
REPORT ON THE IMPACT OF
THE *BOOKER* CASE ON THE WORKLOAD
OF THE FEDERAL JUDICIARY

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
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INTRODUCTION

The Administrative Office of the United States Courts has been asked to report on changes in caseload, increases in workload, and new trends resulting from the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) (*Booker*). The request was included in the report of the Senate Appropriations Committee (S. REP. NO. 109-109) and the Conference Report (H. REP. NO. 109-307) accompanying the fiscal year 2006 appropriations legislation for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and Independent Agencies. This report responds to the request by reporting relevant statistics, describing the additional work that federal courts have experienced, and analyzing the short-term and long-term impact of *Booker* in the context of the Supreme Court case law leading up to it.

I. THE SUPREME COURT'S DECISIONS IN *BLAKELY* AND *BOOKER*

The January 2005 decision in *Booker* was preceded by two other landmark Supreme Court cases addressing the constitutionality of sentencing practices. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (*Apprendi*), the Court held that the Fourteenth Amendment requires that any fact increasing a criminal penalty beyond the prescribed *statutory* maximum be submitted to a jury and proven beyond a reasonable doubt.

In *Blakely v. Washington*, 542 U.S. 296 (2004) (*Blakely*), the Supreme Court extended that principle and held that the defendant's Sixth Amendment right to trial by jury was violated when a state court imposed an *above-guidelines* sentence based on facts (other than a prior conviction) that had been neither admitted by the defendant nor found by a jury beyond a reasonable doubt. The Court said in *Blakely* that the federal sentencing guidelines were not before it and expressed no opinion on them.¹ But two dissenting opinions emphasized the similarity of the Washington State guidelines at issue in *Blakely* to the federal sentencing guidelines and those of other states. Thus, they warned, *Blakely* would cast doubt on them all, jeopardize every sentence imposed under them, and wreak havoc on courts across the country.²

Federal district judges immediately had to face *Blakely's* potential impact on all the cases before them. Many judges continued to apply the federal guidelines in their intended fashion, but many delayed imposing sentences until the law could be clarified in their circuit. Some district judges began asking juries to determine all facts that could result in increasing a defendant's sentence rather than doing so themselves. Eventually, most courts of appeals addressing the issue held that *Blakely* did not affect the constitutionality of the federal sentencing guidelines, but two circuits decided that the federal guidelines did in fact violate the Sixth Amendment.

¹ 542 U.S. at 305 n. 9.

² *Blakely*, 542 U.S. at 324-26 (O'Connor, J., dissenting); *id.*, at 346-47 (Breyer, J., dissenting).

In January 2005, the Supreme Court resolved the matter in *United States v. Booker*, 543 U.S. 220 (2005), by extending the *Blakely* holding to the federal sentencing system. The Court held that mandatory application of the federal sentencing guidelines violates a defendant's right to trial by jury under the Sixth Amendment. After severability analysis, the Court struck down two provisions of the Sentencing Reform Act of 1984 — 18 U.S.C. §§ 3553(b)(1) and 3742(e) — that had required courts, absent limited circumstances justifying a departure, to impose a sentence within the applicable range specified by the federal guidelines.

The practical effect of *Booker* was to render the federal guidelines advisory, rather than mandatory. Accordingly, district judges must now consider the guidelines alongside the other sentencing factors identified in the Sentencing Reform Act at 18 U.S.C. § 3553(a), such as the defendant's personal history and characteristics. The sentences they impose are subject to review by the courts of appeals for reasonableness.³

The impact of *Booker* was felt almost immediately by the federal courts. On the day it issued the decision, the Supreme Court remanded approximately 400 affected cases to the courts of appeals. Thousands of inmates began to seek reconsideration of their pre-*Booker* sentences, both in direct criminal appeals and habeas corpus petitions,⁴ contending that they would have received a lesser sentence had the sentencing court considered § 3553(a) factors. In addition, the courts of appeals remanded many cases back to the district courts for resentencing.

In those cases where the defendant had not yet been sentenced — and in all new cases — the district courts have had to adjust their sentencing practices to comply with *Booker* and the now-advisory nature of the guidelines. As expected, district courts took different approaches on how much weight to give the guidelines and what evidentiary standards to apply to fact-finding at sentencing. Eventually, though, all the courts of appeals held that, after *Booker*, the district court must first calculate the applicable guidelines range before it may consider whether the other § 3553(a) factors might warrant a sentence outside the guidelines in a given case. Many other important legal issues, however, remain to be resolved as the cases continue to make their way through the appellate process.

