

# Movements in the Discretionary Authority of Federal District Court Judges Over the Last 50 Years

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INTRODUCTION .....	933
I. FEDERAL JUDICIAL IMPARTIALITY IN THE TUMULTUOUS 1960S VERSUS THE NEW AGE OF “COURTWATCHERS” AND OTHER MODERN-DAY PROTESTORS.....	935
II. FEDERAL JUDGES LOSE CRIMINAL JUSTICE AUTHORITY TO FEDERAL PROSECUTORS IN THE 1980S .....	954
III. FEDERAL DISTRICT COURT JUDGES AND CURRENT NATIONWIDE INJUNCTIONS AGAINST THE FEDERAL GOVERNMENT .....	960
CONCLUSION.....	967

## INTRODUCTION

Please let me begin by expressing my great appreciation for being invited to participate on this panel. Any topic selected by Professor Bruce Green will be dynamic, timely, and perhaps just a little bit controversial—but never dull. Since Bruce picked the panelists as well, I will do my best to enlighten and entertain. We are here today to examine “the contemporary role, conduct, challenges, and responsibilities of judges in criminal cases.” I have not been on the scene for quite as long as Bruce, but I would like to discuss three trends I have noticed over the last three decades during which I have practiced and studied criminal law. The most recent trend has the potential to greatly expand the discretionary authority of federal district judges by the issuance of national injunctions; an earlier movement that largely, but not completely, reduced judicial authority over criminal trials and sentences, and the earliest inherent judicial control over courtroom behavior remains mostly unchanged. I

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will discuss these trends in reverse order.

From my vantage point, judges' individual control over their courtrooms remains largely stable. Updated but similar versions of the problems encountered (and created) by Judge Julius Hoffman now confront our newer, younger, and more qualified judges.<sup>1</sup> While federal judges may be less likely to encounter radical, overtly political defendants and government officials trying to wrest control (and public opinion) from them in court, they are more likely to see minority defendants along with accompanying "courtwatchers" who want inequities in the criminal justice system noticed in individual cases. I will first describe the Chicago Eight (soon to become the Chicago Seven) trial and then explain the new courtwatchers in Part I.

On the other hand, I have witnessed federal judges having lost, primarily since the mid-1980s, much of their earlier control over the criminal justice process in general, but in particular over charging and sentencing decisions. Judicial discretion and control over a criminal trial is obviously less important when 97.2 percent of federal felony sentences are imposed by the district judge pursuant to a guilty plea negotiated between the government and the defendant, and only 2.8 percent of the sentences that judges impose are after a jury or bench trial.<sup>2</sup> The power players in the criminal justice system are the folks who determine whether to offer a plea and what plea terms to include. We live in a world of guilty pleas controlled by prosecutors. Federal prosecutors determine whom to investigate, whom to charge, and how much punishment to impose.<sup>3</sup> However, the pendulum has begun to swing back, and federal district judge discretion over criminal sentencing is now on the rise. I will support these observations, as well as offer some good sentencing news post-*Booker*,<sup>4</sup> in Part II.

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1. Judge Julius Hoffman, the federal district judge who tried the Chicago Seven, was rated "unqualified by 78 percent of the lawyers polled in a 1976 survey of judicial performance by the Chicago Council of Lawyers." Stephanie B. Goldberg, *Lessons of the '60s: "We'd Do It Again," Say the Chicago Seven's Lawyers*, A.B.A. J., May 15, 1987, at 32, 33.

2. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-25 fig.C (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf) [hereinafter USSC SENTENCING STATISTICS SOURCEBOOK] (the above statistics include only those defendants found guilty by juries or who admitted guilt, excluding those defendants who obtained a dismissal or an acquittal).

3. See generally NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 1279-1370 (6th ed. 2015) (exploring plea bargaining and cooperation agreements in the context of the Federal Rules of Criminal Procedure and the Constitution).

4. *United States v. Booker*, 543 U.S. 220 (2005) (holding that the Federal Sentencing Guidelines violated the Sixth Amendment right to a jury trial as is, but could be saved by excising 18 U.S.C.

Finally, in Part III, I will raise a relatively new phenomenon—federal district court judges imposing nationwide temporary restraining orders against the federal government. Though this last trend is not limited to or primarily about criminal trials, I think it fairly covered by the topic for today—most of these injunctions involve controversial policies that can, like with the Deferred Action for Childhood Arrivals case,<sup>5</sup> lead to criminal charges. This legal device allows a single federal judge in a single judicial district to determine federal policy for the entire country, at least until the matter can be resolved by the Supreme Court. This is one of the few areas where I have seen federal district judicial authority expand over the last few decades. The Supreme Court has taken very recent notice of this trend,<sup>6</sup> and will likely have something to say about the matter soon.

I. FEDERAL JUDICIAL IMPARTIALITY IN THE TUMULTUOUS 1960S VERSUS THE NEW AGE OF “COURTWATCHERS” AND OTHER MODERN-DAY PROTESTORS

When I was initially invited to this panel, I embarrassingly admitted that I knew next to nothing about this infamous trial, despite the fact that I was hired at the University of Texas by the great Michael Tigar. When I met Michael, he was a staid law professor, but in the 1960s he was one of the prominent defense attorneys thrown into federal lockup in Chicago by a U.S. Marshal when Judge Hoffman tried to strong-arm defendant Bobby Seale into replacing his attorney, Charles R. Garry, with substitute counsel.<sup>7</sup> Those of us who ignore history are doomed to repeat it, so it was clearly the time for a quick study. I discovered that the Chicago Seven (at that time there were actually eight defendants) were a group of political activists who were arrested for anti-war rioting, conspiracy, and alleged illegal activities during the August 1968 Democratic National Convention in Chicago, Illinois.<sup>8</sup> Numerous “radical” groups converged

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§ 3553(b)(1), which required the court to sentence within range, and 18 U.S.C. § 3742(e), which required *de novo* review of sentencing errors for conformity with the guidelines).

5. See *infra* note 130.

6. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

7. Goldberg, *supra* note 1, at 33. Judge Hoffman demonstrated hostility toward the defense from the get-go, when he refused to delay the trial so that Mr. Seale’s lawyer, who needed emergency surgery, could attend. *Id.*

8. *Chicago Seven*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Chicago-Seven-law-case> (last visited June 8, 2019) [hereinafter *Chicago Seven*, ENCYCLOPEDIA BRITANNICA]; see generally JACOB EPSTEIN, *THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY AND THE CONSTITUTION* (1970); *Conspiracy: The Trial of the Chicago 8* (HBO television broadcast May 16, 1987).

in Chicago to protest U.S. participation in the Vietnam War, as well as other government policies considered racist. Eight protest leaders: Abbie Hoffman and Jerry Rubin (Youth International Party or “Yippee”); Tom Hayden (cofounder, Students for a Democratic Society or “SDS”); Bobby Seale (Chairman, Black Panther Party); David Dellinger and Rennie Davis (National Mobilization Committee to End the War in Vietnam or “MOBE”); and John Froines and Lee Weiner, were arrested along with hundreds of others on charges of criminal conspiracy and incitement to riot.<sup>9</sup> Rioting and violence had erupted sporadically between August 25th and August 29th as Chicago police, armed with tear gas and billy clubs, attempted to enforce an 11:00 p.m. curfew in the city’s parks where the young protesters were camping.<sup>10</sup>

The trial was conducted in the U.S. District Court for the Northern District of Illinois and lasted an amazing five months (from September 24, 1969 to February 18, 1970). Observers noticed pretty immediately that Judge Julius Hoffman appeared biased in favor of the government.<sup>11</sup> Though Tom Hayden hoped to win his trial by playing it straight, defendants Abbie Hoffman and Jerry Rubin treated the proceeding as a farce: eating jelly beans, making faces and blowing kisses, wearing outlandish clothing, cracking jokes, and otherwise deliberately disrupting the trial. Their conduct was later termed “Guerilla Theater” for the way it commanded media attention.<sup>12</sup> The nadir of the trial was when Judge Hoffman had codefendant Bobby Seale, the only black defendant in the group, bound and gagged for three days in front of the jury for allegedly calling him a “fascist dog,” a “pig,” and a “racist.”<sup>13</sup> A mistrial was declared as to Mr. Seale, and he was removed from the criminal trial a month after it began.<sup>14</sup> Though the government eventually dismissed its

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9. United States v. Dellinger, 472 F.2d 340, 348 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1974) (mem.). The 1968 federal Anti-Riot Act was codified as 18 U.S.C. § 2101.

10. The 1968 Walker Report, a study prepared under the direction of Chicago attorney Daniel Walker for the U.S. National Commission on the Causes and Prevention of Violence, concluded that a “police riot” had sparked the violence. Goldberg, *supra* note 1, at 33. Americans watched the police respond to the young demonstrators “with an orgy of head bashing” on television. *Id.* at 32.

11. *Chicago Seven*, ENCYCLOPEDIA BRITANNICA, *supra* note 8. As a reporter for the *New York Times* noted, Judge Hoffman presided over “a kangaroo court in which an arrogant despot favored the prosecution at every turn and could barely conceal his contempt for the defendants’ lifestyles and politics.” Goldberg, *supra* note 1, at 33. According to David Goldberger, at the time the legal director for the Chicago chapter of the ACLU, “Hoffman was one of the worst judges who ever sat on the federal bench . . . He was a bully who loved to put down lawyers.” *Id.*

12. Goldberg, *supra* note 1, at 32 (calling it “the hottest show in town”).

13. *Chicago Seven*, ENCYCLOPEDIA BRITANNICA, *supra* note 8.

14. United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972).

criminal case against Seale,<sup>15</sup> Judge Hoffman was less forgiving, and, acting pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, Mr. Seale was summarily tried individually for contempt of court, in violation of 18 U.S.C. § 401(1), and was sentenced to four years in prison.<sup>16</sup> The remaining seven defendants (now the “Chicago Seven”) were acquitted of conspiracy, but five of them were convicted of crossing state boundaries with the intent to induce a riot.<sup>17</sup> Judge Hoffman sentenced each of the five defendants that the jury found guilty to five years in prison, and moreover summarily sentenced all seven defendants (even the two acquitted) plus two of their attorneys (William Kunstler and Leonard Weinglass) to prison terms for contempt of court!<sup>18</sup>

The substantive criminal convictions against the Chicago Seven were all reversed on appeal.<sup>19</sup> In overturning these convictions, Judge Fairchild cited Judge Hoffman’s “deprecatory and often antagonistic attitude toward the defense” during the almost five months of trial as a primary reason for the reversal.<sup>20</sup> Cumulatively, Judge Hoffman’s comments “must have telegraphed to the jury the judge’s contempt for the defense.”<sup>21</sup> The Seventh Circuit panel also noted Judge Hoffman’s failure to conduct pertinent *voir dire* regarding the jurors’ exposure to pretrial publicity and their attitudes toward the Vietnam War, and his abuse of discretion on rejecting expert witnesses.<sup>22</sup> The government never refiled any of the charges against the Chicago Seven, nor did the government ever attempt to charge Mr. Seale with the original substantive federal crimes after his mistrial.

Moreover, in addition to the eventual failure of the substantive criminal trials, both sets of these contempt convictions that Judge Hoffman imposed were reversed on appeal in two companion cases

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15. *Id.* at 350 n.3.

16. *Id.* at 350–51 (reversing contempt convictions imposed by Judge Hoffman). An appendix to the Seventh Circuit ruling contains the Certificate of Contempt filed by Judge Julius J. Hoffman against Mr. Seale, dated November 5, 1969. *Id.* at 373–89. See generally *Chicago Seven*, ENCYCLOPEDIA BRITANNICA, *supra* note 8 (describing the contempt charges).

17. *United States v. Dellinger*, 472 F.2d 340, 348 (7th Cir. 1972).

18. *In re Dellinger*, 461 F.2d 389, 391 (7th Cir. 1972).

19. *In re Dellinger*, 472 F.2d at 416 (Pell, J., concurring in part).

20. *Id.* at 385–86 (majority opinion) (noting “[t]rial decorum often fell victim to dramatic and emotionally inflammatory episodes,” complaints about discrimination in seating arrangements, the chilling effect of placing nineteen marshals in the courtroom, etc.).

21. *Id.* at 387.

