

**Strategic Judging Under the United States Sentencing Guidelines:
Positive Political Theory and Evidence**

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Abstract

We present a positive political theory of criminal sentencing and test it using data from the United States Sentencing Commission. The theory posits that, faced with appellate review, federal district court judges applying the Sentencing Guidelines strategically use "sentencing instruments" -- fact-based and law-based determinations made during the sentencing phase -- to maximize the judges' sentencing preferences subject to the Guidelines' constraints. Specifically, district court judges are more likely to use law-based determinations (leading to Sentencing Guidelines' "departures") when they share the same sentencing policy preferences with the overseeing circuit court than when the sentencing policy preferences between the two courts differ. On the other hand, fact-based determinations (leading to offense level "adjustments") are routinely used to maximize sentencing preferences regardless of policy preference alignment between the two courts. The empirical test of our theory suggests that, as predicted: (1) sentencing policy preferences (measured by political ideology) matters in sentencing -- liberal judges give different sentences than conservative judges for certain categories of crime; (2) the length of sentence given by sentencing judges depends on the amount of political-ideological alignment between the sentencing judge and the circuit court; and, (3) sentencing judges selectively use fact-based adjustments and law-based departures to enhance or reduce a criminal sentence, and the use of departures is influenced by the degree of political alignment between the sentencing judge and the overseeing circuit court, while the use of adjustments is not so influenced.

Positive political theories of judging suggest that much of the policy discretion exercised by judges is guided by the judges' policy preferences (often represented as political ideology), constrained by higher court review, and exercised through a variety of legal decision instruments available to judges when deciding cases. Judges are modeled as strategic policy makers who routinely manipulate doctrines, procedures, and other decision instruments to advance their preferred policies when faced with higher courts who may have competing policy preferences.¹ In this article, we construct an "instrument choice" positive political theory of criminal sentencing and test it empirically with sentencing data from the United States Sentencing Commission. The theory suggests that, when determining prison time for a convicted felon, federal district court judges (1) are influenced by their policy preferences in setting prison length under the United States Sentencing Guidelines²; (2) manipulate the rules and structure of the Sentencing Guidelines to maximize the sentencing preference outcomes; and (3) make choices in anticipation of the likely response of the overseeing circuit court of appeals.

Criminal sentencing is uniquely amenable to positive political analyses for several reasons. First, criminal justice policy is politically divisive and lengthy sentences have

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¹ For recent Positive Political Theory models focusing on selection of decision instruments, see Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992); Emerson H. Tiller, "Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making," 14 *Journal of Law, Economics, & Organization* 114-135 (April 1998); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. L. ECON. & ORG. 349 (1999). For empirical support, see Joseph L. Smith and Emerson H. Tiller, "The Strategy of Judging: Evidence from Administrative Law," 31 *Journal of Legal Studies* 61 (2002).

² UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, 18 U.S.C. (2000) [hereinafter, U.S.S.G.].

become increasingly controversial. Second, a complex and manipulable set of rules and standards, the Sentencing Guidelines, govern sentencing in the federal courts. Finally, sentence length gives us a unique opportunity to quantify the effect of political preferences (length of prison time), instead of simply coding outcomes as “conservative” or “liberal.”

Under the Sentencing Guidelines, judges can alter the sentencing range for a convicted defendant through a variety of factual and legal determinations at the sentencing hearing. The fact-based determinations relate to aggravating and mitigating factors and can lead to upward and downward *adjustments* to the base offense level (determined by the crime of conviction) which, in combination with a defendant's criminal history, ultimately sets the presumptive sentencing range. In addition to offense level adjustments, judges may choose a more dramatic alternative -- to “depart” from the Guidelines’ sentencing range altogether because, as a matter of law, the circumstances are so unusual, or at least were not the type considered by the Sentencing Commission in forming the Guidelines, that they are essentially outside the “heartland” of the Guidelines. This determination requires significant legal conclusions in addition to factual findings. These law-based departures allow the district court judge to make significant enhancements or reductions to the felon's calculated sentence.

The theory suggests that when the lower and higher courts are politically aligned, the sentencing judge has the ability to use both fact-based adjustments and law-based departures in a cumulative manner to set the defendant’s sentence to the term most preferred by the sentencing judge. When the lower and higher courts are not so aligned, however, the risk of reversal increases, and the district court judge is less likely to use

law determinations (departures) because, in contrast to fact-based adjustments, departures invite greater scrutiny by the overseeing circuit court.

The empirical test of our theory suggests that, as predicted: (1) sentencing policy preferences (measured by political ideology) matters in sentencing -- liberal judges give different sentences than conservative judges for certain categories of crime; (2) the length of sentence given by sentencing judges depends on the amount of political-ideological alignment between the sentencing judge and the circuit court; and, (3) sentencing judges selectively use fact-based adjustments and law-based departures to enhance or reduce a criminal sentence, and the use of departures is influenced by the degree of political alignment between the sentencing judge and the overseeing circuit court, while the use of adjustments is not so influenced.

I. United States Sentencing Guidelines

In 1987, the United States Sentencing Commission, as authorized by the Sentencing Reform Act of 1984,³ promulgated the U.S. Sentencing Guidelines to govern the sentencing of defendants convicted of federal crimes. Formerly, sentencing judges had nearly absolute sentencing discretion within broad statutory ranges and their sentencing decisions generally were not reviewable by higher courts. The Sentencing Guidelines were intended to limit judicial discretion and make sentences consistent via the introduction of binding regulations and appellate review of sentences.⁴

³ Pub. L. 98-473, Title II, § 212(a)(2), 98 Stat. 1988 (1984), codified in scattered sections of 18 U.S.C. *See also* 18 U.S.C.A. § 3551 notes.