II. SUPPLEMENTAL FUNDING REQUEST

Within weeks of the *Booker* decision, Congress requested an estimate of its economic impact on the judicial branch workload. In March 2005, the President transmitted the judiciary's request for \$91.3 million in supplemental *Booker*-related funding. The request included \$30 million for workload increases in the district courts and courts of appeals, \$60 million for

³ *Booker*, 543 U.S. at 262-68.

⁴ Habeas corpus is a procedure for bringing a person before a court, most often to ensure that the person's imprisonment or detention is legal. Prisoners convicted in state court may file an action in federal court under 28 U.S.C. § 2254 to challenge the legality of their state custody under the U.S. Constitution or federal law. Federal prisoners may challenge their federal sentence by filing a motion to vacate the sentence under 28 U.S.C. § 2255, often referred to as a federal habeas corpus petition.

increased work by federal defenders and Criminal Justice Act (CJA) panel attorneys, \$0.9 million for the U.S. Sentencing Commission, and \$ 0.4 million for the Federal Judicial Center. These estimates were predicated on the best information available at the time, and although subsequent developments intervened with respect to certain projected costs, the predicted increases in the workload of court staff resulting from *Blakely* and *Booker* have proven reasonable.

While the Senate included \$65 million in its version of the supplemental bill, the conference agreement provided no funding in the final version of the fiscal year 2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (Pub. L. No. 109-13). Accordingly, the judiciary has handled the increased workload flowing from *Booker* without any additional funding.

III. IMPACT ON THE COURTS

The Supreme Court's decisions in *Blakely* and *Booker* have had a significant impact on the workload of the federal judiciary in the past two years — an impact expected to be felt for another two years. Thousands of defendants who had already been sentenced filed appeals or habeas corpus petitions contesting the legality of their sentences, and thousands of cases already on appeal were remanded for resentencing. Habeas corpus filings by federal prisoners sentenced before *Blakely* and *Booker* have now largely ended, but the courts must continue to clear the backlog of these cases over the next couple of years. State prisoners, however, will continue to file habeas corpus petitions in federal court for another year or two because of the requirement that they first exhaust state remedies. Direct appeals of federal sentences after *Booker* will continue indefinitely, and many legal issues remain to be decided on appeal.

For new federal criminal prosecutions, there will continue to be some additional work for the district courts. Some criminal cases will be more complex because lawyers, probation officers, and judges will have to address sentencing factors that had been discouraged or prohibited in the past. This will result in additional work in connection with presentence investigations, motions and briefs, sentencing hearings, Judgment and Commitment forms, and Statement of Reasons forms.

A. Courts of Appeals

1. Caseload Statistics

As a result of *Booker*, more cases were filed in the courts of appeals than in previous years. The increase, though, began in July 2004, after *Blakely* was decided and six months before *Booker*.⁵ In the courts of appeals:

⁵ All analysis in this report is based on caseload data for the 12-month periods ending March 2004, March 2005, and March 2006. References to 2006 data, for instance, relate to statistics for the

- filings increased for direct criminal appeals,
- filings increased for habeas corpus petitions,
- filings increased for second or successive motions seeking permission to file habeas corpus petitions,⁶
- more cases were remanded by the Supreme Court,
- the pending caseloads of the appellate courts have grown, and
- the time needed for the appellate courts to dispose of appeals has increased.

The courts of appeals received more than 11,600 *Blakely* and *Booker*-related additional appeals between July 2004 and March 2006 — 6,400 direct criminal appeals, 1,500 federal habeas corpus petitions, and 3,700 second or successive motions seeking permission to file habeas corpus petitions.⁷ In addition, the courts of appeals received 843 cases remanded by the Supreme Court, more than 20 times the 35 to 40 remands ordered in a typical pre-*Blakely* year. Over 6,000 *Blakely* and *Booker* appeals were still pending on March 31, 2006 — 10.4 percent of all appeals pending in the courts of appeals.