22. *Id.* at 368–69 (failure to inquire as to juror prejudices regarding war in Vietnam); *id.* at 371–77 (failure to inquire about jurors’ exposure to pretrial publicity); *id.* at 385–87 (erroneous rejection of expert witnesses in areas of racism, youth culture, and police crowd control); *id.* at 388. See also *Chicago Seven*, ENCYCLOPEDIA BRITANNICA, *supra* note 8.

rendered in 1972.<sup>23</sup> In *In re Dellinger*,<sup>24</sup> the contempt appeal for the Chicago Seven and their two attorneys, Judge Cummins reversed all contempt counts against the seven defendants in light of *Mayberry v. Pennsylvania*.<sup>25</sup> The *Mayberry* Court held that where a trial judge is the object of personal vilification carrying potential for bias and he does not act instantly to cite for contempt, due process forbids him from sitting in judgment on the alleged contemnor.<sup>26</sup> The defendant is entitled to a hearing before a judge other than the one he has reviled.<sup>27</sup> The *Dellinger* panel rejected the government's argument that post-trial summary contempt punishments of the two lawyers in the case was proper under earlier Court holdings, finding instead that the more recent *Mayberry* case forbade the use of summary contempt power post-trial by a trial judge who had become "personally embroiled" with the lawyers cited.<sup>28</sup> In both *Dellinger* and its companion case, *United States v. Seale*, the Seventh Circuit provided, as additional grounds for reversal, that the defendants were entitled to a trial by jury on the contempt charges.<sup>29</sup> The contempt counts were punishable by prison sentences that exceeded six months and thus required a jury trial, and Judge Hoffman could not avoid this requirement by indicting numerous instances of contempt that each carried a six-month sentence. "[T]he potential for abuse is obvious."<sup>30</sup>

As already noted, the government decided not to refile the original criminal charges against the Chicago Seven<sup>31</sup> or against Mr. Seale.<sup>32</sup> The

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23. *United States v. Seale*, 461 F.2d 345, 345 (7th Cir. 1972) (reversing contempt citations against Mr. Seale in part because Judge Hoffman should have recused himself from the contempt hearings because of his personal relationship with the defendants and because defendants were entitled to a trial by jury on the contempt charges). Four of the sixteen contempt charges were reversed as insufficient as a matter of law. *Id.* at 371. See also *In re Dellinger*, 461 F.2d 389 (reversing contempt citations against the Chicago Seven and their two attorneys).

24. *In re Dellinger*, 461 F.2d 389.

25. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

26. *Id.* at 463-66.

27. *Id.*

28. The government had relied upon *Offutt v. United States*, 348 U.S. 11 (1954) (holding that this particular judge was so "personally embroiled" with a lawyer at the trial as to make him unfit to sit in judgment on the contempt charge), and *Ungar v. Sarafite*, 376 U.S. 575 (1964) (holding that remarks of a witness at a state criminal trial that he was being "badgered" and "coerced" did not constitute such a personal attack on the judge so as to require his disqualification from pending post-trial contempt hearing). The *Dellinger* court also noted Justice Jackson's statement in *Sacher v. United States*, 343 U.S. 1 (1952), that it is realistically impossible to distinguish between personally insulting contempt and those which are not personal affronts, and in consequence there should be disqualification in every case of delayed citation. *In re Dellinger*, 461 F.2d at 394 n.5.

29. *United States v. Seale*, 461 F.2d 345, 353 (7th Cir. 1972).

30. *Id.*

31. *In re Dellinger*, 370 F. Supp. 1304, 1307 n.1 (N.D. Ill. 1973).

32. *Seale*, 461 F.2d at 351 n.3.

contempt charges against Mr. Seale were dropped when a court compelled the government to produce transcripts of illegal wiretapping.<sup>33</sup> The contempt charges against the Chicago Seven and their attorney Mr. Kunstler were refiled and retried in a bench trial before a federal judge from Maine named Edward Gignoux.<sup>34</sup> He acquitted five of the defendants and upheld contempt findings only against attorney Kunstler and defendants Dellinger, Hoffman, and Rubin, though no fines or prison sentences were imposed.<sup>35</sup>

I will focus on two key issues surrounding the 1969 trial, which will transition us to the same issues facing current district judges: (1) were the original criminal charges politically motivated?; and (2) did Judge Hoffman's treatment of Mr. Seale transform the proceeding into a political trial? In my opinion, while the answer to the first question is not as clear (though I lean towards an affirmative answer), the answer to the second is a resounding "yes." Of course both questions depend heavily upon the meaning assigned to the term "political." There are many plausible definitions we could ascribe to the word "political" in this context.

First, we might call the trial "political" if the opposing major political party would not have brought such charges in an identical scenario. (So, in this case, for example, it was political if only the Republicans would have instituted the Chicago Seven trial, and had the Democrats been in power, the case would not have been indicted.) Second, we could call a prosecution "political" if the prosecution is pursued only because of the identity of the defendants, or because of the causes such defendants represent, or because the underlying alleged crime was committed or defended to make a political point or advance a political agenda. (So, for example, less famous lawyers and individuals who were not social and political players would not have been charged, and in fact were not charged, for identical conduct.) This is close to the definition offered by Professor Zalman, who defined a "political crime" as "the application of

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33. Goldberg, *supra* note 1, at 35.

34. "The Chief Justice of the United States, pursuant to 28 U.S.C. § 292 (1976), then designated the Honorable Edward T. Gignoux, District Judge of the United States District Court for the District of Maine, to hear the contempt specifications on remand." *United States v. Dellinger*, 657 F.2d 140, 141–42 (7th Cir. 1981).

35. *In re Dellinger*, 357 F. Supp. 949 (N.D. Ill. 1973); *In re Dellinger*, 370 F. Supp. 1304, *aff'd*, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975). The case was reopened when defendants sought to expunge the contempt findings on the basis of law enforcement and prosecutorial misconduct, after they obtained documents through a FOIA request showing that police had monitored meetings between the defendants and their counsel during trial. Judge Gignoux, while calling the government surveillance program "particularly egregious," upheld the contempt convictions. *Dellinger*, 657 F.2d at 146 n.15.

criminal law to politically dissident factions.”<sup>36</sup> Or third, we might define a “political” charge much more broadly as any offense where a substantial percentage of the population disagrees with the law being enforced (as was true during Prohibition for crimes involving alcohol, and is true today in many states for federal anti-marijuana enforcement). I will refrain from selecting a definition for now, and I will return to it when I discuss courtwatching later in this section.

This prosecution was arguably “political” under either of our first two definitions. The eight activists were indicted on charges of violating and conspiring to violate the Anti-Riot Act of 1968.<sup>37</sup> Ramsey Clark, the outgoing attorney general under Democrat Lyndon B. Johnson, had recommended no prosecution of what was then the Chicago Eight because a grand jury refused to indict after three months. However, ingoing Attorney General John Mitchell, appointed by new President Richard Nixon, immediately sought an indictment in the case.<sup>38</sup> A couple of days after the Chicago Eight were indicted, President Nixon began to denounce student rebellions and ring the law-and-order bell. In one speech a few months after the indictment, the president warned, “Drugs, crime, campus revolts, racial discord, draft resistance—on every hand we find old standards violated, old values discarded.”<sup>39</sup> Then the Department of Justice announced that it was conducting electronic surveillance of the defendants without a court order due to national security threats.<sup>40</sup> Both

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36. Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILL. L. REV. 897, 897–98 (1975). In Professor Zalman’s view, “political crime is restricted to offenses affecting sovereignty, national security or governmental functions,” such as treason and sedition. *Id.* at 899.

37. 18 U.S.C. §§ 2201–2202 (2012). This was passed after the violence in Newark following the assassination of Martin Luther King. It made crossing state lines with intent to incite a riot a federal felony punishable by five years’ imprisonment, a \$10,000 fine, or both.

38. Goldberg, *supra* note 1, at 34.

39. JONATHAN SCHELL, *THE TIME OF ILLUSIONS* 36–37 (1975); Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1331 (2000). This quote is from Nixon’s speech at General Beadle State College on June 3, 1969, contained in the Public Papers of the President of the United States archives, located at the Federal Depository Library. The full text of the speech and the quote in the text can be found at: President Richard Nixon, Address at the Dedication of the Karl E. Mundt Library at General Beadle State College, Madison, South Dakota (June 3, 1969), <https://www.presidency.ucsb.edu/documents/address-the-dedication-the-karl-e-mundt-library-general-beadle-state-college-madison-south>.

40. See generally EPSTEIN, *supra* note 8, at 108–13; BRUCE A. RAGSDALE, *THE CHICAGO SEVEN: 1960S RADICALISM IN THE FEDERAL COURTS* 16 (2008), <https://www.fjc.gov/sites/default/files/trials/chicago7.pdf>; Lahav, *supra* note 39, at 1331. The Seventh Circuit did not address the argument that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2511(3)) permitted electronic surveillance without a warrant in “an ‘emergency situation’ . . . with respect to conspiratorial activities threatening the national security interest.” See *United States v. Seale*, 461 F.2d 345, 365 (7th Cir. 1972). The Supreme Court later invalidated the



of these government actions appear to frame the Chicago Seven trial as a crackdown on the protest movements. So, if we accept our first definition of “political”—that the opposition party would not have charged the offense; then perhaps we can label the trial “political.” If we accept the second definition—requiring that other less famous or expressive individuals would not have been charged, and that this prosecution was a “symbolic” stand for “American values”—then again this prosecution might be labeled “political.”<sup>41</sup>

After all, in reversing substantive criminal convictions, the appellate court itself noted “the conflicts of values represented by the so-called youth culture—hippies, yippies and freaks—in contrast with the more traditional values of the vast majority of the community, presumably including most citizens summoned for jury service.”<sup>42</sup>

[W]e are not unaware that many otherwise qualified members of the community could not be impartial toward, and in fact are often offended by, persons who wear long hair, beards, and bizarre clothing and who seem to avoid the burdens and responsibilities of regular employment. Several defendants would exemplify this conflict.<sup>43</sup>

Recall that the anti-riot law itself had just been enacted and then immediately attacked as facially unconstitutional, so if nothing else, the Chicago Seven were the guinea pigs to test this new law. During the grand jury phase of their investigation, the individuals who would later come to be known as the Chicago Seven defendants instituted a class action for themselves and others that sought a declaratory judgment that the 1968 Civil Disorders and Riot provisions of the criminal code (18 U.S.C. §§ 231, 232, 2101, and 2102) were unconstitutional on their face and as applied.<sup>44</sup> The Seventh Circuit rejected that argument in 1969<sup>45</sup> and again when it eventually reversed their convictions in 1972.<sup>46</sup> Yet despite its

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DOJ’s rationale. *United States v. U.S. Dist. Ct. (Kieth)*, 407 U.S. 297, 306 (1972).

41. See RICHARD HARRIS, *JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA* 59–65, 70 (1970); Zalman, *supra* note 36, at 913–15.

42. *United States v. Dellinger*, 472 F.2d 340, 369 (7th Cir. 1972).

43. *Id.*

44. The defendants unsuccessfully sought to enjoin their indictment on the grounds that the statute was unconstitutional on its face. The district court rejected that argument, and the Seventh Circuit affirmed in *National Mobilization Committee to End The War in Viet Nam v. Foran*, 411 F.2d 934 (7th Cir. 1969). See also *United States v. Featherston*, 461 F.2d 1119, 1120–21 (5th Cir. 1972) (upholding conviction under 18 U.S.C. § 231(a), another civil unrest law enacted with the Anti-Riot Act that prohibited teaching use of and/or making explosives, based upon intent requirement).

45. *Foran*, 411 F.2d at 938.

46. In the case reversing the Chicago Seven’s convictions, the Seventh Circuit again held that the Anti-Riot act was not facially unconstitutional. *Dellinger*, 472 F.2d at 409. *But see id.* (Pell, J., dissenting) (arguing that the statute is facially unconstitutional and inconsistent with the First

“facial” constitutionality, the government ultimately lost the Chicago Seven trial and rarely tried such a tack again.