⁴28 U.S.C. § 991(b) (“[The Guidelines shall] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct.”) Whether the Guidelines decreased inter-judge sentencing disparity remains something of an open question. *See Hofer et al., 1999, finding a slight decrease in disparity;*

The centerpiece of the Guidelines is a 258-box grid called the Sentencing Table, reproduced in Appendix 1, containing presumptively valid prison sentences determined by the crime of conviction, offense characteristics, and the felon's criminal history. These sentencing calculations are made by the judge in post-conviction sentencing proceedings -- that is, after a plea bargain or the determination of guilt at trial. The Sentencing Table's horizontal axis ("Criminal History Category") measures criminal history across six categories,⁵ and the vertical axis ("Offense Level") measures the severity of the criminal conduct. The intersection of these two determinations results in the recommended sentencing range expressed in months. If criminal history and offense level have been properly calculated, a sentence within the presumptive range cannot be reversed by the overseeing circuit court.⁶

Offense Level Adjustments. For sentencing purposes, the Guidelines classify all federal crimes into nineteen generic groupings, such as "offenses against the person," "offenses involving drugs" and "offenses involving the environment." Each category contains subcategories of crime for which a numerical base offense level is specified. For example, for criminal sexual abuse (under "offense against the person") the base offense level is 27. With a Criminal History Category of 1, the sentencing range for this crime is 70 to 83 months. For illegal entry into the United States, the base offense level is 8; a Criminal History Category of 4 for an offense level of 8 results in a sentencing range of 6 to 12 months.

Anderson et al., 1999, finding a decrease in inter-judge disparities; and Lacasse and Payne, 1999, finding no change post-Guidelines.

⁵ The Criminal History Category adjusts the range based on the offender's past conviction record. The Criminal History Category is more or less set by past judicial determinations.

⁶ 18 U.S.C. § 3742.

While the base offense level is set by the crime of conviction (a determination made prior to and separate from the sentencing hearing), the Guidelines direct the sentencing judge in the post-conviction proceedings to make “adjustments” to the base offense level if the judge makes a factual finding that certain “specific offense characteristics” listed in the Guidelines – essentially aggravating and mitigating circumstances – are present in the case.⁷ For certain crimes, for example, points may be added to base offense levels when a victim sustained permanent bodily injury, when large quantities of cash were stolen, and when a high level of sophistication existed in conducting a fraudulent scheme. In addition, there are several important general adjustments over which the judge has substantial discretion: the existence of a vulnerable victim (add 2 to 3 levels);⁸ the convicted defendant’s role in the offense (add or subtract up to 4 levels depending on role);⁹ the defendant’s obstruction of justice (add 2 levels);¹⁰ and the defendant’s acceptance of responsibility (subtract 2 to 3 levels).¹¹

For the most part, determinations of these characteristics are *fact-driven*. If found by the judge to exist, these facts lead to upward or downward adjustments to the base offense level leading to the final offense level which, in combination with the convicted defendant’s criminal history, result in sentencing ranges from which judges choose a prison term. Although the judge has discretion within the range set by the base offense level, adjusting that offense level up or down expands that discretion. Judges can reduce

⁷ The sentencing judge uses the “preponderance of evidence” standard to make these determinations, a standard considerably below the guilt phase standard of “beyond reasonable doubt.”

⁸ U.S.S.G. §§3A1.1-3.

⁹ U.S.S.G. §§3B1.1-2.

¹⁰ U.S.S.G. §§3C1.1.

¹¹ U.S.S.G. §§3E1.1.

the minimum sentence, or increase the maximum sentence, between 10% and 15% by moving up or down *a single offense level*, and most adjustments are two or three levels.

Criminal sentencing scholarship has taken note that the factual determinations leading to adjustments are often vague and allow for considerable discretion by the judge.¹² Consider, for example, the distinction between “minor” and “minimal” participation in a crime for the “role in offense” adjustment. The Sentencing Guidelines provide that the offense level should be reduced by two points if the defendant was only a “minor” participant, but by four points if he was a “minimal” participant. This factual determination is easily manipulated as the distinction between “minor” and “minimal” is not especially clear. Another fact-based adjustment that can be applied in many cases is the two-point enhancement for obstruction of justice, which may be applied if the defendant committed perjury, altered documents during the investigation, or provided false information to investigators before or after indictment that “significantly impeded” the investigation.¹³ Whether the action “significantly impeded” is a determination saturated with discretion. In total, these adjustments can lead to a substantial shift in the relevant sentencing range, or “box”, in the Sentencing Table. For example, with a Criminal History Category of 1, reducing the offense level from 30 to 28 reduces the minimum Guidelines sentence by 21 months.

Although over 90% of the convictions are the product of plea bargains, judicial discretion over sentencing remains in the subsequent sentencing hearing. The judge can make additional findings of fact that adjust the plea bargained base offense that level upward or downward. For example, the defendant could plead guilty to fraud, but at the

¹² See Smith and Cabranes, *The Fear of Judging*, pp. 91-92.

¹³ The Guidelines themselves state that “[o]bstructive conduct can vary widely in nature” and is “not subject to precise definition.” U.S.S.G. § 3C1.1 application note 2.

sentencing hearing dispute the amount stolen -- an adjustment category provided for in the Guidelines. Or the defendant could plead guilty to drug trafficking, and at the sentencing hearing the judge could find that he accepted responsibility -- another adjustment category -- and adjust the sentencing range downward. For these reasons, some have asserted that the most important part of the modern criminal process is the sentencing hearing.¹⁴ Even if the prosecution and defense stipulate as to specific facts in the plea bargain that bear on sentence enhancements or reductions, the judge need not accept them. Moreover, the plea bargain occurs in the shadow of the sentencing judge. Any stipulations to fact by the prosecution and defense were likely made with an eye toward the judge who would be conducting the sentencing hearing and, hence, are still reflective of the judge's preferences.

Both the prosecution and the convicted defendant may appeal the sentencing judge's adjustments to the base offense level. These fact-based adjustments are generally reviewed by the circuit court for "clear error" -- a legal standard giving substantial discretion to the sentencing judge's conclusion.¹⁵ As one Ninth Circuit judge characterized it "under the 'significantly deferential' clear error standard, we may reverse only if left with the 'definite and firm conviction that a mistake has been committed.'"¹⁶ A Fourth Circuit Court judge characterized it this way: "The clear error standard is not concerned with the certainty of an appellate court regarding its own view of the facts.