Booker significantly increased the appellate caseload in 2005, and the filing of direct criminal appeals should continue at an increased level through 2006 and 2007. The increases have come at a time when funding for staff resources has not kept pace, and the additional workload has negatively impacted the operations of most of the courts of appeals. Nationally, pending cases jumped dramatically from 46,976 on March 31, 2004, to 58,801 on March 31, 2006 — an increase of 25 percent.

In addition, the median times for the courts of appeals to dispose of appeals from the district courts rose from 10.4 months in the year ending March 2004, to 11 months in the year ending March 2005 — an 18-day increase in processing time — and to 12.2 months in the year ending March 2006 — an additional 36 days. The longer disposition times were a result of the

period from April 1, 2005, to March 31, 2006. Pre-*Blakely* data for 2004 (before July 2004) serve as a baseline. Nationally, criminal filings in the district courts did not increase in 2005 and 2006. Therefore, the increase in criminal appeals in those years was disproportionately large and likely resulted from issues raised by *Booker*. Also, federal habeas corpus petitions pursuant to *Booker* had to be filed by the 12-month anniversary of the decision on January 12, 2006, when the period of limitation ran out on these cases. Thus, the 2006 data include all federal habeas corpus petitions resulting from pending criminal cases, thus capturing the bulk of the immediate impact of *Booker*.

⁶ By statute, a prisoner may file a “second or successive” habeas corpus application only in limited circumstances. The prisoner must first move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b).

⁷ All statistics were generated from the data maintained by the Administrative Office of the U.S. Courts (AO). Each month the AO receives its data via electronic file transfer from the courts’ case management systems. Numbers not contained in the standard tables produced by the AO have been rounded to the nearest hundred for use in this report.

additional work associated with the influx of new filings and the fact that many courts delayed resolution of cases until key legal questions raised by *Blakely* and *Booker* had been answered.

The increase of 54 days in median disposition times from 2004 to 2006 is very significant. During the four-year period before *Blakely* (1999-2003), the national median disposition time from the filing of the notice of appeal to judgment on the merits had been trending downward, declining from 11.8 months to 10.6 months. But by March 2005, the trend had reversed, and by March 2006, the gains had been undone, as the national median disposition time increased to 12.2 months.

The rise occurred at every stage of processing for which records are kept. Moreover, there was a domino effect on the courts of appeals, as the increased work in prisoner cases affected not only criminal and prisoner appeals, but also non-prisoner civil appeals. As a result, non-prisoner civil litigants have been forced to wait longer to have their cases resolved as the median disposition time of their cases rose by 36 days from 2004 to 2006.

2. Court Procedures

The courts of appeals varied in the ways they handled criminal cases during the period between *Blakely* and *Booker*. Some delayed oral argument and disposition in sentencing appeals. Other courts stayed all criminal cases. Still others stayed briefing requirements (and later asked for additional briefing after *Booker* was decided).

After *Booker*, some courts of appeals reviewed all their pending cases that might be suitable vehicles to address *Booker* issues. They then invited supplemental briefing by the litigants and proceeded to hear the cases. This required the staff attorneys and clerk's office personnel to identify and categorize cases by issue and prepare them for disposition once the court issued a controlling, published authority. Extensive work was needed because of the sheer volume of cases, the variety of procedural postures of the different cases, and the complexity and novelty of some of the issues. The concentration of so much additional staff work necessarily diverted attention from other parts of the courts' criminal and civil dockets.

In addition to the increased processing time, law clerks, staff attorneys, and clerk's office personnel were impacted by the complexity of issues presented in many of the cases. The impact was felt in the courts' schedules for oral argument, motions panels, and screening panels, directly affecting the work of the appellate judges.

The work has been shouldered in large measure by the clerk's offices and the staff attorney offices. From 2004 to 2006, funding for staff of these two offices has not kept pace with the increases in overall caseload. The net result is that many cases and many tasks simply were delayed and added to the backlog.

The judiciary's request for supplemental funding in March 2005, which covered an 18-month period, included \$30 million to meet staffing needs relating to *Blakely* and *Booker* in the

district and appellate courts. Staff and related costs associated with just the 11,600 new appeals directly attributable to those cases represented \$28 million. Thus, the request for supplemental funding was not only reasonable, but actually lower than the workload would warrant.