18 U.S.C. §§ 231, 2101, and 2102 were part of a compromise amendment to the Civil Rights Act of 1968.<sup>47</sup> The enactment of Sections 2101 and 2102 is commonly referred to as the Federal Anti-Riot Act of 1968 (although this popular name of the act does not appear in the text of the law). Liberals in Congress in the late 1960s thought the most effective solution to civil disorder in urban cities was an attack on the root causes such as substandard housing, poverty, unemployment, and racial discrimination. Conservatives believed that the recent riots were caused by organizations not necessarily concerned with the well-being of the rioters, and that therefore the rioting should be squelched by harsh criminal penalties.<sup>48</sup> Professor Zalman believed this Federal Anti-Riot Act was a symbolic measure so that Congress could claim it was properly reacting to the riots after the April 1968 assassination of Dr. Martin Luther King, Jr., and that Congress was well aware that its effective parts were redundant with existing and adequate federal and state laws.<sup>49</sup>

I could find less than a handful of prosecutions using 18 U.S.C. § 2101 outside of the Chicago Seven trial. There was one 1969 case in California upholding the constitutionality of the statute,<sup>50</sup> one in Rhode Island excluding an act from the statute’s coverage,<sup>51</sup> one in Oregon that had been dismissed in the best interests of justice,<sup>52</sup> and one case involving

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Amendment).

47. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (providing a compromise amendment to the Civil Rights Act of 1968).

48. Zalman, *supra* note 36, at 911.

49. *Id.* at 912–13.

50. *In re Shead*, 302 F. Supp. 569 (N.D. Cal. 1969), *aff’d sub nom.* Carter v. United States, 417 F.2d 384 (9th Cir. 1969) (upholding the constitutionality of 18 U.S.C. § 2101 and compelling witnesses granted immunity to answer questions before a grand jury), *cert denied*, 399 U.S. 935 (1970). The crux of these cases was whether the immunized witnesses had to answer questions before a grand jury, not the constitutionality of Section 2101.

51. *Providence Wash. Ins. Co. v. Lynn*, 492 F.2d 979 (1st Cir. 1974) (affirming that three inmates secretly starting a fire causing damage and prisoner relocation did not meet any of the three definitions of riot in a reinsurance contract, rejecting the argument that 18 U.S.C. § 2101 is inconsistent with the riot definitions and even if so, noting the different purpose of that statute, and affirming that the reinsurance company failed to produce evidence that civil disorder had occurred).

52. *Burgwin v. Mattson*, 522 F.2d 1213 (9th Cir. 1975) (affirming a motion for summary judgment in a case brought against FBI agents for an arrest where charges were dropped in “the best interests of justice”; agreeing with the district court that “concluded from the record before it that probable cause to arrest appellants had been established . . . that in making the arrests appellees were acting within the scope of their authority and reasonably believed in good faith that the arrest was lawful; and that consequently appellees were immune from liability.”), *cert. denied*, 423 U.S. 1087 (1976).

the Oneida Indians in New York.<sup>53</sup> Most interestingly, there has been no use of the statute at all since the mid-1970s. It now seems quaint to discuss prosecutions for inciting riots, though that could change, especially in light of the rash of recent police killings of unarmed black men, and the civil unrest that those killings generated. The fact that the government has essentially abandoned these provisions of the U.S. Code tells me that they were either purely political or symbolic all along, or that they lean so far into the First Amendment that they are not worth the trouble to charge.

Whether or not the trial was started as a political one, it seems clear to me that Judge Hoffman turned it into political theatre by the nature of his engagement with the defendants and their attorneys. While federal district judges may have less discretion regarding how to handle a prosecution that was politically motivated (though of course Judge Hoffman could have dismissed the indictment on grounds of selective or vindictive prosecution),<sup>54</sup> they do have discretion to attempt to minimize the political dimension of a charge once it is before them.

It was unnecessary, unprofessional, and immature for a life-appointed, ostensibly impartial federal district judge to ridicule a defendant and/or his attorneys. And then for Judge Hoffman to paint America a picture of a black man shackled before a primarily white courtroom and jury took things from beyond unnecessary and at least halfway to racist, even by 1960s standards. By the judge's own description:

[T]he Court thereupon ordered the defendant Seale removed from the courtroom at which time he was forcibly restrained by binding and gagging. The defendant Seale was then returned to the courtroom, but continued to shout through the gag. The Court then ordered the marshal to reinforce the gag.<sup>55</sup>

Why would any sane and experienced judge order such a spectacle on his watch, during a trial he knew the media would hold under a

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53. *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992) (affirming 18 U.S.C. § 2101 convictions for riot activity by Oneida Indians including a gathering of thirty people to retrieve a checkbook, an attack on a gas station, and a bingo hall break-in where two people were attacked. "All these events involved groups larger than three people where property was damaged, or where threats were made with the ability to immediately execute such threats. Moreover, the riots shared common goals: to intimidate those who disagreed with the defendants and to disrupt businesses in The Territory."), *cert. denied sub nom. Belgen v. United States*, 506 U.S. 1086 (1993).

54. *See, e.g., Wayte v. United States*, 470 U.S. 598 (1985) (holding that prosecution of vocal defendants in failure to register for the draft case was not selectively prosecuted); *Blackledge v. Perry*, 417 U.S. 21 (1974) (finding presumption of vindictiveness where prosecutor obtained felony indictment after defendant's appeal).

55. *United States v. Seale*, 461 F.2d 345, 386 (7th Cir. 1972) (quoting from the contempt citations drafted by Judge Hoffman in the appendix to the opinion).

microscope? It certainly was not required by law. It is true that there was a very recent Seventh Circuit decision very close to this time where the panel held that it was improper for a disruptive and disrespectful defendant to be excluded from his trial, and the proper course “was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged.”<sup>56</sup> Moreover, Judge Hoffman did read this opinion, as well as its bitter dissent.<sup>57</sup> However, the holding in that case clearly did not mandate such a procedure.<sup>58</sup> Shortly after the Seale case, the Supreme Court reversed the Seventh Circuit’s ruling that a defendant can never lose his Sixth Amendment right to be present at his trial and confront witnesses, and made it crystal clear that shackling and gagging would be accepted as a very “last resort.”<sup>59</sup> Judge Hoffman could not have been influenced by the Supreme Court’s grudging acceptance of the practice, as that opinion was not yet rendered when Judge Hoffman ordered Mr. Seale shackled and gagged. Judge Hoffman knew he had many options to conduct the Seale trial in Seale’s presence; he could grant Seale the continuance so he could have his lawyer, he could have instituted contempt proceedings (to be ruled on by a different judge), or he could have tried killing him with kindness. Though today’s Court has still not resolved the shackling issue,<sup>60</sup> it seems

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56. *United States ex rel. Allen v. Illinois*, 413 F.2d 232, 235 (7th Cir. 1969) (reversing a conviction because abusive and threatening defendant has an unqualified Sixth and Fourteenth Amendment right to be personally present at all stages of his trial; proper course was restraining defendant or using contempt power). This opinion was later reversed by the Supreme Court, but not in time to be useful to Judge Hoffman. *See Illinois v. Allen*, 397 U.S. 337 (1970) (reversing *United States ex rel. Allen*, 413 F.2d 232).

57. *See Lahav, supra* note 39, at 1333–34. Dissenting Judge Hastings warned us to “imagine the result that may occur in a criminal trial of multiple defendants who determined ‘to raise hell’ and disrupt the trial to the point of no return. Shackles, chains, gags and a courtroom full of deputy marshals engaged in trying to keep the defendants off the floor.” *United States ex rel. Allen*, 413 F.2d at 235–36 (Hastings, J., dissenting).

58. As Professor Kalven noted, Judge Hoffman could have separated him, as was in fact done. Harry Kalven, Jr., *Introduction* to CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, at xiii, xxvi (1970).

59. *Allen*, 397 U.S. at 344 (holding that judge has options to handle a disruptive defendant including to bind and gag him, cite him for contempt, or remove him from the courtroom until he promises to behave). Justice Black noted that shackling and gagging must be last resort because the sight not only “might have a significant effect on the jury’s feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.” *Id.*

60. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1542 (2018) (vacating Ninth Circuit *en banc* ruling that in-custody defendants cannot constitutionally be routinely shackled when they enter the courthouse in the Southern District of California for nonjury proceedings as moot because named defendants plead guilty). Interestingly, the Supreme Court’s issue was not necessarily with the merits of the ruling, but rather with the court attempting to treat the case as a “functional class action” to save it from mootness. I question how the Court would have responded had the district

quite obvious to me that its use, especially on a black defendant, will always be worse than the alternative.

Will today's judges face such choices? The answer to that question might depend on whether we will see an increase in "political" cases, under any of our previously offered definitions. A few scholars have argued recently that much more crime is "political" than might appear at first blush. If the definition of a "political" crime is that a major portion of the population believes the conduct should not be criminalized, or believes that the law is used against racial or political minorities, then much more crime is "political" in current practice than anyone suspects. For example, in her controversial and thoughtful bestseller *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Professor Alexander argues that, through the War on Drugs, the United States criminal justice system functions as a contemporary system of racial control over black men in America.<sup>61</sup> It is a fact that the U.S. penal population increased from less than 300,000 to over two million over the last thirty years,<sup>62</sup> and that as many as one in four young African American men will serve time in prison if current trends continue.<sup>63</sup> It is also fact that while black people comprised only about 13 percent of our population in 2014, black men made up 37 percent of the combined state and federal male prison population at that time.<sup>64</sup> Finally, statistics

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court instead issued a nationwide injunction against the practice. *See infra* Part III.

61. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2012) (suggesting that we have not ended racial discrimination in this country since the height of Jim Crow, we have merely redesigned racism by labeling African Americans as criminals).

62. DANIELLE KAEBLE ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 1, 2 fig.1 (2016), <https://www.bjs.gov/content/pub/pdf/cpus14.pdf>; MARC MAUER, RACE TO INCARCERATE 1, 55, 96 (2006) (noting that almost 3 percent of our adult population is either incarcerated in a federal or state prison or on probation, parole, or other correctional supervision). I must note, however, that the prison population, both state and federal, has finally started to decrease over the last few years since 2014. *See, e.g.*, E. ANN CARSON, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PRISONERS IN 2014, at 1, 2 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> (noting that we have over 1.5 million persons incarcerated at the federal and state levels, 2.2 million when you add jails, and over 5 million when you add anyone under some kind of criminal justice supervision, and that these figures in 2014 were the smallest since 2005); ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 5 tbl.2 (11th ed. 2015) (noting that the United States incarcerated about 698 per 100,000 in 2015). This number is down from 743 per 100,000 in 2011. ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 3 tbl.2 (9th ed. 2011).

63. Glenn Kessler, *The Stale Statistic that One in Three Black Males 'Born Today' Will End up in Jail*, WASH. POST (June 16, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/06/16/the-stale-statistic-that-one-in-three-black-males-has-a-chance-of-ending-up-in-jail/?utm\\_term=.c5200d26a16c](https://www.washingtonpost.com/news/fact-checker/wp/2015/06/16/the-stale-statistic-that-one-in-three-black-males-has-a-chance-of-ending-up-in-jail/?utm_term=.c5200d26a16c).

64. CARSON, *supra* note 62, at 15.

establish that 53 percent of blacks in the federal penitentiary are in for drug-related offenses, while that figure is only 40 percent for whites.<sup>65</sup> In light of a growing new movement against mass incarceration that is sensitive to the racial impact of our war on crime, many more “ordinary” or “garden variety” criminal charges, especially drug charges, may now be labeled, at least by some, as “political.”<sup>66</sup> If every trial is potentially a “political” one, perhaps we need better articulated rules for how federal district judges should respond to certain kinds of conduct in their courtrooms.

Some scholars have recently (within the last five years or so) suggested that because crime has been politicized, and because the criminal justice system has been utilized as a tool of racial oppression, we will see a sharp rise of movements like “courtwatching,” “copwatching,” and “participatory defense.” Scholars like Jocelyn Simonson and Janet Moore, for example, describe these as organized movements comprised primarily of marginalized groups such as poor people of color that work antagonistically to the present criminal justice system, not within it.<sup>67</sup> We might also include here the legal and social justice movement known as “Black Lives Matter,” or any other group that believes it should not necessarily work within the criminal justice system, since that is run and maintained by privileged insiders, but should facilitate critical resistance

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65. *Id.* at 17.

66. See, e.g., ALEXANDER, *supra* note 61, at 181; Kurt L. Schmoke, *Foreword* to STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS*, at xiii (1993) (arguing that “addiction is a disease to be treated and that criminal sanctions create far more crime than they stop”); Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 17 (arguing that much of the harm associated with drug use is caused by the fact that drugs are illegal); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970 (2008) (arguing that the decline of local control over criminal justice systems coupled with increasing control of suburban voters, legislators, and appellate judges has led to disproportionate criminal punishment of urban black neighborhoods); *Drug Courts*, NAT’L INST. JUST., <https://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx> (last visited June 9, 2019) (stating over 3,000 drug courts were operating in the United States as of June 2015, which have focused on treatment rather than incarceration and have been found to be much more effective at reducing the re-arrest rate than traditional incarceration).