¹⁴ See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L. J. 1097 (2001).

¹⁵ Undoubtedly, there are times when legal determinations must be made along side the factual determinations involved in offense level adjustments. The application of the facts to the Guidelines is a mixed question of law and fact, which would typically be reviewed de novo. Addressing a circuit split for the Guideline "career criminal" offense adjustment (which can involve years of extra prison time), the Supreme Court held that "fact-bound" Guidelines questions, even when involving the applications of law to the facts, should generally be reviewed with substantial deference. *Buford v. United States*, 532 U.S. 59, 65-66 (2001). This was the majority rule prior to the Supreme Court's decision. *Id.* at 59.

¹⁶ Circuit Court Judge Donald Lay, *United States v. Tang*, No. 03-10170 (9th Cir., June 23, 2004).

‘Where there are two permissible views of the evidence, the factfinder’s [sentencing judge’s] choice between them cannot be clearly erroneous.’¹⁷

Sentencing Range Departures. In addition to the adjustments mentioned above, judges are authorized to depart from the Sentencing Table’s recommended range if there is an “aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Sentencing Guidelines that should result in a sentence different from that described.”¹⁸

To a much greater extent than adjustment determinations, departures present law-based conclusions. A departure involves the legal conclusion by the district court judge that the circumstances of the case “fall outside the ‘heartland’ of the Sentencing Guidelines” (a question of law) and thus were not preempted as relevant sentencing circumstances by the Sentencing Commission in formulating the Guidelines. The Guidelines prohibit departures on grounds that have been either proscribed by the Sentencing Commission or already considered by the Sentencing Commission and not added to the list of factors for adjustments. Circuit courts have reversed district court departures that were based, for example, on family history, post-arrest rehabilitation, family responsibility, health, and exemplary military service.¹⁹ The courts held that these types of departures were, by law, unavailable in the cases at issue. While undoubtedly

¹⁷ Circuit Court Judge Shedd. *United States v. Riggs*, No. 03-4017 (4th Cir., June 3, 2004).

¹⁸ 18 U.S.C. 3553(b); see also U.S.S.G. 5K.2.0 (Policy Statement). In 1994, the Sentencing Commission adopted the position that factors “not ordinarily” relevant can still be considered if they remove the case from the “heartland” of the Guidelines. The Supreme Court subsequently endorsed the “heartland” departures concept in *Koon v. United States* in 1996. 518 U.S. 81 (1996). It also held that departures from the Guidelines should be reviewed by circuit courts for “abuse of discretion.” Prior to *Koon* some circuits gave an even stricter *de novo* standard of review to downward departures. Consistent with the argument that departures are discouraged and strictly reviewed under either the “abuse of discretion” or *de novo* standard, Hoffer et al. (1997) found little change in the rate of downward departures post *Koon*. (See also Sentencing Commission 2003.)

¹⁹ See Stith and Cabranes, *The Fear of Judging*, p. 100.

there are factual determinations to be made in a departure, what distinguishes a departure from an adjustment is the added legal conclusion that the type of circumstances involved in the case was not meant to be addressed solely by Guideline factors. The prosecution can appeal a downward departure from the Sentencing Table to the overseeing circuit court, and the defendant similarly can appeal an upward departure.²⁰

II. Positive Political Theory of Criminal Sentencing

The theory we present here builds on the growing “judicial hierarchy” scholarship in Law and Positive Political Theory.²¹ Judges are modeled as strategic policy maximizers who work within a set of defined institutional rules, and who anticipate the reactions by other players before making their own choices with the ambition of maximizing their preferences after all players have acted. A branch of this work has

²⁰ We note that the prosecution itself can facilitate downward departures by moving for a “substantial assistance” downward departure based on the offender’s cooperation in prosecuting other offenders, and judges can only grant substantial assistance departures on such motion of the prosecution. As a check, some of the empirical analyses below remove substantial-assistance departures from the sample on the theory that the prosecution has significant control over the sentence at this point and, consequently, the judges’ preferences should matter less.

²¹ Donald R. Songer, Jeffrey Segal, and Charles Cameron, “The Hierarchy of Justice: Testing a Principal Agent Model of Supreme Court-Circuit Court Interactions,” 38 *American Journal of Political Science* 673-96 (1994); McNollgast, “Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law,” 68 *S. Cal. L. Rev.* 1631, 1641-47 (1995) Charles M. Cameron, Jeffrey A. Segal, and Donald Songer, “Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions,” 94 *American Political Science Review* 101-16 (2000). Earlier worked focused on Congress and its interactions with regulatory agencies and courts. See, McNollgast, “Administrative Procedures as Instruments of Political Control”, 3 *J.L. Econ. & Org.* 243 (1987); McNollgast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies”, 75 *Va. L. Rev.* 431 (1989); Rafael Gely and Pablo T. Spiller, “A Rational Choice Theory of Supreme Court Decisions with Applications to the State Farm and Grove City Cases”, 6 *J.L. Econ. & Org.* 263 (1990); Pablo T. Spiller, “Agency Discretion Under Judicial Review”, 16 *Mathematical and Computer Modeling* 185-200; Pablo T. Spiller and Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 *J. Legal Stud.* 347 (1997).

attempted to bring analyses of traditional legal structures such as decision instruments and doctrines into the strategic model.²²

In the sentencing model we present here, there are two actors: federal district court judges who sentence criminal offenders and circuit courts which can sustain or overturn the sentencing decisions of the district judges. Judges at both levels have preferences over sentencing outcomes, some preferring longer sentences for various classes of crimes while others preferring shorter sentences for those same classes of crimes.²³

Next, we emphasize the role of decision instruments – fact-based adjustments to base offense levels and law-based departures from the sentencing range. As discussed above, district court judges have the power to change the sentencing range through adjustments to base offense levels, or to depart from the recommended sentencing range. Fact-based adjustments receive less stringent review by the circuit courts and thus allow the sentencing judge considerable leeway in changing the sentencing range by calculating a higher or lower final offense level. This deference by the circuit courts may be the result of high review cost – information gathering and monitoring of case specific factual

²² Emerson H. Tiller and Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J L, Econ, & Org 349, 351-52 (1999); Frank B. Cross and Emerson Tiller, *Judicial Partisanship and Obenience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 Yale Law Review 2155 (1998). For a discussion of the difficulties, and opportunities, in modeling legal doctrine in a positive political theory, see Emerson H. Tiller and Frank B. Cross, *What is Legal Doctrine?*, Northwestern Law Review (forthcoming, 2005).