3. Clerk's Offices

The influx of 11,600 new filings and 843 remands caused by *Blakely* and *Booker* significantly increased the paper flow and case management responsibilities of the clerk's offices, which process all court filings. Moreover, the courts often ordered additional briefing, and the parties filed numerous motions for supplemental briefing, often in cases already submitted to a panel for decision. In cases remanded to the district courts for resentencing in light of *Booker*, additional processing by the clerk's offices was required when the cases were later appealed.

Some courts of appeals did not automatically stay all criminal appeals and instead decided questions of additional briefing and motions for stay on a case-by-case basis. This resulted in substantially longer processing times. Clerk's offices had to develop new internal procedures for handling these cases and to track and categorize cases and issues. This was a very labor-intensive process, requiring much coordination with judges' chambers. Some courts modified their case management systems to better track and report statistics on these cases.

4. Staff Attorney Offices

Staff attorney offices have been particularly hard hit because they are the legal staff who focus on pro se prisoner cases,⁸ direct criminal appeals, and habeas corpus cases. They have performed much of the substantive legal analysis that has assisted the courts in addressing the new and often complex issues presented by *Blakely* and *Booker*. Staff attorneys report that even with substantial uncompensated overtime and increased levels of productivity by their staff, they can barely sustain the workload demands. For example, individual staff attorney offices report:

- a 113 percent increase in cases pending review by screening panels;
- a 97 percent increase in second or successive petitions filed during 2005 as compared to the previous year;
- from November 1, 2005, to January 30, 2006, a 450 percent increase in successive applications, as compared to the same period in the prior year;
- a near-tripling of the percentage of criminal cases assigned to the office since *Blakely* and *Booker*; and
- a 23 percent increase in the number of cases received during 2005 decided without oral argument.

⁸ Pro se cases are those in which the plaintiff or petitioner files without an attorney's assistance.

Staff attorney offices have reported delays in resolving cases. One office reports that its productivity had increased by 25 percent during 2005, but that the enhanced output barely scratched the surface of the 80 percent increase in the office's pending caseload, most of which is attributable to *Blakely* and *Booker*. Staff attorneys also anticipate substantial additional work in cases that have been remanded to the district courts and then subsequently return to the court of appeals on sentencing issues.

Staff attorneys also report on the impact of the thousands of second or successive habeas corpus applications filed. The number of these petitions filed more than doubled in 2005 and increased another 50 percent in 2006, as compared to 2004 filings (i.e., pre-*Blakely*). Although these matters are not particularly time-consuming on an individual basis, they are time sensitive, with a statutory 30-day limit. A consequence of the increased volume of these petitions is that individual staff attorneys, attorney supervisors, and support staff must interrupt other work to process and address these petitions on an expedited basis, causing a disruption in the production of all other civil and criminal appeals.

The delays resulting from growth in workload directly contributed to the increase in median disposition time for appeals (discussed above). From 2004 to 2006, the median disposition time for appeals rose by 54 days — a significant increase. The work assigned to staff attorneys provides one example of this measurable increase. The median disposition time for processing appeals from the date the appellee's last brief is filed to the date that the appeal is submitted to a panel (for oral argument or for resolution without argument) increased by 24 days. This statistic reflects the interim during which cases often are reviewed by the staff attorneys.

The workload situation has been exacerbated by staff vacancies. Due to the uncertainty of future funding, many appellate court staff attorney offices have been reluctant to fill attorney positions that are badly needed now to clear the *Blakely* and *Booker* caseload because there is no assurance that funding will be available in FY 2007 and 2008 to retain new hires. The practical inability to hire and retain sufficient staff to handle the current workload surge is affecting the overall disposition of cases in the courts.

B. District Courts

1. Caseload Statistics

The district courts also experienced an increase in workload as a result of *Booker*:

- filings in district court increased for habeas corpus petitions filed by state prisoners;
- filings increased for habeas corpus petitions and motions to vacate sentence filed by federal prisoners;
- more cases were remanded or reversed by the courts of appeals;
- more criminal defendants were tried by a jury;

- the pending caseload of the district courts has grown; and
- the time needed to dispose of criminal cases in the district courts has increased.