67. See, e.g., Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 356 (2015) (examining the tactics of and challenges to the Movement for Black Lives); Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281 (2015) (describing participatory defense as a means of reforming public defense and mass incarceration); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 265 (2019); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1617 (2017) (describing how movement actors engage in communal acts of resistance throughout the criminal process); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 393, 393 (2016) (describing the practice of organized copwatching by marginalized populations).

from below. Examples of such collective resistance are community bail funds,<sup>68</sup> surrounding police when they detain a black teen,<sup>69</sup> and participatory defense teams that create biographical videos about defendants<sup>70</sup> and encourage letter-writing and visiting the wrongly incarcerated.<sup>71</sup> Examples solely of courtwatching include packing the audience section of a courtroom to demonstrate support for the accused,<sup>72</sup> wearing pins or T-shirts to support the defendant rather than the victim,<sup>73</sup> and simply observing in order to present the results to the community.<sup>74</sup>

I can personally attest to one example of the kind of activity that one could label “courtwatching,” though it was in a state, not a federal, courtroom. In March of 2016, I began working on a habeas appeal in a case styled *Miller v. Director*.<sup>75</sup> Mr. Miller, at the time a twenty-year-old

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68. *Our Mission*, CHI. COMMUNITY BOND FUND, [https://www.chicagobond.org/#our\\_clients](https://www.chicagobond.org/#our_clients) (last visited June 9, 2019) (describing stories of people in Chicago for whom the Community Bond Fund has posted bail for defendants unrelated to them).

69. *Activists Helping Teen Detained by Police Pepper Sprayed in Cleveland*, AL JAZEERA (July 27, 2015, 4:40 AM), <http://america.aljazeera.com/articles/2015/7/27/black-lives-matter-activists-pepper-sprayed-in-cleveland.html>.

70. See, e.g., Moore et al., *supra* note 67, at 1285–86; Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitionist Organizing*, NEW INQUIRY (May 8, 2017), <https://thenewinquiry.com/free-us-all/> (discussing the possibility of freeing prisoners and improving justice through collective organizing); *Photo Recap: National Social Biography Media Boot Camp!*, ALBERT COBARRUBIAS JUST. PROJECT (June 6, 2017), <https://acjusticeproject.org/2017/06/06/photo-recap-national-social-biography-media-boot-camp/> (describing meeting of participatory defense hubs from around the country to share strategies for creating biographical videos of defendants for potential use in court).

71. *Defense Campaign Toolkit*, SURVIVED & PUNISHED, <http://www.survivedandpunished.org/sp-toolkit.html> (last visited June 9, 2019) (describing movement to eliminate incarceration through building defense committees, letter-writing to incarcerated survivors, working with lawyers, and crowdfunding defense).

72. See, e.g., *Let’s Pack the Courtroom for Eric’s Preliminary Hearing!*, BAY AREA ANTI REPRESSION COMMITTEE (July 24, 2017), <https://antirepressionbayarea.com/lets-pack-the-courtroom-for-erics-preliminary-hearing/> (calling for supporters of an activist arrested during a demonstration to “pack the court” at his preliminary hearing). Similarly, police officers frequently pack the courtroom against a defendant when the victim was another peace officer. See Bruce Youngblood, *Letters to the Editor: May 15, 2018*, STATESMAN (May 15, 2018, 12:01 AM), <https://www.statesman.com/news/20180514/letters-to-the-editor-may-15-2018> (suggesting that the judge should not have allowed a bevy of uniformed police officers to attend the sentencing phase of a trial against Mr. Harrell, who shot a SWAT officer).

73. See, e.g., Michael Shatz, *Winn Trial Begins; Judge Says Shirts in Support of Defendant Barred*, KAN. EXPOSED (July 20, 2015), <https://kansasexposed.com/2015/07/20/winn-trial-begins-judge-says-shirts-in-support-of-defendant-barred/> (describing judge who banned individuals wearing shirts in support of the defendant, but who allowed victims’ rights advocates to wear shirts indicating their support in other trials).

74. See, e.g., *Help Stop Over-Incarceration in Cook County*, COMMUNITY RENEWAL SOC’Y (July 25, 2015), <https://www.communityrenewalsociety.org/blog/help-stop-over-incarceration-cook-county> (discussing the planned eight-week court watching program).

75. See *Miller v. Director*, No. 6:15-cv-00535, 2018 WL 1148105 (E.D. Tex. Jan. 26, 2018).

college football player, was indicted, convicted, and sentenced to death for the murder of his young son.<sup>76</sup> His argument, aside from actual innocence, was that the two white prosecutors violated equal protection and due process by injecting irrelevant considerations of race throughout the trial.<sup>77</sup> For example, they belittled the way he wore his hair (referring to his “dreadlock” hairstyle and “muscular” body), castigated the family for being poor (living in Section 8 housing) and having relatively minor misdemeanor criminal records, attacked the size of his immediate family (especially minor children and the number of “baby daddies”) as well as the way they spelled their Christian names, and, finally, made fun of the way the defendant and his friends talked about “white folks.” Mr. Miller’s large extended family attempted to watch his trial wearing purple shirts to indicate support. The prosecution was able to bar his family and friends from attending the trial by invoking the rule against witnesses.<sup>78</sup>

Finally, the government succeeded in insinuating that the defendant’s family constituted a gang that presented a threat to the safety of the jury, convincing the judge to station two uniformed guards at the door to the courtroom and requiring deputy accompaniment for each juror from the jury room to their cars. The prosecutor was able to scare the white judge, jurors, and observers by generating a circus-like atmosphere where essentially every member of the community who supported Mr. Miller (and who was black) had to wait outside in the hallway because of the no witness rule. The state court judge, an elected official in Texas, did absolutely nothing to discipline the government for its obnoxious behavior. Though the prosecutor was the cause of this, he regularly

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Lead counsel was Steptoe & Johnson LLP, a large Washington D.C. based firm that took the matter on pro bono.

76. See *Miller v. State*, No. AP-76270, 2012 WL 1868406 (Tex. Crim. App. May 23, 2012) (affirming conviction and sentence).

77. The jury consisted of eleven white jurors and two white alternates.

78. The government accomplished this by having one of their investigators show up at the defendant’s sister’s house, where she was holding a support meeting. This investigator, Mr. Lazarus, wrote down the names of all attendees, as well as family and friends who did not attend. Then the government placed each of these names on a witness list and subpoenaed them for trial. On the morning before the trial started, the prosecutor rounded up all forty-six African-American friends and family members of defendant and swore them in, thus effectively barring them from the courtroom as observers. The government’s sixth amended witness list had over 600 names on it, of whom they called less than twenty-five total (for the punishment and guilt phases). Of the forty-six Miller supporters sworn in as witnesses, only eight testified. In my opinion, the list was merely subterfuge to keep black faces out of the courtroom. Equally alarmingly, the government was able to scare his mother from testifying in his defense at the punishment stage by threatening her with arrest for a minor probation violation regarding a minor misdemeanor conviction should she show up. Declaration of Susan R. Klein, *Miller v. Stephen*, No. 6:15-cv-00535-MAC-ZJH, 2018 WL 1148105 (E.D. Tex. Apr. 18, 2016).



referenced to the white jurors and white audience the large number of black individuals wearing purple T-shirts or ribbons and carrying signs congregating in the hallway, as if they were up to no good.<sup>79</sup> No rational person could read the transcript of this trial and do other than conclude that the trial was “political,” at least if politics includes race-baiting. This was precisely the kind of case that rightly fuels public and academic criticism of the criminal justice system in general, and the death penalty in particular, as unfairly implemented based upon race. This trial desperately needed some courtwatching.

If there actually is an increase in the occurrence of courtwatching, as the above-mentioned scholars anticipate, many federal judges will have to exercise great restraint in their courtrooms to refrain from overreacting, and they may be forced to discipline prosecutors as well as audience members who are behaving badly. Today’s judge reacting publicly to courtwatchers must refrain from making the same mistakes Judge Hoffman made. However, I am not optimistic regarding the strength of the new movement. The examples I could find, both in checking the footnotes of scholarly research and reviewing local and national newspapers, show very small and localized groups, and none of the websites I checked when Professor Simonson’s articles were first published a few years ago appear to have any larger followings today. It does not appear to me that any of the groups involved in these movements expanded much. My admittedly pessimistic view is that such movements will not spread enough to do much good.

I believe this for the same reasons that I cannot get either of my college-age children to vote:<sup>80</sup> the grand weight of apathy and inertia. But the failure of the “courtwatching” or any other social justice movement that involves mild opposition to criminal justice officials to expand will not ultimately negate the good work that having observers in the courtroom generates. Courtwatching is something that can be done on an individual basis, despite the scholarly definitions to the contrary. Any person with an iPhone or camera can sit in on any trial and report judicial, prosecutorial, or law enforcement misbehavior, so the rest of us can be

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79. *Id.*

80. They joined the almost 60 percent of eligible voters ages 18 to 29 who couldn’t be bothered to vote during the last presidential election. Census data on voting available at: Thom File, *Voting in America: A Look at the 2016 Presidential Election*, U.S. CENSUS BUREAU (May 10, 2017), [https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting\\_in\\_america.html](https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html). Elections Project data available at: Michael McDonald, *Voter Turnout Demographics*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/home/voter-turnout/demographics> (last visited June 9, 2019).

alerted to future Chicago Seven-type trials.<sup>81</sup> I believe the behavior I witnessed in the *Miller* case, as well as the prosecutor's grandstanding in the Chicago Seven trial, would not have been tolerated by the judge or in the court of public opinion had the trial been observed and recorded by reporters or captured on film. It is technology, and not the courtwatching movement, that can prevent judicial excess.

Scholars have long debated whether courtroom observers (as individuals or parts of movements) should be allowed to use their smartphones and computers in court.<sup>82</sup> Separate from the issue of whether courtwatchers are going to transform everyday court proceedings into political theatre, there is the issue of what devices the media should be allowed to use. Journalists and other courtroom observers are now holding smartphones, tablets, and other small computers so that they can photograph, blog, and tweet the trials and other proceedings that they observe. For example, though the 2012 manslaughter trial of Dr. Conrad Murray for the killing of superstar Michael Jackson was not televised, one reporter at a local news station sent out 1,900 tweets a day.<sup>83</sup>

By the mid-1990s, TV cameras were permissible in criminal courtrooms in forty-six states, with judicial approval.<sup>84</sup> Scholars and judges hoping to stop or even slow this tide of cameras in the courtroom are fighting a battle, which they will and should lose. I say this despite watching first-hand how TV cameras helped destroy any chance for the government to receive a fair trial in the O.J. Simpson matter.<sup>85</sup> Judge Ito's mistakes were not in his decision to allow filming; it was his inability to fairly handle the myriad of problems that accompany any new technology. The arguments against the technology include that cameras

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81. Of course, individual courtwatchers or members of a social movement like Black Lives Matter can enter a courtroom at any moment and act disruptively, forcing a federal judge to respond.

82. Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 AM. J. TRIAL ADVOC. 573 (2013).

83. Bruce Carton, *Is Tweeting from the Courtroom by Reporters Too Distracting for Jurors?*, LAW.COM: LEGAL BLOG WATCH (Apr. 6, 2012, 4:21 PM), [https://legalblogwatch.typepad.com/legal\\_blog\\_watch/2012/04/is-tweeting-from-the-courtroom-by-reporters-too-distracting-for-jurors.html](https://legalblogwatch.typepad.com/legal_blog_watch/2012/04/is-tweeting-from-the-courtroom-by-reporters-too-distracting-for-jurors.html).

84. See David Shaw, *The Shaping and Spinning of The Story That Hijacked America*, L.A. TIMES (Oct. 9, 1995), [http://articles.latimes.com/1995-10-09/news/ss-55101\\_1\\_simpson-case](http://articles.latimes.com/1995-10-09/news/ss-55101_1_simpson-case). Cameras are allowed in courtrooms in almost all states today. See *Cameras in the Courts: State by State Guide*, RADIO TELEVISION DIGITAL NEWS ASS'N, [https://www.rtdna.org/content/cameras\\_in\\_court](https://www.rtdna.org/content/cameras_in_court) (last visited June 9, 2019).

