered. In *Crawford v. Washington*, for example, the Supreme Court, led by Justice Antonin Scalia, completely renovated the Sixth Amendment's Confrontation Clause.<sup>41</sup> *United States v. Gonzalez-Lopez* found, for the first time, that the Sixth Amendment contains a right to counsel of one's choice, at least in some respects, in another opinion written by Justice Scalia.<sup>42</sup> A number of recent decisions have expanded the reach of the Eighth Amendment's ban on cruel and unusual punishment. The Rehnquist Court decided first, in *Atkins v. Virginia*, that it is cruel and unusual to execute people who are mentally retarded.<sup>43</sup> Then in *Roper v. Simmons*, the Court decided that it is cruel and unusual to execute people who were juveniles at the time their crimes were committed.<sup>44</sup> Finally, just this last term, in *Kennedy v. Louisiana*, the Roberts Court (in an opinion eponymously written by Justice Kennedy) held that it is cruel and unusual to execute people for crimes against individuals other than homicide.<sup>45</sup> Those are all very major decisions, and could be joined in the future by a similarly-reasoned decision that it is cruel and unusual punishment to execute the mentally ill.<sup>46</sup>

Will this revolution continue? Twenty years ago, few would have predicted that the Supreme Court was likely to be expanding rights in constitutional criminal procedure at all. That crystal ball, despite the very recent shift in politics in the Congress and the Presidency, is cloudy.

#### IV. SENTENCING

In 1968, the indeterminate model of sentencing prevailed. Judges had a good deal of discretion in sentencing. Parole boards also exercised considerable discretion in deciding when someone given an indeterminate sentence would be released, because one of the purposes of punishment was thought to be rehabilitation. Deciding what was

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<sup>41</sup> 541 U.S. 36, 68 (2004).

<sup>42</sup> 548 U.S. 140, 146 (2006).

<sup>43</sup> 536 U.S. 304, 321 (2002) (although Chief Justice Rehnquist himself dissented in *Atkins*, *id.* at 321).

<sup>44</sup> 543 U.S. 551, 568 (2005).

<sup>45</sup> 128 S. Ct. 2641, 2650–51 (2008) (again, the Chief Justice, now John Roberts, was in dissent, *id.* at 2665 (Alito, J., dissenting, joined by Roberts, C.J., and Scalia and Thomas, JJ.)).

<sup>46</sup> See, e.g., John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93, 131–32, 143 (2003); Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. Rev. 255, 289 (2003).

required to rehabilitate an offender, and when rehabilitation had occurred, were highly individualized determinations. By 1988, Congress had passed the Sentencing Reform Act<sup>47</sup> and the age of the Federal Sentencing Guidelines<sup>48</sup> had begun. The Guidelines limited judicial discretion in sentencing in order to reduce some of the disparities that had occurred under individualized sentencing—disparities contingent on which judge happened to set the sentence. But the Guidelines changed more than that. They changed what district judges do in sentencing, requiring judges to spend a lot more time to find facts, to look at long presentence reports, and perhaps to employ software to enable them to sentence under a complex grid.<sup>49</sup> The Guidelines also involved appellate judges in sentencing to a much greater extent, as the appellate courts were given the task of ensuring that district judges were following the guidelines. This was a major shift that took some judges quite a while to absorb.

During the past decade, the Supreme Court held its own counter-revolution and totally overhauled the Federal Sentencing Guidelines.<sup>50</sup> Beginning with *Apprendi v. New Jersey*,<sup>51</sup> in 2000, following with *Blakely v. Washington*,<sup>52</sup> in 2004, and finally addressing the Guidelines directly in *United States v. Booker*,<sup>53</sup> in 2005, the Supreme Court held that the Federal Sentencing Guidelines were unconstitutional on the theory that they violated the Sixth Amendment right of a criminal defendant to have a jury decide the facts on which the sentence would be based. In a procrustean compromise, the Court then saved the Guidelines by declaring that henceforth they would only be advisory.<sup>54</sup> As a result, district judges once again have greater discretion in sentencing. The *Booker* decision also changed the scope of appellate review from the very specific question Courts of Appeals were asked under the Guidelines—whether the district judges were following the Guidelines—to the very general question of whether the sentence imposed was “reasonable.” As in the Sixth Amendment cases described above, Justices considered to be conservative, like Antonin Scalia and Clarence Thomas, were among the leaders of this revolution.

The federal courts are still in the process of adjusting to the aftermath of the *Booker* decision. Decisions of the Supreme Court in its

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<sup>47</sup> 18 U.S.C. §§ 3551 et. seq. (2006).

<sup>48</sup> U.S. SENTENCING COMMISSION, GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2008).

<sup>49</sup> Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 310 n.80 (1992).

<sup>50</sup> Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002).

<sup>51</sup> 530 U.S. 466, 490 (2000).

<sup>52</sup> 542 U.S. 296, 303 (2004).

<sup>53</sup> 543 U.S. 220, 226–27, 244 (2005).

<sup>54</sup> *Id.* at 227.

most recently completed 2007–2008 term, in the *Gall v. United States*<sup>55</sup> and the *Kimbrough v. United States*<sup>56</sup> cases, settle some of the open questions that divided the lower courts after *Booker*. The Supreme Court has begun to offer the Courts of Appeals more precise instructions about how to conduct appellate review of sentences under the new regime. So it seems that sentencing is beginning to normalize and stabilize in the federal courts. However, a number of questions remain, including: one, will sentences go up or down now that sentencing judges have more discretion, and two, what will happen to appeals once defendants learn that the appellate courts are reviewing their sentences only on a forgiving abuse of discretion standard? Will the number of appeals of sentences go down?

There are many other questions raised by this brave new world of federal sentencing, but the biggest question of all, looming over this whole area, is whether or not Congress is going to get into the act. So far, Congress has left the *Booker* revolution alone and has left the federal judges to paddle their own canoes. But while paddling, many continue to look over their shoulders at Congress, wondering whether or not, at some point, Congress is going to make what has been a decision for the courts into a political decision and change the current. Politics will determine whether the *United States v. Booker* compromise remains stable.

## V. CONCLUSION

In conclusion, on the basis of the past forty years, I can comfortably predict that there will indeed be changes in the nature, volume, and challenges in federal criminal litigation, including challenges for the Federal Judicial Center. Even after the election of Barack Obama, just what those changes will be remains, at this point, unpredictable.

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<sup>55</sup> 128 S. Ct. 586, 594–95 (2007).

<sup>56</sup> 128 S. Ct. 558, 564 (2007).