Between July 2004 and March 2006, the district courts received 10,300 new *Blakely* and *Booker*-related cases — 6,800 federal habeas corpus petitions or motions to vacate sentence and 3,500 state habeas corpus petitions. In addition, the courts of appeals remanded or reversed 5,000 criminal and habeas corpus appeals to the district courts during that period — 264 percent more appeals than the 1,400 they remand or reverse in a typical year. On March 31, 2006, 2,800 habeas corpus petitions were still pending in the district courts — 1,500 by federal prisoners and 1,300 by state prisoners.

As a result of *Blakely* and *Booker*, significantly more criminal cases were decided by a jury during the year ending March 2006 than in either 2004 or 2005 — 2,751 in 2004, 2,810 in 2005, and 3,534 in 2006 — a 28 percent jump from 2004 to 2006. Since the *Blakely* decision in June 2004, criminal jury trial days rose by 1,500, from 16,000 in 2004 to 17,500 in 2005. The one-year increase was most likely the result of judges bringing additional sentencing factors to a jury in light of the *Blakely* decision.

Even though the national total of defendants prosecuted in the district courts decreased slightly between 2004 and 2006,⁹ the median disposition times for criminal cases in the district courts have risen significantly since *Blakely* was decided in July 2004. Largely as a result of *Blakely* and *Booker*, it took longer to decide cases in 2005 and in 2006 than it did in 2004. Many judges and courts simply postponed sentencing decisions until their respective circuits clarified the law following *Booker*. The median disposition time for criminal cases rose by 21 days — from 6.3 months to 7 months, and the district courts are still working through the backlog.

2. Court Procedures

The increase in the number of jury trials is only the most obvious effect of *Booker* on court procedures. The advisory nature of the sentencing guidelines has resulted in judges and courtroom staff devoting more time to sentencing hearings in many cases. Work in the district clerk's offices and probation offices has also increased significantly as a result of *Booker*.

District courts saw both an increase in uncompensated overtime that staff had to devote to complete the additional workload caused by *Booker* as well as an increased backlog in other work. But no separate records in district clerk's offices specifically gauged the effect of *Booker*. Courtroom deputies processing prisoner petitions, for instance, often did not focus on pre- and post-*Booker* differences in the amount of work involved. Similarly, court reporters and court interpreters may not have specifically attributed workload increases to *Booker*.

⁹ 92,761 defendants were prosecuted in 2004, 92,672 in 2005, and 91,203 in 2006.

District judges noted that median disposition times were rising due in large part to *Booker* issues. The judges reported spending more time and effort on preparing for sentencing hearings and on the hearings themselves. The increase can be attributed, in large measure, to the *Booker* holding that district judges have discretion in applying the sentencing guidelines. As in-court time for judges increases, so does the time required of court support staff.

3. Clerk's Offices

Calculating the 10,300 *Booker*-related filings against the work measurement formulas used to allot staff funding to the courts, the added staff work would yield an annual cost of more than \$3 million. The work in the clerk's offices includes opening files, scanning documents into the court's electronic database, accepting filing fees or processing in forma pauperis applications, assigning cases to the judges, closing cases, and preparing statistical reports.

The great majority of prisoners filing habeas corpus petitions, as opposed to criminal appeals, file them in forma pauperis (*i.e.*, asking the court for a waiver of the case filing fees). To proceed as a pauper without prepaying fees and costs, a litigant must supply an affidavit establishing inability to pay. Staff of the clerk's office must review the affidavit to ensure that it is in proper form and conforms to the rules of civil procedure and to local court rules. Special provisions are in effect for in forma pauperis actions filed by prisoners. They require clerk's office staff to accept all papers included with prisoner filings, including the envelope, in order to allow a judge to make a threshold determination of indigence.

In addition, extra staff work was required in the criminal cases already pending in the district courts when *Booker* was decided. Many of those cases required the filing of superseding indictments, revision of sentencing reports, and preparation of additional jury instructions. The staff work connected with these activities is not measured in caseload filings data, nor is it included in staffing formulas. Nevertheless, it was substantial in total and contributed to national increases in the processing times of criminal cases.

District court clerks report that *Booker* has made it more difficult and time-consuming for courtroom deputy clerks and other court staff to complete the Judgment and Commitment and Statement of Reasons forms. The newly revised Statement of Reasons form increased in length from four pages to seven, prolonging the time it takes for staff to prepare and review it. Clerks report that litigants have filed more sentencing memoranda, and sentencing findings often are more complicated than before *Booker*. In some cases, moreover, it is necessary to transcribe portions of the sentencing hearing to assist court staff in preparing the sentencing forms. Clerks also report that judges spend more time in the courtroom at a number of sentencing hearings, creating additional workload for the courtroom deputies, court reporters, and court interpreters.