85. Shaw, *supra* note 84 ("One thing is already clear: However unwittingly at times, the media played a pivotal role in this most bizarre drama."); see Christo Lassiter, *TV or Not TV—That Is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928 (1996) (questioning the wisdom of allowing cameras in court, noting the high profile O.J. Simpson case, and highlighting the twenty million viewers with access to the Court TV network in the early 1990s).

physically disrupt judicial order and decorum, that they distract the jury and impede proper fact-finding by encouraging showmanship by those on camera, and that they are a threat to the personal security of all trial participants.<sup>86</sup> Older Supreme Court justices appear especially worried that “soundbites” will be taken out of context, and that they might be the butt of jokes.<sup>87</sup>

Arguments in favor of the practice generally start with a 1980 Supreme Court case holding that state and federal criminal trials are presumptively open to the media and the public.<sup>88</sup> According to the Court, open trials serve as a check on government power, helping to ensure that defendants receive a fair trial; they serve the public interest by promoting public understanding of the judicial process and confidence in the fair administration of justice, and finally they have a “significant community therapeutic value” when a “shocking crime occurs.”<sup>89</sup> Since the Court

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86. See Packer, *supra* note 82, at 578–79 (summation of opposition argument). See also Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1513 (2012) (outlining the concern about the effect on participants in the courtroom, including the witnesses, jurors, and lawyers).

87. See, e.g., RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS 221 (2017) (noting that Justice Souter said that televising of the Court’s hearings would be “over his dead body”); Am. Constitution Soc’y, *U.S. Supreme Court Justice Stephen Breyer in Conversation with Associate Dean Alan Morrison*, YOUTUBE (June 12, 2017), <https://www.youtube.com/watch?v=ksuRCixAto8> (stating in the interview, that cameras in the courtroom would be a “risk” and that there is “no going back”); Associated Press, *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body’*, N.Y. TIMES (Mar. 30, 1996), <https://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html> (noting that Justice Souter “minced no words” on the subject of cameras in the courtroom); Robert Kessler, *Why Aren’t Cameras Allowed at the Supreme Court Again?*, ATLANTIC (Mar. 28, 2013), <https://www.theatlantic.com/national/archive/2013/03/case-allowing-cameras-supreme-court-proceedings/316876/> (quoting Justices Antonin Scalia and Anthony Kennedy expressing reservations against televised court hearings). Nevertheless, in 2016 the ABA House of Delegates passed a resolution urging the Supreme Court to televise its proceedings. Lorelei Laird, *Supreme Court Should Make Video of Oral Arguments Available to Public*, ABA House Urges, A.B.A. J. (Feb. 8, 2016, 8:00 PM), [http://www.abajournal.com/news/article/supreme\\_court\\_should\\_make\\_video\\_of\\_oral\\_arguments\\_available\\_to\\_public\\_aba\\_h](http://www.abajournal.com/news/article/supreme_court_should_make_video_of_oral_arguments_available_to_public_aba_h). Even the younger justices, who, at their confirmation hearings, expressed some openness to the idea, appear to now have greater apprehension toward video in federal courts. See Matt Sedensky & Sam Hananel, *Supreme Court’s Kagan, Sotomayor Rethink Support for Cameras in the Courtroom*, WASH. POST (Feb. 2, 2015), [https://www.washingtonpost.com/politics/courts\\_law/supreme-courts-kagan-sotomayor-rethink-support-for-cameras-in-the-courtroom/2015/02/02/1fb9c44c-ab34-11e4-ad71-7b9eba0f87d6\\_story.html?noredirect=on&utm\\_term=.6d031b20ba24](https://www.washingtonpost.com/politics/courts_law/supreme-courts-kagan-sotomayor-rethink-support-for-cameras-in-the-courtroom/2015/02/02/1fb9c44c-ab34-11e4-ad71-7b9eba0f87d6_story.html?noredirect=on&utm_term=.6d031b20ba24).

88. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980) (using the “experience and logic” test to determine whether a particular judicial proceeding can be closed). See generally Packer, *supra* note 82, at 574–77. Of course, media interest in criminal cases started with the trial of Bruno Hauptmann for the kidnapping and murder of baby Charles A. Lindbergh, Jr. See Shaw, *supra* note 84.

89. *Richmond Newspapers*, 448 U.S. at 570–71.

gave states the right to experiment with allowing cameras in their courts,<sup>90</sup> there are now laws permitting cameras in the courtroom in almost every state, resulting in shows on channels such as Court TV that film criminal trials from *voir dire* to verdict.<sup>91</sup>

Since these experiments began, it appears to me that none of the opposition's arguments have stood the test of time. As Professor West has convincingly written, television adds to a trial's transparency; improvements in technology mean that cameras are no longer disruptive, and televising the Court's proceedings "provide the public with more information about the [Court] and [would] produce more accountability. . . . [T]he fear of grandstanding . . . is not yet a fear that is supported by the vast and growing experience with cameras in courtrooms."<sup>92</sup> Former Judge Posner, in his new book on the subject, answers the "soundbites" and "threats" argument by reporting that "there has never been an adverse incident—a threat to a judge seen on television, an assault, an insult, an angry letter—by someone who had seen the judge in a televised argument."<sup>93</sup> Judges' and justices' fear of looking silly can be combatted by self-restraint, rather than limiting public access to critical information.

The federal judiciary has been much slower than the states in allowing cameras. However, despite Federal Rule of Criminal Procedure 53, many federal judges allow tweeting and blogging from their courtroom.<sup>94</sup> The

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90. *Chandler v. Florida*, 449 U.S. 560, 574–75 (1981) (holding that cameras in the courtroom was not an automatic violation of a criminal defendant's Fourteenth Amendment due process rights to a fair trial).

91. Court TV launched in 1991 and covered prominent criminal trials such as the O.J. Simpson trial in 1995 and the Menendez brothers' trial in 1994. It was bought by Time Warner and became In Sessions in 2008, and it ended in 2014. It is now a channel devoted to bad, court-themed reality TV shows, called TruTV. Online coverage of many criminal trials is now at CNN.com's "Crime" section. This exempts jury deliberation, which of course should remain private. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017) (holding a juror finding a defendant guilty based on racial bias creates an exception to the generally beneficial Federal Rule of Evidence 606 and noting that a no-impeachment rule that promotes "full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations" and gives "stability and finality to verdicts"). A number of smaller scale, independent court TV channels are budding. One example is LAW & CRIME, <https://lawandcrime.com/> (last visited June 9, 2019).

92. Sonja R. West, *The Monster in the Courtroom*, 2012 BYU L. REV. 1953, 1964. See also Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, JUDICATURE, Summer 2017, at 14 (noting that the United Kingdom's Supreme Court issued its Brexit decision on live streaming service, and arguing that the U.S. Supreme Court's bar against allowing oral argument or decision announcement to be broadcasted or live streamed is a national embarrassment, especially when C-SPAN is willing to cover them at its own expense).

93. POSNER, *supra* note 87, at 219. Judge Posner cites to his friend Judge Kozinski, a judge on the Ninth Circuit since 1985.

94. Rule 53, adopted in 1946, bars the taking of photographs in a courtroom or the broadcasting of judicial proceedings from the courtroom, and the 1972 Judicial Conference clause to the Code

United States Judicial Conference conducted what many scholars considered a successful pilot program that allowed for the use of cameras in federal district courts to record civil proceedings, though it unfortunately closed it after four years.<sup>95</sup> Nevertheless, the U.S. Court of Appeals for the D.C. Circuit announced early in the summer of 2017 that it will begin livestreaming audio of all oral arguments with its 2018–2019 term.<sup>96</sup> This is the third federal court of appeals to livestream its oral arguments. The Ninth Circuit has regularly allowed livestreaming of audio for arguments, and the Fourth Circuit does it for major cases.<sup>97</sup> The

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of Conduct for United States Judges prohibits “broadcasting in both criminal and civil proceedings.” FED. R. CRIM. P. 53; CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3(A)(7) (JUDICIAL CONFERENCE OF THE U.S. 1989) (repealed in 1990). *But see* FED. R. CRIM. P. 57(b) (permitting a judge to regulate her courtroom). In 1996, the U.S. Judicial Commission reversed its absolute ban on cameras from the federal court and left it up to the individual judge. Once the pilot program ended in 2016, the two federal circuit courts and fourteen federal district courts that had allowed video recordings of their proceedings under these programs were simply allowed to continue using cameras after the conclusion of the pilot program. To lift the ban on cameras would require that the Judicial Conference amend the Federal Rules of Civil Procedure or that Congress enact a statute allowing or requiring cameras in the courtroom. *See* CONG. RESEARCH SERV., R44514, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS 3 (2016), [https://www.everycrsreport.com/files/20160601\\_R44514\\_2522b097461fe5a9bb3230406a45d3b926810e83.pdf](https://www.everycrsreport.com/files/20160601_R44514_2522b097461fe5a9bb3230406a45d3b926810e83.pdf) [hereinafter BROADCASTING FROM FEDERAL COURTS].

95. Katherine Geldmacher, Note, *Behind Closed Doors: Why the Federal Judiciary’s Decision to Keep Cameras Out of District Courts was a Mistake*, 30 GEO. J. LEGAL ETHICS 753, 754 (2017) (describing Judicial Conference pilot program in 2010 wherein fourteen district courts recorded and edited civil proceedings with the consent of the participating parties and the presiding judge, and then posted the recordings on the U.S. Courts website and made them free to the public). Though the Committee on Court Administration and Case Management which oversaw the implementation of the program concluded that it did not produce sufficiently persuasive evidence of a benefit to the federal judiciary to justify a change in the use of cameras policy, Geldmacher argued persuasively that this recommendation was a mistake. *See also* Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 COLUM. L. REV. SIDEBAR 79, 92 (2015) (suggesting that the Judicial Conference of the United States’ “Cameras in Courts” pilot program should be extended, as participants did not perceive cameras to have adverse effects). Professor Singer notes as well that the FJC reviewed studies on the impact of the electronic media in twelve state courts and concluded that the cameras were not “distracting or anxiety-inducing to witnesses, and did not influence juror deliberations or outcomes.” *Id.* at 82 (citing Molly Treadway Johnson & Carol Krafska, Fed. Judicial Ctr., *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* 39–41 (1994), <https://www.fjc.gov/sites/default/files/2012/elecmediacov.pdf>).

96. Melissa Heelan Stanzione, *D.C. Circuit Will Livestream Argument Audio Next Term*, BLOOMBERG L. (Mar. 30, 2018, 3:30 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/dc-circuit-will-livestream-argument-audio-next-term>. The only exceptions to the live stream will be discussions of classified or sealed material.

97. *Id.* (according to Gabe Roth, a courtwatcher with Fix the Court). Fix the Court is a grassroots organization that advocates for a more open and accountable Supreme Court. The Ninth Circuit uploads the video to both its own website and YouTube. *See Audio and Video*, U.S. CT. APPEALS FOR NINTH CIR., <http://www.ca9.uscourts.gov/media/> (last visited June 10, 2019); *U.S. Court of Appeals for the Ninth Circuit*, YOUTUBE, <https://www.youtube.com/channel/UCeIMdiBTNT>

Seventh Circuit began offering video coverage of some of its oral arguments late summer of 2018.<sup>98</sup>

Regardless of one's personal feelings about cameras in the courtroom, technology is a runaway train that no one can catch. C-SPAN has tracked public attitudes about cameras in courtrooms since June of 2009, and in the 2015 version of its poll, at least 76 percent of U.S. adults surveyed supported televising the Supreme Court's oral arguments.<sup>99</sup> My children laugh at the idea that it is possible to keep cameras out of any public space, and this appears to include, at least for them, concerts and events where cameras are pretty clearly prohibited. The next generation is not comprised of scofflaws; they simply cannot conceive of a camera-less space outside their homes. Thus, unobtrusive handheld smartphones that can record and transmit high-definition videos have been secretly brought into and used in the Supreme Court!<sup>100</sup> Whether we like it or not, any hope of privacy, at least in public spaces, is dead. Inevitably, I predict that the pure public relations problem of judges treating all litigants and observers with respect will be solved by cameras and other technological devices in the courtroom. Regardless of local rules, cameras in phones have become so ubiquitous and so small that there is no way to keep them out of the courtroom. So every judge, like every peace officer (and every average citizen), can expect to be filmed at all times, and should behave accordingly.<sup>101</sup>

## II. FEDERAL JUDGES LOSE CRIMINAL JUSTICE AUTHORITY TO FEDERAL

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peA84wmSRDPg (last visited June 10, 2019).