²³ In addition to having preferences over sentencing outcomes, we assume that district court judges do not want to be reversed. This may be for several reasons. First, a reversal may bring with it certain restrictions on a re-sentencing that would move a judge farther away from her preferred sentence than if she had not been reversed in the first place. Second, there may be reputation costs in being reversed that a district court judge may want to avoid. Finally, district judges may wish to keep their dockets clear and not want to create more work that would come from a sentencing reversal. We note, however, that it is plausible that judges, at least sometimes, may care less about reversal, or even invite it, because there could be positive reputation benefits from a reversal. For example, a Democrat appointed judge reversed by a Republican dominated circuit court could improve the chances that the Democrat appointed judge could be appointed to an even higher court.

details not easily observable by the circuit courts on review -- and the highly deferential “clear error” doctrinal standard of appellate review for adjustments to the offense level by sentencing judges. The clear error standard may be related to, or even the result of, the high review cost attendant in monitoring factual details. Moreover, the circuit court may, for reputational reasons or even sincere belief in the limits of its discretion under this review doctrine, be hesitant to reverse the lower court’s factual findings. In either case, the model predicts substantial deference by the circuit courts to factual determinations by the district court judges.^{24, 25}

To the extent that adjustments are insufficient to maximize the sentencing judge’s preferences on the length of a prison term, the judge may depart from the Guidelines’ presumptive range that resulted from final offense level calculations. Departures are more susceptible to review and reversal by the circuit court because they introduce a legal determination in addition to any factual findings. The circuit court can reverse the district court on the threshold legal finding of whether the Guidelines already incorporate the circumstances relied upon by the sentencing judge and whether or not the circumstances, even if not covered by the Guidelines, are sufficiently unusual to warrant a departure. The appellate review of the legal conclusion underlying a departure is governed by an abuse of discretion standard -- a standard allowing the circuit court to be more exacting and less deferential than the clear error standard used for review of factual

²⁴ We note that while the sentencing judge enjoys substantial deference from the circuit court on adjustment determinations, the sentencing judge’s discretion is not wholly unbridled. The judge cannot dream up facts that have no basis, and the Guidelines limit the number of categories for which an adjustment can be made.

²⁵ One may be concerned that the legal standard is easily changed by the higher court for a given case. Without going into substantial detail here, we assume that circuit courts want legal doctrines or standards to have more durability across a series of decisions and will not make changes in the doctrine for any one case. If over a series of cases the standard continues to fail in achieving the circuit court’s preferences, a change of doctrine may occur. We leave the determinants of that condition for a future theory of doctrine creation.

determinations.²⁶ These conditions suggest that the sentencing judge is at much greater risk of reversal when a departure from the recommended sentencing range is undertaken than when an adjustment to offense level is made.

We now consider the effect of the alignment of sentencing preferences between the sentencing judges and the overseeing circuit courts. To the extent that an overseeing circuit court is aligned in its sentencing preferences with the district court (i.e., both courts preferring higher, or lower, sentences for certain classes of crimes) the sentencing judge should enjoy relatively more discretion in both adjustment and departure decisions. In that case, the higher court has little incentive to aggressively review adjustments or departures as it would prefer a sentencing outcome similar to the one chosen by the like-minded sentencing judge. If, however, the two courts are not aligned in their preferences over sentencing outcomes, the calculus changes. While adjustments may still enjoy deference by the circuit court of appeal because of the deference generally accorded fact decisions, the sentencing judge bears a greater risk in making a law-based departure as the higher courts review costs are lower, their payoff higher, and the review doctrine – *abuse of discretion* review – justifying a closer review of the lower court’s decision. In short, the reversal risks increase greatly.²⁷

To summarize the theory: (1) sentencing judges and the reviewing circuit courts have preferences over sentencing outcomes; (2) sentencing judges modulate prison sentence length based upon the relative political alignment between the sentencing judge

²⁶ *Koon* held that departures from the Guidelines should be reviewed by circuit courts for “abuse of discretion.” 518 U.S. at 96-97. Prior to *Koon*, some circuits gave an even stricter *de novo* standard of review to downward departures. Consistent with the argument that departures are discouraged and strictly reviewed under either the “abuse of discretion” or *de novo* standard, Hoffer et al. (1997) found little change in the rate of downward departures post *Koon*. (See also Sentencing Commission 2003.)

²⁷ Although we do not model the Supreme Court into the framework, it could be that the deference level is affected also by the alignment of preferences between the Supreme Court, Circuit Court and the district court judge regarding sentencing outcomes.

and the overseeing circuit court, and (3) the sentencing judge's use of sentencing departures to enhance or shorten prison length is dependant upon alignment of sentencing preferences with the circuit court – specifically, sentencing judges increase their use of law-based departures (legal determinations) when aligned with the circuit court and reduce them when not aligned. In contrast, the use of fact-based adjustments to enhance or shorten prison length are fairly independent of alignment conditions.

III. Empirical Analysis

A. Testable Propositions

In this section, we set out the testable propositions from the theory outlined above. To do so we must identify a proxy for judge sentencing preferences since there is no direct measure of such preferences. We adopt the conventional wisdom that liberals (Democrat appointees) prefer more lenient sentences than do conservatives (Republican appointees) for “street” crimes (violent, theft, and drug crimes).²⁸ Conventional wisdom also suggests that Republicans prefer more lenient sentences than Democrats for environmental and white collar crimes than do Democrats.²⁹ Thus, by identifying

²⁸ We use the phrase “street crime” somewhat loosely. The crimes at issue here are federal crimes, so our criminals are not typical. Most of the crimes have interstate characteristics. In the time frame of the sample, 43% of those sentenced under the federal Guidelines were sentenced for drug trafficking, over 14% were sentenced for fraud, and 8.5% for immigration offenses. Within broad categories, the crimes here are also federal in nature. For example, over 90% of the violent crimes in the sample are armed bank robbery, and 96% of the “drug crimes” in the sample are for trafficking (less than 3% are for possession).