4. Probation Offices

Since *Booker*, district judges have asked probation officers to gather additional information in their presentence investigations and to prepare lengthier presentence reports that

address the additional sentencing factors listed in 18 U.S.C. § 3553(a). Judges have made this request in individual cases, in certain categories of criminal cases, or in all criminal cases.

Probation officers report that many presentence investigations and reports take longer to prepare than before *Booker*. Among other things, they have to conduct more collateral interviews and home inspections as part of the presentence investigation process. In addition, use of the newly revised Judgment and Commitment and Statement of Reasons forms has required additional training for probation officers and development of informational and educational materials for the judges.

Many sentencing hearings now take longer after *Booker* because judges now may consider § 3553(a) factors that had been discouraged or prohibited in the past, such as the defendant's personal history and characteristics. Moreover, defense attorneys are increasingly advocating for their clients based on these factors.

Booker has resulted in 5,000 remands or reversals of criminal and habeas corpus appeals from the courts of appeals for resentencing. Once a case is remanded, the assigned probation officer must construct a new court file, review the remand itself, review the case file, read the submissions, draft new sentencing recommendations, research any new issues raised, meet with the judge, travel to attend the resentencing hearing, and draft another Judgment and Commitment form, commitment order, and Statement of Reasons form. Then the clerical staff of the probation office have to resubmit the necessary documents and information to the Sentencing Commission and the Bureau of Prisons.

C. Federal Defenders and Panel Attorneys

The *Booker* decision also has had a significant impact on the workloads of federal defenders and CJA panel attorneys. Although precise dollar figures are difficult to extract, the cost has been lower than predicted in March 2005. During the period between the *Blakely* and *Booker* decisions, federal defenders and panel attorneys represented a large number of defendants at sentencing and on appeal. Then, following *Booker*, they represented defendants in hundreds of cases remanded for resentencing.

The increase in workload for appellate and district court staff was also reflected in workload increases for the federal defenders who handle those cases on appeal and then on remand back to the district courts. For example, between 2004 and 2006, largely as a result of *Blakely* and *Booker*, the number of sentencing guideline appeals jumped by more than 41 percent, from 10,238 appeals to 14,462.

Nevertheless, federal defender offices were able to respond to the additional workload associated with the large increase in appellate cases without additional staff, largely because their work on other, new criminal cases in the district courts decreased during the same time period. From 2004 to 2006, new criminal prosecutions decreased nationally from 92,761 defendants to 91,203 defendants. Similarly, from 2005 to 2006, new trial-level assignments to

federal defender organizations under the Criminal Justice Act decreased from 66,000 to 62,100. These decreases were probably due, at least in part, to the U.S. attorneys' offices being preoccupied with the same post-*Booker* workload.

In addition, the workload that most defender offices expected as a result of *Booker* proved not to be as great as anticipated, particularly in those cases where the defendant had already been sentenced before *Booker*, because the courts of appeals all held eventually that *Booker* did not have retroactive effect on sentences imposed before it was decided.

In addition to working through the backlog of cases that could proceed after *Booker*, defense counsel spent additional time investigating and presenting mitigating § 3553(a) factors previously discouraged or unavailable under the mandatory guidelines system. The initial estimate by defenders of the additional time per case upon which the 2005 request for supplemental funding was based, however, has not been fully realized. Congress requested the estimate soon after the *Booker* decision was announced and before there was any consensus within the legal community regarding its meaning or any significant post-*Booker* litigation. Consequently, the initial projection was based on the best information available at the time — rough estimates by defenders of the additional time per case, on average, that *Booker* would require and the possibility of retroactive effect. Those time estimates formed the basis of the \$60 million in supplemental funding requested for defender services to address the impact of *Booker* in 2005 and 2006.