98. Debra Cassens Weiss, *Is Posner's 'Baffling' Book an Ethics Breach? Chief Judge Objects to Release of Internal Memos*, A.B.A. J. (Sept. 21, 2017, 11:48 AM), [http://www.abajournal.com/news/article/is\\_posners\\_book\\_an\\_ethics\\_violation\\_chief\\_judge\\_objects\\_to\\_re](http://www.abajournal.com/news/article/is_posners_book_an_ethics_violation_chief_judge_objects_to_re). See also POSNER, *supra* note 87.

99. ROBERT GREEN & ADAM ROSENBLATT, PENN SCHOEN BERLAND, U.S. SUPREME COURT: KEY FINDINGS 8 (2015), [https://sites.c-span.org/camerasInTheCourt/pdf/July-SCOTUS-Agenda-071415\\_multiple-year-tracking.pdf](https://sites.c-span.org/camerasInTheCourt/pdf/July-SCOTUS-Agenda-071415_multiple-year-tracking.pdf).

100. Unauthorized videos of Supreme Court oral arguments were posted to a YouTube channel at various times since February of 2014. See BROADCASTING FROM FEDERAL COURTS, *supra* note 94, at 18 n.92 (noting that while it was not clear what device filmed the proceedings, it was clearly small enough to come in to the court undetected); see also Marder, *supra* note 86; Bill Mears, *Supreme Court Secretly Recorded on Camera*, CNN (Feb. 27, 2014, 7:53 PM), <http://www.cnn.com/2014/02/27/politics/supreme-court-video/>.

101. Susan R. Klein & Chloe Teeter, *Policing in a Democracy Without Privacy*, 53 NEW ENG. L. REV. (forthcoming 2019) (reviewing BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017)).

## PROSECUTORS IN THE 1980S

As rulers of their courtrooms, federal district judges were also solely responsible for the fate of suspects found guilty of committing a federal criminal offense. Prior to the Sentencing Reform Act of 1984 (SRA), federal district judges had near absolute authority to determine criminal sentences in their courtrooms, with essentially no appellate review.<sup>102</sup> The judge determined whether the offender should be incarcerated and for how long, whether he should be fined, and whether probation or some other penalty might be a better avenue. The sentences imposed were indeterminate, in that the Probation Commission could return an offender to society earlier than the judge planned based upon the offender's rehabilitation. That all changed with the SRA, which aimed to give similarly situated defendants similar federal sentences and to provide notice and transparency such that a defendant can calculate her sentence from the face of her indictment based upon the factors set forth in a constantly evolving manual called the Federal Sentencing Guidelines (FSG). The SRA created a group of experts who wrote and amended the FSG, and it abolished parole. Whether or not intentional at the time, the scholarly consensus is that the effect of the SRA was to stifle judicial discretion and move all sentencing authority to federal prosecutors.<sup>103</sup>

It was not the Act alone that transferred sentencing discretion from judges to federal prosecutors. That shift was assisted by a combination of legislation and Supreme Court cases that encouraged plea bargaining. The courts allowed coercive pleas and boilerplate agreements to constitute "voluntary and intelligent" acts by defendants.<sup>104</sup> Congress enacted not only the SRA but, near the same time period, a host of mandatory minimum sentence and consecutive sentence statutes.<sup>105</sup>

Prosecutors are in complete control now through the many carrots and

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102. A judge could sentence an individual anywhere within the very broad sentencing ranges established for most federal offenses. There were no mandatory minimum penalties at this time. The only exception to judicial authority in sentencing was the Parole Commission, who could let reformed defendants out early. And there were no grounds on which a defendant could appeal a sentence, unless it was outside the statutory maximum or based upon constitutional considerations. *See generally* ABRAMS, BEALE & KLEIN, *supra* note 3, at 1377–78.

103. *See id.* at 1282, 1369–70 nn. p–w (listing such scholars).

104. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (holding that a prosecutor could threaten to add a recidivism enhancement, with a mandatory life sentence, if a defendant refused to plead guilty to a two- to ten-year felony); *Brady v. United States*, 397 U.S. 742, 758 (1970) (holding that a government's offer of a plea to life imprisonment to avoid the death penalty was non-coercive).

105. *See, e.g.*, 21 U.S.C. § 841(b) (2012) (mandatory minimum penalties for drug offenses); 18 U.S.C. § 924(c) (2012) (consecutive sentences for possessing firearm in relation to crime of violence or drug offense).

sticks in their arsenals.<sup>106</sup> For example, prosecutors are permitted to threaten defendants with serious charges—such as notice of three-strike provisions or recidivist enhancements, mandatory minimum or consecutive sentences, or adding weapons charges with draconian penalties, if they refuse a plea bargain. Likewise, they offer steep sentencing discounts to those who sign, such as the 25 percent reduction in sentencing for acceptance of responsibility,<sup>107</sup> dismissal of charges,<sup>108</sup> and the possibility of escaping a mandatory minimum penalty through a government substantial assistance motion.<sup>109</sup>

Thus, prosecutors obtained not only all the authority to set charges and determine the contours of plea agreements, but also the power to determine most sentences. Since they have total control over the contents of pleas, boilerplate plea agreements now contain a host of mandatory waivers, primarily waivers of the right to directly or collaterally attack the conviction or the sentence, in addition to those trial-right waivers necessary to the plea process.<sup>110</sup> A federal district judge, from the late

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106. Excuse the mixed metaphors, from Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2037 (2006) [hereinafter Klein, *Enhancing the Judicial Role*] (arguing that the most pernicious problems in our new world of guilty pleas are lack of information for defendants and a coercive process for obtaining pleas, and suggesting that we can improve transparency and equality by amending discovery rules such that defense attorneys receive the information necessary to determine whether the client would be found guilty at a jury trial and whether the particular plea deal was standard, and requiring that judges ensure this occurred during the plea colloquy); see also Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 719–34 (2005) [hereinafter Klein, *The Return of Federal Judicial Discretion*] (predicting that *Booker* would cause a shift in the balance of power from the prosecutor back to the judiciary, as the FSG are no longer mandatory and judges use 18 U.S.C. § 3553(a) to justify any conceivable sentence she might wish to impose).

107. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2018). There is an additional one-point reduction for a “timely” plea, taken before the prosecutor begins to prepare for trial.

108. See FED. R. CRIM. P. 11(c)(1)(A); note 104, *supra*.

109. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2018); 18 U.S.C. § 3553(e) (2012).

110. Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 83–87 (2015) [hereinafter Klein et al., *Waiving the Criminal Justice System*] (counting plea agreements containing *Brady* or other discovery waivers, habeas waivers, and ineffective assistance of counsel waivers in arson and Hobbs Act plea agreements from 2006 to 2010). See also Donna Lee Elm, Susan R. Klein & Elissa C. Steglich, *Immigration Defense Waivers in Federal Criminal Plea Agreements*, 69 MERCER L. REV. 839, 876–881 (2018) (arguing that plea agreements containing waivers of the right to contest deportation are unconstitutional under the Sixth Amendment); Quin M. Sorenson, *Appeal Rights Waivers: A Constitutionally Dubious Bargain*, FED. LAW., Oct./Nov. 2018, at 33, [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2018/OctNov/Features/Appeal-Rights-Waivers-A-Constitutionally-Dubious-Bargain.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/OctNov/Features/Appeal-Rights-Waivers-A-Constitutionally-Dubious-Bargain.aspx?FT=.pdf). But cf. *Class v. United States*, 138 S. Ct. 798 (2018) (holding that the defendant’s plea waiver of his right to appeal a sentence at or below the judicially determined maximum sentencing guideline range did not waive, for direct



1980s until about the mid-2000s, had very little control over the length of a sentence; she would simply read the plea agreement and then calculate the sentence within a 25 percent range based upon the facts surrounding the offense and the offender listed in the FSG. Moreover, she did not have the opportunity to assess the facts surrounding the actual offenses committed by the defendant, and could not easily discover ineffective assistance of counsel in investigating the charges or negotiating the plea.<sup>111</sup> Federal judges, at both the trial and appellate levels, became little more than rubber stamps in this new world of guilty pleas. While judges could theoretically still reject a subset of plea bargains<sup>112</sup> or offer “downward departures” from guideline sentences they considered too steep,<sup>113</sup> Congress and the DOJ in the mid-2000s did all they could to “stamp out every vestige of judicial leniency at federal sentencing.”<sup>114</sup>

However, I see some not insignificant reversal of this trend since 2005. The Court returned federal district judges much of their pre-1984 sentencing discretion in *United States v. Booker*.<sup>115</sup> This decision

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appellate review, defendant’s constitutional claims that the statute of conviction violated the Second Amendment).

111. Klein et al., *Waiving the Criminal Justice System*, *supra* note 110, at 94–114 (suggesting that plea waivers of effective assistance of counsel and the right to collaterally attack a sentence are unethical and unconstitutional, as they leave the sentencing judge unable to determine whether the defendant knowingly and intelligently waived his rights).

112. FED. R. CRIM. P. 11(c)(1)(A) governs a plea agreement where the defendant pleads guilty in exchange for the prosecutor dismissing charges, 11(c)(1)(B) involves a plea where the government recommends a sentence but such sentence does not bind the court, and 11(c)(1)(C) agreements mandate a particular sentence agreed upon by the parties. The judge can reject a plea under (c)(1)(A) or (c)(1)(C), but they must accept a plea under (c)(1)(B). Pleas pursuant to 11(c)(1)(B), which judges cannot reject and which, pre-*Booker*, forced the judge to sentence within the FSG, are by far the most common. The third type of plea, for a set sentence, was always the most rare, as it takes away all judicial discretion at sentencing, even the discretion to sentence within a guideline range.

113. *Koon v. United States*, 518 U.S. 81, 97–100 (1996) (rejecting DOJ’s request for a *de novo* standard of appellate review for sentencing departures, and ruling that district courts can make departure decisions for unusual cases using an “abuse of discretion” standard). See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2018); 18 U.S.C. § 3553(b) (2012) (allowing judges to depart downward from the FSG for 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”).

114. Susan R. Klein & Sandra Guerra Thompson, *DOJ’s Attack on Federal Judicial “Leniency,” the Supreme Court’s Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 519 (2009). This was accomplished in large measure by the Feeney Amendment of 2003, PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003). See Klein & Thompson, *supra*, at 519 (explaining how and why a true sentencing reform movement that began in the mid-1980s was co-opted by conservative politics at the federal level at the turn of this century, thereby eliminating one avenue of change entirely for all federal and state actors).

115. *United States v. Booker*, 543 U.S. 220 (2005). In addition to making the FSG advisory and eliminating appellate review for conformity with the guidelines, *Booker* also requires review of

generates more of an impact with each passing year. Judges are feeling freer to ignore the guidelines, almost always sentencing below the now-advisory range. In fiscal year 2003, when the guidelines were mandatory, about 70 percent of defendants received within-guidelines sentences.<sup>116</sup> By fiscal year 2012, seven years after *Booker*, only about 52 percent of all defendants received a within-guidelines sentence.<sup>117</sup> During the last year for which statistics are available, 2017, federal district judges sentenced within the established guideline range only 49.1 percent of the time!<sup>118</sup> These federal district judges imposed sentences higher than that recommended by the guidelines in 2.9 percent of the cases, and sentenced below the FSG range in 47.9 percent of the cases.<sup>119</sup> Likewise, sentence length has decreased almost every year since *Booker*. The average federal sentence between 2005 and 2007 was 54 months; from 2008 to 2011 it was down to 49 months, and by 2018 it dropped to 44 months.<sup>120</sup> Clearly, these judges are receiving the message that at least some of their discretion has come home to roost.<sup>121</sup>

Judges could take one further step to increase their discretion in sentencing, especially after a set of revolutionary Supreme Court cases in 2012, *Lafler v. Cooper* and *Missouri v. Frye*, which clarified the right to effective assistance of counsel at the plea negotiation stage of a criminal

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sentences for “reasonableness” under the deferential abuse of discretion standard. *Id.* at 259–60 (Breyer, J., remedial majority opinion). Thus the more searching *de novo* review, mandated by Congress in the PROTECT Act, is unconstitutional because it gives the Guidelines too much binding force. See Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 779 (2008).

116. See PATTI B. SARIS ET AL., U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 5, 58 (2012), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_A.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf) [hereinafter USSC BOOKER REPORT].