²⁹ The conventional wisdom has some empirical support. For example, in a poll taken in 2003, 84% of self-identified Republicans favored the death penalty for murders compared with 54% of self-identified Democrats. See Sourcebook of Criminal Justice Statistics Online, table 2-50 (2004), available at <http://www.albany.edu/sourcebook/1995/pdf/t243.pdf>. In 2002, 77% of self-identified Republicans said sentences were not harsh enough compared to 65% of self-identified Democrats. Two-percent of self-identified Republicans said that sentences were too harsh compared to 11% of self-identified Democrats. See Sourcebook of Criminal Justice Statistics, 2002, page 141. There is no reason to believe that such widespread partisan differences would not reflect themselves among judicial appointees in setting sentences for convicted felons. Indeed, a considerable amount of research shows ideological differences

whether the judge was a Democrat or Republican appointee, we can assign a sentencing preference.

We now set out the testable propositions:

Prison Term, Sentencing Preferences and Alignment

- Proposition A-1: Democrat-appointed district court judges give lower prison sentences relative to Republican-appointed judges for street crimes (violent, theft, and drug crimes).
- Proposition A-2: Democrat-appointed district court judges give lower prison sentences for street crimes when politically aligned with the circuit court than when not aligned. Conversely, Republican-appointees give longer sentences for street crimes when aligned with the circuit court than when not aligned.

Sentencing Preferences, Decision Instruments, and Political Alignment

- Proposition B-1: Democrat-appointed district court judges calculate lower adjusted offense levels than Republican-appointed district court judges for street crimes.
- Proposition B-2: Democrat-appointed district court judges calculate lower adjusted offense levels than Republican-appointed judges for street crimes *independent of whether the sentencing judge is politically aligned with the circuit court.*
- Proposition B-3: Democrat-appointed district court judges calculate larger downward departures from the recommended sentencing range for street crimes

between Democrat and Republican court appointees (decisions involving environment, labor, etc), particularly at the circuit level. See Daniel Pinello, 1999, for a meta-analysis and George, 2001.

when politically aligned with the circuit court than when not aligned. Conversely, Republican-appointees calculate larger upward departures when politically aligned with the circuit court than when not aligned.

Given the conventional wisdom on political attitudes towards environmental and white collar crimes, we can make similar propositions about the treatment of these crimes by district court judges (where Republican-appointees, when compared to Democrat-appointees, would seek lower prison sentences through the use of adjustments and departures). However, lower sentencing ranges (less allowable sentencing variance) in the Sentencing Guidelines for environmental and white collar crimes make empirical measurement of these propositions, as explained more fully below, less reliable. Thus, we focus mainly on street crimes.

B. Data and Variables

The United States Sentencing Commission collects information on every individual sentenced under the Sentencing Guidelines and makes available a public use data file.³⁰ The sentencing data record the offender's criminal history, the base offense level (crime of conviction), the final offense level calculated by the district court after adjustments have been made, whether a departure was granted, and the offender's prison sentence in months. The sentencing data also include a number of important offender demographic variables, such as age, race, educational attainment, number of dependents,

³⁰ The data are available from the University of Michigan's Inter-university Consortium for Policy and Social Research, <http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09317.xml>.

and citizenship. The data, however, do not reveal the identity of the sentencing judge -- only the broader federal district from which the judge was drawn.

We use sentencing data from 1992 through 2001.³¹ We begin with 1992 because the Guidelines were upheld by the Supreme Court in 1989 and the permissibility of certain grounds for downward departures became clearer in the early 1990s. These years yield a population of 474,275. Because a number of key offender characteristics are missing for some individuals, such as offense type, total prison sentence, or demographic variables, the sample was reduced to 406,670.³² We eliminated immigration cases because of the widely noted trends in immigration offenses in this time period.³³ We also excluded other miscellaneous, traffic, and national defense related offenses, leaving a sample size of 365,062.

Table 1a in Appendix 2 gives the means and variances of some variables of interest. Adjustments that alter the base offense level are very common, occurring in 91% of all cases. Fifty-three percent of cases are adjusted to levels below the base level, and 38% are adjusted to levels above the base level. Judge-induced departures (non-substantial assistance) occurred in approximately 11% of the cases; 10% of them are downward departures, less than 1% are upward departures.

³¹ Note our data are prior to the Supreme Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), which made the Guidelines "advisory" and directed circuit courts to review sentences for reasonableness in light of the Guidelines.

³² There is one important measurement issue that must also be addressed. Life imprisonment is possible in certain Guideline ranges, and it is not clear how to calculate the prison sentence level in months for a life sentence. It could be imputed based on the life expectancy of the offender, but then other offenders (say a 40-year-old who received a 40-year sentence) would also have effective life sentences. We therefore excluded life sentences from the analysis, further reducing the sample size. As a check, we top-coded life sentences as the highest observed sentence in months (990) and ran the same analysis. Ultimately, either excluding or including life sentences made little difference to the results.

³³ The United States Sentencing Commission has documented the increasing rate of both prosecution of immigration offenses and downward departures granted pursuant to them (U.S. Sentencing Commission 2003).

Ideally, we would match the sentencing judge to each sentencing outcome, but the sentencing data do not identify the sentencing judge, and the Sentencing Commission will not release the information. Therefore, we rely on district-level variation to identify political effects. The Sentencing Commission data provide the district in which an offender was sentenced, and we can calculate the proportion of judges appointed by a Democrat and Republican president on that district's bench.³⁴ The data on the political composition of the district courts comes from the Federal Judicial Center biographical data on federal judges.³⁵ We use the political variation within the district to measure the impact of political ideology on sentencing. We let %DEMOCRAT = percentage of active judges appointed by a Democratic president on the relevant district bench for the year of the observed sentence. The higher this percentage, the greater the chance an individual offender is sentenced by a Democrat-appointed judge.