Based upon instructions that estimates of requirements were to be for an 18-month period, the \$60 million figure assumed that \$20 million would be required in the second half of FY 2005 and \$40 million in FY 2006. In September 2005, after further analysis based on actual experience by the defenders, Congress was advised that FY 2006 supplemental requirements would only be \$6.5 million. Experience to date has shown that the time increases per case appear to have been relatively marginal. This most likely reflects: (a) effective national training efforts leading to efficiencies in integrating *Booker* into defenders' daily practice; (b) a delayed response to the changed circumstances created by *Booker*, which may eventually result in more substantial time increases as the legal changes play out; or (c) some combination of these and other factors.

Even so, the significant increases in direct appeals and habeas corpus petitions and the length of time that it has taken the courts to resolve cases has directly affected the complexity and extent of appointed counsel's workload post-*Booker*.

D. Federal Judicial Center

The Federal Judicial Center has conducted a number of *Booker*-related programs for judges and federal probation officers. In February 2005, it broadcast a Federal Judiciary Television Network (FJTN) program on the *Booker* decision that analyzed its immediate impact on federal sentencing.

In July 2005, the Center, under the direction of the Criminal Law Committee of the Judicial Conference, and with the cooperation of the Sentencing Commission and the Administrative Office, conducted a National Sentencing Policy Institute devoted to developments in the wake of *Booker*. More than 100 judges and representatives of the executive and legislative branches attended. Plenary sessions were videotaped and later broadcast over the FJTN, and sessions on *Booker* were added to the agendas for several workshops for judges.

The Center's 2005 national conference for chief district judges included a focus on post-*Booker* sentencing developments. The 2006 national conference for chief district judges and the Center's three national workshops for district judges in 2006 included updates on sentencing trends, reporting requirements, and other developments relating to *Booker*.

In mid-July 2006, the Center and the Criminal Law Committee will conduct another National Sentencing Policy Institute for judges, federal defenders, probation officers, U.S. attorneys, and representatives of the Bureau of Prisons. The topic will be *Booker*-related developments, including sentencing patterns and appellate review of sentences.

E. U.S. Sentencing Commission

After *Booker*, the Sentencing Commission placed an emphasis on maintaining a real-time data collection, analysis, and reporting system to assist the federal criminal justice community in developing national sentencing policy in the wake of the Supreme Court's decision. The Commission now releases general sentencing statistics on an almost monthly basis. In addition, it has prepared a comprehensive report on sentencing trends and practices during the year following the *Booker* decision. To accomplish these tasks, the Commission used existing personnel resources supplemented by a temporary summer workforce.

The Commission also has implemented fully its electronic document submission system, which allows district courts to transmit electronically the five sentencing documents that must be sent to the Commission under 28 U.S.C. § 994(w). Currently, 79 districts are either submitting the required documentation electronically or are about to do so. The Commission expects all 94 districts to be on-line with the Commission within the next year. The Commission will begin conducting its analysis efforts on-line beginning in June 2006. The Commission also continues to pursue an aggressive policy agenda, expansive research, and training programs.

IV. LONG-TERM IMPACT

The courts of appeals expect a continuing impact as a result of *Booker* in the area of direct criminal appeals. Already, they have seen an increase in the number of government appeals from sentencing orders, as well as an increase in appeals taken by defendants. *Booker* allows appeals if the sentence is "unreasonable." Given that a sentence can nearly always be debated, it is assumed by most that direct criminal appeal rates will remain high.

The increase in direct criminal appeals that began in July 2004 is expected to continue through 2008, based on historical data following the *Apprendi* case. As noted above, by March 31, 2006, the courts of appeals had received 11,600 *Booker*-related new appeals, 52 percent of which were still pending. Direct criminal appeals will continue to be filed until the courts of appeals have addressed all the major issues related to the reasonableness of sentences.

Although habeas corpus petitions (both federal habeas and second or successive petitions) are now leveling off, *Booker* issues are likely to continue to be raised in collateral attacks on sentencing.¹⁰ Whether or not the claims prevail in the courts of appeals, the additional work generated will be borne by court staff. Moreover, a number of appellate clerks predict an increase in claims for ineffective assistance of counsel for failure to raise *Blakely* and *Booker* issues on direct appeal, again creating additional eventual workload for the appellate courts.