117. See ABRAMS, BEALE & KLEIN, *supra* note 3, at 1475 (deriving data from *U.S. Sentencing Commission’s 2012 Sourcebook of Federal Sentencing Statistics*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2012> (last visited June 11, 2019)).

118. USSC SENTENCING STATISTICS SOURCEBOOK, *supra* note 2, at S-53 tbl.N.

119. *Id.*

120. USSC BOOKER REPORT, *supra* note 116, at 5; U.S. SENTENCING COMM’N, STATISTICAL INFORMATION PACKET 11 tbl.7 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/1c18.pdf>.

121. Not everything is rosy in this picture. While federal judges are imposing sentences below guideline ranges, they are unfortunately returning to the bad old days of unwarranted sentencing disparity between blacks and whites. See Susan R. Klein, *Sentencing Reductions Versus Sentencing Equality*, 47 U. TOL. L. REV. 723, 732–33 (2016) (citing USSC BOOKER REPORT, *supra* note 116) (noting that when judicial leniency was at its lowest while the PROTECT ACT reigned, the difference between similarly situated sentences for black offenders and white offenders was only 5 percent, but that in 2012, sentences for black male offenders were almost 20 percent higher than for similarly situated white male offenders).

proceeding.<sup>122</sup> As early as 2006, I suggested that the Advisory Committee to the Federal Rules of Criminal Procedure amend Rules 11 (governing plea bargains) and Rule 16 (governing discovery obligations) to allow federal judges to become more involved in the plea negotiation process.<sup>123</sup> In 2013, I suggested that the Advisory Committee create two non-waivable Federal Rules of Criminal Procedures, Rules 11.1 (mandatory pre-plea conference) and 11.2 (revised plea acceptance colloquy), that would allow district judges to better monitor the plea process for accuracy (actual guilt) and to ensure no unwarranted sentencing disparities,<sup>124</sup> the twin goals that five justices suggested animated their high-profile 2012 plea bargaining cases.<sup>125</sup> I recommend that we create a pre-plea discovery conference, and expand our current Rule 11 plea colloquy. The new hearing would ensure that prosecutors produce discovery and defense counsel properly investigates the case before plea negotiations conclude, and that all plea offers be transcribed into the record. The expanded judicial questioning at the plea hearing would require that all sentencing outcomes are reduced to writing and that waivers be explained to defendants, especially any waivers of discovery, prosecutorial misconduct, or ineffective assistance of counsel claims. This would give federal judges one more tool in releasing a potentially innocent suspect from a bad plea deal, and give them mastery over an unduly harsh penalty, and prevent prosecutors from simply bargaining around defendants' enhanced Sixth Amendment claims.<sup>126</sup>

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122. *Lafler v. Cooper*, 566 U.S. 156, 174 (2012) (holding that defense counsel's failure to communicate the prosecutor's plea offer to the defendant constituted deficient performance under the first prong of *Strickland's* test); *Missouri v. Frye*, 566 U.S. 134, 150–51 (2012) (holding that where government conceded defense counsel's performance was deficient when he told his client erroneously that he would get a lower sentence after trial than by accepting the plea, case must be remanded to determine whether the defendant was prejudiced by his fair trial). Both of these were 5-4 decisions.

123. See Klein, *Enhancing the Judicial Role*, *supra* note 106, at 2042–52 (arguing that the most pernicious problems in our new world of guilty pleas are lack of information for defendants and a coercive process for obtaining pleas, suggesting that we can improve transparency and equality by amending the discovery rules such that defense attorneys receive the information necessary to determine whether the client would be found guilty at a jury trial and whether the particular plea deal was standard, and requiring that judges ensure this occurred during the plea colloquy); see also Klein, *The Return of Federal Judicial Discretion*, *supra* note 106, at 719–34 (predicting that *Booker* would cause a shift in the balance of power from the prosecutor back to the judiciary, as the FSG are no longer mandatory and judges use 18 U.S.C. § 3553(a) to justify any conceivable sentence they might wish to impose).

124. Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 564–76 (2013).

125. *Id.* at 563.

126. See Klein et al., *Waiving the Criminal Justice System*, *supra* note 110, at 106 (suggesting that a waiver of the right to effective assistance of counsel at the plea bargaining stage is unethical, unwise, and unconstitutional).

### III. FEDERAL DISTRICT COURT JUDGES AND CURRENT NATIONWIDE INJUNCTIONS AGAINST THE FEDERAL GOVERNMENT

I do not see judges' basic day-to-day control over their courtrooms changing much since the 1960s, and I don't think they have yet regained the sentencing discretion they possessed prior to the 1980s. Are there areas of the law, particularly in the criminal justice arena, where federal judicial discretion for district court judges is on the rise? I think so.<sup>127</sup> There are a number of recent examples of federal district judges, in non-class action settings, issuing universal nationwide injunctions that prohibit the enforcement of a federal statute, regulation, or order not only against the plaintiff but against anyone. Such injunctions stop the federal government from taking action to enforce federal law not just against plaintiffs, and not just within that district judge's district or even her circuit. This practice, though used a few times in the sixties,<sup>128</sup> became more popular as red-state courts in places like Texas issued nationwide injunctions against President Obama's environmental and healthcare policies.<sup>129</sup> Famously, such an injunction was used to halt Democratic

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127. Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 191 (2018) (examining a trend beginning in the 1990s of Article III trial and appellate judges engaging in criminal justice activism through dicta of judicial opinions, articles, speeches, and other extra-judicial activities).

128. Professor Bray traces the rise of the national injunction to the desegregation cases of the 1950s and 1960s. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 454–57 (2017).

129. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066, 2016 WL 3766121, at \*46 (N.D. Tex. June 27, 2016) (Republican appointee Judge Sam R. Cummings issued a national preliminary injunction against a Department of Labor regulation called the "persuader rule"); *Texas v. United States*, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016) (Republican appointee Judge Reed O'Connor granted a national preliminary injunction, which blocked Obama-era DOJ guidance that included "gender identity" in the definition of "sex" and required schools to allow students to use bathrooms/facilities of their choice or risk the loss of Title IX funding), *order clarified*, 2016 WL 7852331, at \*4 (N.D. Tex. Oct. 18, 2016) (emphasizing that the injunction applies nationwide and that other statutory duties are not impacted by the injunction), *stay denied*, 2016 WL 7852330, at \*1 (N.D. Tex. Nov. 20, 2016) (reemphasizing the nationwide scope of the injunction in denying a stay of the injunction's application to "non-plaintiff states and entities"), *appeal dismissed*, 2017 WL 7000562, at \*1 (5th Cir. Mar. 3, 2017); Charlie Savage, *In Shift, Justice Dept. Says Law Doesn't Bar Transgender Discrimination*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/politics/transgender-civil-rights-act-justice-department-sessions.html> (explaining then-AG Jeff Sessions's order for the DOJ to take the position that gender identity is *not* included in the definition of sex—a complete reversal of the Obama-era stance). *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at \*15 (E.D. Tex. Oct. 24, 2016) (Republican appointee Judge Marcia A. Crone issued preliminary injunction against enforcement of a regulation that required federal contractors to report labor violations); *Nevada v. United States Dep't of Labor*, 218 F. Supp. 3d 520, 531–34 (E.D. Tex. 2016) (Democratic appointee Judge Amos L. Mazzant issued a national preliminary injunction against the enforcement of a Department of Labor regulation that would make four million workers eligible for overtime pay), *appeal docketed*, No. 16-41606 (5th Cir. Dec. 1, 2016); *Franciscan All., Inc. v. Burwell*, 227 F.

President Barack Obama's policy deferring deportation for Dreamers.<sup>130</sup> Showing anyone's ox can be gored, liberals later used it against Republican President Trump. A district judge in California issued a preliminary injunction against an executive order on "sanctuary cities."<sup>131</sup> Shortly thereafter, federal judges in Washington and in Hawaii temporarily stopped President Trump's travel ban.<sup>132</sup>

Even those who strongly oppose the ban should recognize the extraordinary authority such a legal doctrine offers a single unelected federal official. Recently, scholars have begun to both notice this legal maneuver and argue about its propriety. Professor Bray argues that federal district judges have no statutory or equitable authority to issue national injunctions, despite their relatively recent emergence on the scene.<sup>133</sup> The disadvantages of such injunctions are straightforward: First, they incentivize forum shopping. Thus we see anti-Trump plaintiffs run to California, while anti-Obama folks head to Texas (even when they

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Supp. 3d 660, 695–96 (N.D. Tex. 2016) (Republican appointee Judge Reed O'Connor issued a national preliminary injunction against a rule interpreting an antidiscrimination provision in the Affordable Care Act).

130. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (Judge Andrew S. Hanen, a Republican appointee, granted a nationwide preliminary injunction that prohibited the implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA) and expansion of Deferred Action for Childhood Arrivals (DACA) in the DAPA Directive), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

131. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (Judge William H. Orrick granted the motions for a nationwide preliminary injunction where defendants were enjoined from enforcing an executive order against sanctuary cities), *appeal dismissed as moot*, No. 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018). *See also* Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018) (holding that President Trump blocking users on Twitter was unconstitutional but declining to issue an injunction under the assumption that the President would remedy the blocking), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018).

132. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order against implementation of President Trump's first executive order restricting entry by individuals from seven countries). The executive order challenged here was subsequently replaced by a second order, which was stayed in part by the Supreme Court. *See* *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087–89 (2017) (per curiam). It was vacated and dismissed as moot in *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017). President Trump's third executive order on the travel ban was also the subject of a successful national injunction in *State v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017) (granting temporary restraining order), *aff'd in part, vacated in part*, *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).

133. Bray, *supra* note 128, at 420 (suggesting a rule, which could be adopted by the Supreme Court or Congress, that a federal court give a plaintiff-protective injunction only with respect to the particular plaintiff before that judge). Additional scholars critical of the national injunction include Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017).

are not from there). If a plaintiff loses in front of a particular district judge (who upholds the challenged law), that decision has no effect on other potential plaintiffs (anyone who disagrees with the policy), who can then simply challenge the law before an alternate judge. Once a district judge invalidates the executive action and issues a national injunction, that controls the executive with respect to everyone. Second, the injunctions increase the risk of conflicting injunctions, as different federal district judges have different opinions about the legality of key executive action. With a rule that awards the prize to the first plaintiff to receive an injunction anywhere in the United States, we eliminate the percolation of legal questions through different courts of appeals, which would allow each circuit to carefully consider each matter and draft reasoned opinions that, though they may well clash, can aid in the ultimate resolution of the issue by the Supreme Court. Third, they arrest the development of the law. The answer is given quickly and definitively by a single federal judge, who will not have benefitted of opposing viewpoints. And since the same judge deciding the merits of the policy also selects the remedy, she will always impose a national injunction, as she will always believe that her underlying decision was sound.

I would add to this list the pure unseemliness of those opposed to a sitting president's policy running off to a jurisdiction where that president lacks support and playing to a branch of government that probably should not be making policy. Plaintiffs in both parties have done this, as Republicans file their lawsuits in conservative Texas when the administration is full of Democrats, and Democrats high-tail it to tree-loving California when the president is a Republican. None of this cloaks federal judges with the appearance of impartiality; and all the judges imposing such injunctions, no matter their party affiliation, appear activist.<sup>134</sup>

On the other side, defenders of these injunctions argue that they ensure that individuals who did not challenge the unconstitutional federal law

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134. Professor Bray provides a nice example of this. Imagine the appearance of impropriety had the federal district judge in Florida who held that President Obama's signature healthcare law was unconstitutional also granted an injunction, as twenty-six states requested, rather than the declaratory judgment he did order. That might have resulted in the death of the Affordable Care Act (ACA) even though the Supreme Court was soon to declare the district judge wrong on the merits. See Bray, *supra* note 128, at 460; see generally Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). Though arguably that would not have been such a big deal, as President Trump has managed to kill the act in any case, it is better to have such an obviously partisan move done by a politician rather than a judge. See Bray, *supra* note 128, at 449, 460–61 (asserting that these were acts of "judicial restraint" and that the court could have decided differently without it being an abuse of discretion).

are treated identically to plaintiffs who did so, they provide national uniformity, and finally that nationwide injunctions give the judiciary a needed tool to immediately check the Executive Branch.<sup>135</sup> For example, the ACLU suggests that President Trump's travel ban inflicts irreparable harm on those attempting to enter the United States from one of the banned countries, and that it would be unjust to grant relief only to those plaintiffs that filed suit, and not parties similarly situated to those plaintiffs.<sup>136</sup> One might respond that the judge deciding the merits will likely believe the injunction is necessary, while other judges might give more weight to the extraordinary disruption of agency policies caused by such a ban. Or that the injunction supporters might feel less supportive when it is their candidate's policies that are being enjoined. The supporters of nationwide injunctions appeal to judicial self-restraint to answer the critiques above, despite the fact that such an appeal has not been particularly successful in reigning in such injunctions over the last few years.