To control for possible age effects, we include the average age of the district court judges (AVAGE) as an independent variable.³⁶ District dummies (DISTRICT) are included in every regression to capture any district-specific effects. In addition, including district dummies means that we identify the political effects solely from changes in the political composition of the bench.

³⁴ Note that this is the typical convention used in political science. See Pinello, *supra* note **; and, Cass Sunstein, David Schkade, and Lisa Ellman, *Ideological Voting on Federal Courts of Appeal: A Preliminary Investigation*, 90 VIR. L. REV. 301 (2004).

³⁵ History of the Federal Judiciary, available at <http://www.fjc.gov>. Studies that have examined judicial characteristics and case outcomes have controlled for a number of factors other than partisan affiliation, such as age, race, sex, and previous work experience. (See George 2002 for a survey.) Schanzenbach (2005) found little general effect of the age, race, or sex of the judge on prison sentences, although sentences for specific demographic groups of offenders were affected.

³⁶ Although average judge age was rarely significant, our results for the %DEMOCRAT were slightly stronger in some specifications (those taking final offense level as the dependant variable) after controlling for age.

We assign the circuit court overseeing the district judges in any given year a Democrat or Republican designation based upon whether the majority of the active circuit court judges on that court were appointed by a Democrat or Republican president. We let CIRCDEM = 1 if the circuit majority is Democrat in the year of the decision, and 0 if majority is Republican in the year of the sentence. In some specifications, we will allow CIRCDEM to take on a more flexible form by further subdividing it.³⁷

The remaining variables of interest are from the sentencing data:

BOL = base offense level (the offense level before adjustments, largely determined by the crime for which the defendant was convicted);

FOL = final offense level as calculated by the judge after any adjustments are made;

FINALCHANGE = difference between final sentence given and minimum sentence of FOL/Criminal History combination presumptive sentencing range;

BASECHANGE = difference between final sentence given and minimum sentence of BOL/Criminal History combination presumptive sentencing range;

³⁷ We use CIRCDEM as a dummy instead of a percentage for a couple of reasons. First, the district-level variable is (by necessity) a percentage. If we specify a percentage for the circuit, the interaction term becomes an interaction of levels, which is hard to interpret. Second, the interaction of levels imposes a symmetry that is not theoretically justifiable. For example, consider one district of 20% Democrats and a circuit of 40% Democrats, and another that is the opposite-40% on the district and 20% on the circuit. The interaction term would be the same (800) but there is no reason to suppose that the effect should be the same.

GRID = Position on the sentencing grid (dummy variables for FOL or BOL, criminal history, and an interaction term for criminal history/offense level). In addition, a variable for statutory minimum sentence is entered.

OFFTYPE = Primary offense of conviction

We divide the primary offense of conviction into nine separate categories:

VIOLENT = Violent crime (e.g., murder, sex abuse, assault, robbery)

THEFT = Theft (e.g., auto, burglary)

DRUG = All drug offenses

RACKETEERING = Racketeering and gambling offenses

PORN = Obscenity/child pornography offenses

OBSTRUCT = Obstruction of justice offenses

CIVILRIGHT = Civil rights offenses

ENVIRON = Environmental offenses

WHITECOL = White collar (e.g., tax, embezzlement, fraud, antitrust)

Table 2a in Appendix 2 gives the breakdown of crimes in the sample. Over 65% of crimes are street crimes (violent, theft, or drug) and 29% are white collar and environmental crimes. Conventional wisdom, and our theory, suggests that political orientation of judges should affect sentencing in these areas (Republican-appointees tougher on street crimes than Democrat-appointees, but lighter on white collar and environmental crimes). The remaining categories have small sample sizes and small sentencing range differences, and the conventional wisdom about political-ideological

preferences in sentencing in these areas is less clear for some; but we continue to include them in the analysis as an initial matter.

We also enter dummy variables for year of sentencing (YEAR) and district of sentencing (DISTRICT). As control variables, we add a number of individual offender characteristics (OFFENDER), including age, race, sex, education, number of dependents, citizenship status, and the type of trial.³⁸

C. Results

Political Orientation, Adjustments, and Prison Term. We first consider generally whether Democrat-appointed district court judges give lower prison sentences than Republican-appointed judges. We estimate the following equation:

$$(1) \text{Total Prison}_{ijt} = a \text{Constant} + \beta \text{YEAR}_t + \gamma \text{DISTRICT}_j + \delta \text{OFFENDER}_{ijt} + \epsilon \text{OFFTYPE}_{ijt} + \sigma \text{GRID}_{ijt} + \rho \text{AVAGE}_{jt} + \mathbf{d} \% \text{DEMOCRAT}_{jt} + E_{ijt}$$

where i indexes individual sentenced, j indexes district, and t indexes year. Theory suggests that we should examine offense level calculations and departure magnitudes directly, which we do next.

Because we are using district-level variation on individual data, we report robust standard errors that reflect clustering by district. The coefficient of interest is d , which is interpreted as the effect on prison sentences from increasing the percentage of Democrat

³⁸ Age of offender is controlled for by a quadratic age term; race is controlled for by dummies for black, Hispanic, Asian, and other; education is controlled for by dummies for high school completion, college completion, and advanced degree; number of dependents is controlled for by dummies indicating no, one, or two dependents; and type of trial is controlled for by a dummy indicating that the case was disposed of by a jury or bench trial.

appointees on the district bench by 1%. Because judges are either Republican or Democrat-appointed, d really measures how Democrats behave *relative* to Republicans. We cannot say whether Democrats are unduly lenient, or Republicans unfairly harsh. We only measure the relative positions of Republican and Democrat sentencing practices based on the political composition of the district bench.

For ease of interpretation, the %DEMOCRAT coefficients are all multiplied by 100. On the assumption that criminal cases are randomly assigned and retirements and replacements of judges occur randomly, the %DEMOCRAT coefficient reflects the impact of an entirely Republican-appointed bench versus an entirely Democrat-appointed bench. If our identification strategy is ideal (i.e., cases are randomly assigned and judges decide roughly the same number of criminal cases as their colleagues), the reported coefficients mimic a dummy variable specification based on individual judge identity.