The district courts will likely continue to receive *Blakely*-related habeas corpus petitions from state prisoners under 28 U.S.C. § 2254 for the next couple of years, since state prisoners must first exhaust their appeals in the state courts before they can file in the federal courts. Based on historical data following *Apprendi*, state habeas corpus petitions were filed in the federal courts for three years following the decision. Since *Apprendi*, *Blakely*, and *Booker* all addressed similar issues, it is very likely that the pattern seen after *Apprendi* will occur post-*Blakely*, and that state habeas corpus petitions will likely be filed through 2008.

Once the initial wave of federal and state cases has been disposed of in the district courts and the courts of appeals, the long-term impact of *Blakely* and *Booker* on the federal courts should be less onerous. The case law will become settled, and judges, attorneys, and court staff will become used to the new procedures. Nevertheless, broader options are now available in sentencing, and additional factors will have to be addressed in appropriate cases by attorneys, probation officers, judges, law clerks, and staff attorneys.¹¹ An increase in the length of some presentence investigations and reports is likely, and there will be additional complexity in some sentencing hearings, judgments, and Statement of Reasons forms. Although these realities are likely to have some marginal effect on judge and court staff workloads, case processing times, and defense attorney vouchers, it is too early to estimate the impact. In the courts of appeals, it is anticipated that the number of direct criminal appeals filed will level off as many legal issues in dispute are resolved, but that the rate of filings will remain higher than the pre-*Blakely* level.

¹⁰ Collateral attacks include habeas corpus petitions and any other requests for post-conviction relief outside the context of a direct appeal.

¹¹ The U.S. Sentencing Commission reports that a majority of federal criminal defendants continue to be sentenced post-*Booker* in conformance with the guidelines. Approximately 86 percent of the sentences are either within the guideline ranges or are prosecution-sponsored, below-range sentences. *Final Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006), p. 46.

CONCLUSION

As predicted, the Supreme Court's decisions in *Blakely* and *Booker* have had significant workload implications for federal court staff, particularly in the first couple of years after the decisions were rendered. In the months immediately following *Blakely* and *Booker*, the federal courts were asked to process and adjudicate thousands of new claims in both direct criminal appeals and habeas corpus petitions. Median disposition times for criminal cases have increased by a month nationally in both the courts of appeals and the district courts, due in large measure to *Blakely* and *Booker*. Meanwhile, the backlog of pending cases in the district and appellate courts caused by these decisions will take months, and in some instances years, to clear.

The burden of adjusting to the post-*Booker* federal sentencing landscape generally has fallen more heavily on the courts of appeals than on other components of the judiciary. The lack of supplemental funding has forced court staff to scramble to handle the additional workload. Although subsequent developments have intervened to make the estimated impact of *Booker* on federal defenders and CJA panel attorneys less severe than some initially feared, the predictions concerning the potential impact on clerk's offices and staff attorneys have proven reasonable.

Booker will also have some long-range, permanent impact on the workload of the courts, although that is more difficult to gauge. In appropriate cases, probation officers will continue to be asked to prepare lengthier presentence reports that address the additional sentencing factors identified at 18 U.S.C. § 3553(a). Federal defenders and CJA panel attorneys will make additional arguments and conduct additional investigations in appropriate cases. Sentencing hearings will take longer on average than they did before *Booker*. And it will take longer for court staff to prepare the Judgment and Commitment form and the Statement of Reasons form.

In summary, the federal courts assumed and completed a great deal of additional work as a result of the *Blakely* and *Booker* cases, particularly in the short run. They did so without additional funding. In fact, court staff faced a "double whammy." Just as they experienced a surge of new cases after *Blakely* and *Booker*, they suffered reductions in funding in the FY 2004 appropriations, which led to significant staff layoffs across the federal judiciary. Court staff and federal defenders worked harder and longer to cope with the additional work, but the case-disposition times lengthened, backlogs grew, and other important tasks have been deferred.

The immediate surge of filings following *Blakely* and *Booker* has now largely abated. But damage has been done to court support offices, and a large backlog remains to be cleared. Intensive staff efforts will be required for a couple of more years, and there will be some lingering, permanent increase in staff work. The inability of the judiciary to obtain supplemental funding to meet the workload surge created by *Blakely* and *Booker* compromised court support offices, particularly clerk's offices and staff attorney offices. It is essential to restore the funding base and return these offices back to the staffing levels that they require to process the ongoing workload expeditiously and efficiently and to clear the resulting backlog.