The Supreme Court punted ruling on the legitimacy of a single judge blocking executive policies in its 5-4 decision, which reversed the injunction and upheld President Trump's travel ban.<sup>137</sup> Justice Thomas has commented and condemned this relatively recent and expanding practice, that he calls "universal injunctions," in his concurring opinion upholding President Trump's travel ban.<sup>138</sup> Though he wholeheartedly agreed with the majority's decision to reverse the Ninth Circuit and uphold the ban, he wrote separately to express his chagrin at the remedy that the plaintiffs had sought and obtained in this case.<sup>139</sup> The federal district judge issued an injunction that purported to prohibit the Executive Branch from applying the law against anyone, not just against the

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135. Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51, 54 (2017); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 57, 60 (2017). See generally Andrew Coan & David Marcus, *Article III, Remedies, and Representation*, 9 CONLAWNOW 97 (2018). Coan & David do not fit neatly into the category of injunction supporters, but are critical of Bray's article, suggesting that at least in some of the universal injunction cases the courts are more likely to get the issue right than the political process. *Id.* at 107.

136. Amdur & Hausman, the authors of *Nationwide Injunctions and Nationwide Harm*, are attorneys for the ACLU, though they write in their individual capacities. Amdur & Hausman, *supra* note 135.

137. *Trump*, 138 S. Ct. at 2423. Chief Justice John Roberts, writing for the majority, said that "[o]ur disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court." *Id.*

138. *Id.* at 2424–25 (Thomas, J., concurring) (agreeing with the majority and also noting that the President has inherent authority to exclude aliens from the country and aliens abroad can raise no First Amendment claims).

139. *Id.* at 2424.

plaintiffs to the lawsuit. Agreeing with and citing to Professor Bray, Justice Thomas asserts that these injunctions “are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.”<sup>140</sup> Justice Thomas is highly skeptical that district courts have the authority to issue such injunctions under any statute or the Constitution.<sup>141</sup> Instead, he believes such injunctions conflict with longstanding limits on equitable relief and the power of Article III courts to decide controversies between parties.<sup>142</sup> I agree with Justice Thomas’s conclusion: “If federal courts continue to issue them, this Court is duty-bound to adjudicate their authority to do so.”<sup>143</sup>

I predict both that the Court will soon hear this issue, and that that this Court, particularly now that President Trump replaced Justice Kennedy with Justice Kavanaugh, may limit the practice. On April 19, 2018, a panel of the U.S. Court of Appeals for the Seventh Circuit affirmed a nationwide injunction against President Trump’s Executive Order 13,768, a policy of withholding federal grants to so-called “sanctuary” cities that refuse to cooperate with federal authorities to enforce federal immigration law.<sup>144</sup> The City of Chicago sued, challenging conditions that Attorney General Sessions placed on the receipt of funds under the Edward Byrne Memorial Justice Assistant Grant Program, claiming that they were not supported by statute and were unconstitutional.

A single judge in the Northern District of Illinois agreed with the City with respect to two of the challenged conditions—(1) the notice condition, which requires advance notice to federal authorities of the release date of persons in state or local custody who are believed to be noncitizens, and (2) the access condition, which requires local correctional facilities to provide access to federal agents to meet with those persons. Judge Harry Leinenweber not only enjoined the Attorney General from enforcement of the conditions against the City of Chicago, but on September 15, 2017, issued the injunction on a nationwide basis.<sup>145</sup>

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140. *Id.* at 2425.

141. *Id.*

142. *Id.*

143. *Id.* at 2429.

144. *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018). This opinion upheld a nationwide ban issued by Judge Harry D. Leinenweber of the Northern District of Illinois in *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

145. *Sessions*, 264 F. Supp. 3d at 951, *aff’d*, 888 F.3d 272 (7th Cir. 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).



On June 4, 2018, the Seventh Circuit granted rehearing *en banc* only as to the geographic scope of the preliminary injunction entered by the district court and not on the merits, but it refused to issue a stay of the nationwide injunction.<sup>146</sup> On June 18, 2018, the Solicitor General of the United States asked the Supreme Court for a “partial stay,”<sup>147</sup> and Justice Kagan, in her role as Circuit Justice for the Seventh Circuit, requested a response from the city on June 29, 2018.<sup>148</sup> Interestingly, the Department of Justice asked the Court only to reverse the nationwide injunction and limit it to the district; it did not request a ruling on the merits.<sup>149</sup> The day that *Trump v. Hawaii* was rendered, June 26, 2018, the Seventh Circuit *en banc* court issued an order staying the preliminary injunction “as to geographic areas in the United States beyond the City of Chicago pending the disposition of the case by the en banc court.”<sup>150</sup> In light of the removal of the nationwide stay, the solicitor general, on June 27th, withdrew his application of a partial stay before the Supreme Court.<sup>151</sup>

A similar partial victory for President Trump on this issue occurred in August of 2018. The Ninth Circuit voted 2-1 to uphold a lower-court ruling from San Francisco and Santa Clara counties that declared unconstitutional President Trump’s executive order to withhold federal funding from counties that operate as sanctuary cities for undocumented immigrants.<sup>152</sup> The Ninth Circuit, a notoriously liberal one, echoed the Seventh Circuit’s June finding that a nationwide injunction issued by a judge in one city was too broad. The Ninth Circuit panel limited the scope of the injunction to make it solely local.<sup>153</sup>

So, although the issue of nationwide injunctions is not presently scheduled to be heard by the Supreme Court, it may well be that the government is waiting for the Seventh Circuit’s forthcoming *en banc*

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146. *Sessions*, No. 17-2991, 2018 WL 4268817.

147. Application for Stay Pending Rehearing En Banc in the United States Court of Appeals for the Seventh Circuit and Pending Further Proceedings in this Court at 1, *Sessions v. City of Chicago*, (No. 17A1379) (June 18, 2018).

148. Order, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 26, 2018).

149. Application for Partial Stay Pending Rehearing En Banc in the United States Court of Appeals for the Seventh Circuit and Pending Further Proceedings in This Court at 2–3, *City of Chicago v. Sessions*, (No. 17-2991) (July 20, 2018). This, of course, would prevent the Court from skirting the issue again if it accepted the case.

150. Order Regarding Review *En Banc*, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 26, 2018).

151. Letter from Noel J. Francisco, Solicitor Gen., to Hon. Scott S. Harris, Supreme Court Clerk, Regarding *Sessions v. City of Chicago* (June 27, 2018). This issue was resolved in Order to vacate the decision to rehear No. 17-2991 en banc, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. Aug. 10, 2018).

152. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018).

153. *Id.*

decision as a better method of going back before the Justices to either eliminate such injunctions or at least limit their use. In the meantime, we are going to see more of these, like the recent decision issued from a federal district judge in Houston, Texas on deportation of parents separated from their children under President Trump's short lived "zero-tolerance" policy,<sup>154</sup> and the one issued by U.S. District Judge Robert Lasnik of Seattle granting the request for a nationwide temporary restraining order sought by eight Democratic state attorneys general to block an Austin company from publishing blueprints for a 3D-printed gun, as mandated by a settlement between the company and the U.S. State Department.<sup>155</sup> Even more recently, Federal District Judge Jon Tigar issued a nationwide injunction on November 19, 2018, that temporarily barred the Trump administration from requiring that all asylum applications be made at official ports of entry.<sup>156</sup> This has blown up into a spat between President Trump and Supreme Court Chief Justice John Roberts over whether there is such a thing as an "Obama judge" (President Trump's words) or only "an extraordinary group of dedicated judges doing their level best." (I will let you guess who said that.)<sup>157</sup> Though the Department of Justice is making clear in public speeches that it "believe[s] that the Supreme Court should issue a clear ruling that shows that district judges cannot issue nationwide injunctions,"<sup>158</sup> the Court is not yet listening (perhaps in response to Justice Roberts public defense of the Court as nonpartisan). Rather than using the asylum case as a vehicle to determine the constitutionality of such nationwide injunctions, the Court, split 5-4, denied a stay of the asylum ban injunction.<sup>159</sup>

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154. Mark Curriden, *Houston Chief Federal Judge Issues First TRO in Parent Deportation*, TEX. LAWBOOK (July 12, 2018), <https://texaslawbook.net/houston-chief-federal-judge-issues-first-tro-in-parent-deportation/>.

155. Chuck Lindell, *Judge Extends Order Blocking 3D-Printed Gun Plans*, STATESMAN (Sept. 26, 2018, 12:16 PM), <https://www.statesman.com/NEWS/20180827/Judge-extends-order-blocking-3D-printed-gun-plans>.

156. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018).

157. Greg Stohr, *Trump Escalates His Feud with Supreme Court Chief Justice John Roberts over 'Obama Judges' Rebuke*, CHI. TRIB. (Nov. 22, 2018, 11:14 AM), <https://www.chicagotribune.com/news/nationworld/ct-trump-roberts-obama-judge-courts-20181122-story.html>.

158. Matthew Whitaker, Acting Attorney Gen., U.S. Dep't of Justice, Remarks on the Importance of a Lawful Immigration System in Austin, Texas (Dec. 11, 2018), <https://www.justice.gov/opa/speech/acting-attorney-general-matthew-whitaker-delivers-remarks-importance-lawful-immigration>.

159. *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782, 782 (2018) (mem.) (denying application for stay by Justices Kagan, Sotomayor, Ginsburg, Breyer, and Chief Justice Roberts. Justices Thomas, Alito, Gorsuch, and Kavanaugh would grant the application for stay).

## CONCLUSION

The Chicago Seven trial was “political” by almost any definition. We may not see more overtly political cases (unless our Statue of Liberty climber or some other anti-Trump groups wants to take on that role). The spectacle of a black man bound and gagged in America in the 1960s is hard to bare. Some new scholars argue that we can turn all crimes into “political” ones through the activity of courtwatching by otherwise marginalized community members. While I am not convinced that this movement will expand into this role, I ultimately do not believe that federal district judges will gain or lose discretion over their courtrooms in this manner. Judicial behavior will be checked, and any modern-day symbol of Mr. Seale shackled will be curbed by the simple fact of modern technology. Cameras and other devices will become so ubiquitous that the American public will watch judges at all times. This will curb judges from exhibiting frustrations with those before them.

So, while judges will remain as seemingly impartial as they have been over the last fifty years, this is not to say that the world of judges has not changed. Federal district judges lost most of their discretion over criminal sentencing in the mid-1980s, and they are only, over the last decade, beginning to exercise it again. It is true that our particular *de facto* administrative law system of resolving all criminal matters through plea bargaining initially shifted all authority in this process to federal prosecutors.<sup>160</sup> However, since the FSG are now advisory,<sup>161</sup> and since most plea bargains are accepted under the subsections of Federal Rule of Criminal Procedure 11 that permits federal judges to determine the sentence and/or reject the bargain entirely,<sup>162</sup> judges have pulled back some of their sentencing authority. The current system leaves judges free to impose any sentence within the statutory minimum and maximum penalty, completely ignoring the Federal Sentencing Guidelines (after correctly calculating the appropriate range).<sup>163</sup>

Finally, I have noted one area where a few federal district judges have increased their authority, though this is not a phenomenon that directly concerns the criminal justice system. Federal judges can stop the application of a statute, regulation, or executive order not just as against

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160. See *supra* notes 105–14 and accompanying text; *supra* Part II.

161. USSC BOOKER REPORT, *supra* note 116, at 10 (noting that post-*Booker* the FSG are considered guidelines but nevertheless remain critically important, citing FRCP 11, and noting that judges can theoretically still reject some plea bargains).

162. See *supra* note 112.

163. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 115 (2007) (district judge must correctly calculate sentence pursuant to Federal Sentencing Guidelines, but appellate court will uphold any reasonable sentence outside that range).

a particular plaintiff, but on a nationwide basis. If this power were to spread to declaratory relief, it might give a single unelected federal official a chokehold over executive and legislative policy.