Table 1 presents the results for all crimes and for specific crime categories. To account for the large percentage of zero prison sentences (about 20% of the total), we use Tobit regressions on total prison sentence.³⁹ There are two ways to control for offense level position on the Sentencing Table (GRID): final offense level and base offense level. Models 1 and 2 below condition on final offense level (FOL). In both models, the coefficient on %DEMOCRAT is small and not statistically significant. Model 2 allows for different political impacts by offense category by interacting each offense category with %DEMOCRAT. There are no partisan effects for specific crimes significant at the 5% level or less, and the coefficients are not jointly significant (p-value .1572). In sum,

³⁹ Due to convergence problems, the dummy-variable controls for FOL and BOL proved intractable in the Tobit models, so we entered a fifth-order polynomial in the numeric final or base offense level, dummies for criminal history, and an interaction between criminal history level and the numeric offense level.

when we condition on final offense level, there are no discernable political effects in sentencing.

Our theory suggests, however, that the final offense level is not exogenously given; its determination may be manipulated by the judge who can make “adjustments.” Thus, conditioning on final offense level is problematic because it removes from the analysis the discretion judges exercise through offense level adjustments. Rather than rely on final offense level, then, Models 3 through 6 condition sentencing on the base offense level (BOL). These regressions rely on the assumption that, to the sentencing judge at least, the base offense level is largely exogenous and the final offense level is endogenous.

TABLE 1: TOTAL PRISON SENTENCE IN MONTHS

	Model 1 (Tobit)	Model 2 (Tobit)	Model 3 (Tobit)	Model 4 (Tobit)	Model 5 (Tobit)	Model 6 (Tobit)	Model 7 (Tobit)
%DEMOCRAT* 100	-.13 (2.65)		-3.56 (2.83)			-8.63* (4.45)	
%DEMOCRAT* VIOLENT		-6.41* (3.92)		-8.85** (4.25)	-9.45* (5.64)		-9.75* (5.73)
%DEMOCRAT* THEFT		-3.62 (4.44)		-7.62 (5.48)	-9.85 (6.12)		-9.71 (8.45)
%DEMOCRAT* DRUG		1.73 (3.29)		-7.12** (3.49)	-5.42 (3.94)		-15.00** (6.00)
%DEMOCRAT* RACKETEER		-.59 (5.46)		3.46 (7.14)	-.72 (.44)		8.29 (11.3)
%DEMOCRAT* PORN		2.98 (4.96)		6.32 (7.13)	-10.3 (6.57)		-2.57 (6.52)
%DEMOCRAT* OBSTRUCT		1.22 (4.45)		6.53 (7.13)	-2.52 (4.73)		-2.57 (6.50)
%DEMOCRAT* CIVILRIGHT		-11.39 (7.86)		-11.69 (14.3)	-24.3* (12.3)		-20.05 (17.3)
%DEMOCRAT* ENVIRON		-9.34 (6.25)		1.12 (4.25)	-1.73 (8.35)		-5.59 (9.53)
%DEMOCRAT* WHITECOL		1.66 (3.22)		6.89* (4.23)	-.72 (4.24)		3.81 (5.75)
Joint test of %DEMOCRAT		.1572		<.0001	.0013		.0051
Interactions (p-value)							
Crime-Specific Linear Time Trends	No	No	No	No	Yes	No	No
Offense Level Control	FOL	FOL	BOL	BOL	BOL	None	None

N=365,062. Not reported: District dummies, offense type dummies (main effects), offense level (base or final), criminal history, criminal history*offense level, demographic characteristics. ***coefficient significant at less than 1% level, **coefficient significant at 5% level or less, *coefficient significant at 10% level or less. Standard errors are in parentheses. All %DEMOCRAT coefficients multiplied by 100. In tobit specifications, offense levels are controlled for via a fifth-order polynomial in offense level.

As discussed, the structure of sentencing law and instrument choice theory suggest that final offense level calculations are endogenous. Models 3 and 4 condition on base offense levels instead of final offense levels, which allows the manipulation of the adjustment instrument to be reflected in the %DEMOCRAT coefficient. Consistent with our theory, under this specification strong political effects are evident and are generally signed as expected.

In Model 3, the coefficient on %DEMOCRAT*100 is -3.56, relative to -.13 for Model 1, but is still not significant. In other words, when all crimes categories are grouped together, the political ideology of the judges still has no effect on sentencing. This may result from grouping street crimes (violent, theft and drug crimes) with white collar crimes where we expect Democrat and Republican appointees to flip their sentencing preferences. Model 4 allows for differing political impacts by crime category, and the results strongly indicate a partisan sentencing effect. Sentence lengths for street crimes are between 7 and 9 months lower for Democrat-appointed judges compared to Republican-appointed judges. This is to be contrasted with an average sentence of 70 months for these crimes, suggesting a roughly 10% sentencing differential between Republican and Democrat appointees. We also note that the interactions between %DEMOCRAT and white collar and environmental crimes, while not significant at the 5% level, now have sizeable positive coefficients. The joint test of the %DEMOCRAT/offense type interactions is highly significant (p-value <.0001), indicating strong partisan differences in how crimes are treated across categories. The

results are strongest in the case of street crimes and white collar crimes, which together comprise nearly 95% of the sample.

The next few columns test the robustness of the results obtained in Models 3 and 4. A possible concern is that secular changes in sentence practices occurred over the 1990s and were simply correlated with the increasing proportion of Democrats on the district bench. Column 5 includes crime-specific linear time trends to check for the possibility that our results are conflated with trends for specific crimes, and the previous results survive largely intact.

A final concern is the exogeneity of the base offense level itself, which can be influenced by the charges that are brought or dropped by the prosecution. Plea agreements may reflect charge bargaining, and these negotiations occur in the shadow of the judge, setting the bargaining parameters. In unreported regressions, we examined directly whether or not the base offense level is influenced by the political composition of the district court and did not detect a correlation, suggesting that the base offense level is largely exogenous.

We note that the base offense level is determined in a unique way in drug crimes. The quantity and type of drugs at issue directly determines the base offense level, whereas the base offense level for other crimes is determined generally by the crime itself and then adjusted by the judge to reflect the quantities at issue (e.g., the amount of money lost due to a fraud). As such, the base offense level in the case of drugs represents a calculation over which the judge has some control at sentencing. Therefore, in practice, it is an offense level adjustment.⁴⁰ Because drug trafficking cases frequently involve

⁴⁰ This is widely recognized. For a discussion, see *Blakely v. Washington*, 124 S.Ct. 2531, 2546 (J. O'Connor, dissenting) (2004).

broader conspiracies to distribute, the amount of drugs at issue is often in dispute and plays an important role in the sentencing hearing.⁴¹ In addition, prosecutors and defendants can stipulate in a plea agreement to the type and amount of drugs, and therefore influence the base offense level (although the judge need not abide by the stipulation, it is likely to be highly influential). This bargaining undoubtedly occurs in the shadow of the judge. The results suggest that any bias is toward zero, however, as removing base offense level controls only increases the size and significance of the %DEMOCRAT interactions. This is not surprising. The more we control for instruments under the judge's influence, the smaller will be the observed political effects.

Columns 6 and 7 remove the base offense level dummies, but continue to include criminal history dummies. Column 6 does not permit varying impact by crime category, and the coefficient on %DEMOCRAT is almost statistically significant (the p-value was .069). Column 7 allows varying impact by crime category. Given the foregoing discussion, we would expect to see the biggest change in sentences for drug crimes. Not surprisingly, the coefficient on %DEMOCRAT*DRUG remains negative and more than doubles in absolute value, while interactions with violent crime and theft are slightly stronger. The results are therefore consistent with the implications of our theory – Democrat appointees sentence defendants to lower sentences for street crimes. (We will provide formal tests of differences across regression models in later OLS regressions that focus on street crimes.⁴²)

⁴¹ For a discussion, see Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L. J. 1097 (2001). Bibas suggests that after *Apprendi* prosecutors had more influence over sentencing factors, but *Apprendi* was decided in 2000 and therefore has little effect on our sample. *Id.* at 1160-167

⁴² Tests for differences in political effects across models here did not reject the null of no political differences, and the p-values were generally large (between .2 and .4). The power of the test is diluted here

The conclusion we draw from this analysis is that the political orientation of the judge matters with respect to street crimes and that sentencing differences reveal themselves in part through the selective use of adjustments to the base offense level in the sentencing proceedings. These results are consistent with our theory (Propositions A-1 and B-1).⁴³

Political Orientation, Circuit Court Alignment, and Offense Level Adjustments. We now test directly whether Democrat-appointed district court judges calculate lower final offense levels (resulting from adjustments) than Republican-appointed district court judges. To test this proposition, we estimate the following equation, taking final offense level as the dependent variable:

$$(2) \text{FOL}_{ijt} = \alpha \text{Constant} + \beta \text{YEAR}_t + \gamma \text{DISTRICT}_j + \delta \text{OFFENDER}_{ijt} + \epsilon \text{OFFTYPE}_{sijt} + \zeta \text{SBOL}_{ijt} + \eta \text{SCRIMHIST}_{ijt} + \theta \text{SBOL} * \text{CRIMHIST}_{ijt} + \rho \text{AVAGE}_{jt} + \tau \% \text{DEMOCRAT}_{jt} + E_{ijt}$$

Again, we use BOL dummies, CRIMHIST dummies, and the interaction of BOL and CRIMHIST to control for initial position on the Sentencing Guidelines Table grid. Table 2 presents the results. In Model 1, the coefficient on %DEMOCRAT implies that Democrat-appointed judges would calculate .45 lower final offense level on average, although the result is not statistically significant. Model 2 allows varying impacts by offense category, and a clearer picture is revealed. Democrat-appointees calculate higher

by the inclusion of all crime categories, some of which have small sample sizes and the political effects are imprecisely estimated.

⁴³ These results are remarkably consistent with the findings of Boylan (2004). Boylan found that district court judges were more likely to take senior status after the Sentencing Guidelines were adopted, and the case mix affected Democrats and Republicans in different ways. Democrats and Republicans were both more likely to take senior status after the Guidelines, but this effect was larger for Democrats in districts with high drug caseloads, but not for Republicans in those districts.

offense levels for white collar and environmental crimes, and lower offense levels for drug crimes, than do Republican appointees. Again, the test of joint significance strongly supports partisan effects. The results are weaker when crime-specific time trends are added in Model 3, and the significant effect on white collar crime disappears entirely. The joint test remains strong, however, and supports the notion that a judge's ideology matters to sentencing and is reflected in the calculation of the offense level. In sum, the empirical results are consistent with our theory (Proposition B-1).

TABLE 2: FINAL OFFENSE LEVEL

	Model 1	Model 2	Model 3
%DEMOCRAT	-0.45		
	(.29)		
%DEMOCRAT*VIOLENT		-0.49	-0.32
		(.30)	(.31)
%DEMOCRAT*THEFT		-0.74	-0.74
		(.66)	(.72)
%DEMOCRAT*DRUG		-1.26***	-0.56*
		(.35)	(.31)
%DEMOCRAT*RACKETEER		-0.14	-0.32
		(.56)	(.70)
%DEMOCRAT*PORN		0.61	-0.30
		(.60)	(.50)
%DEMOCRAT*OBSTRUCT		1.32	-1.01
		(1.32)	(1.62)
%DEMOCRAT*CIVILRIGHT		-0.10	-1.62
		(1.44)	(1.24)
%DEMOCRAT*ENVIRON		2.30***	1.72**
		(.68)	(.78)
%DEMOCRAT*WHITECOL		0.84**	-0.054
		(.36)	(.33)
Joint test of %DEMOCRAT Interactions		<.0001	.0151
R-Square	.8550	.8554	.8596
Crime-Specific Time Trends	No	No	Yes

N=365,062. Not reported: District dummies, offense type, base offense level, criminal history, criminal history*base offense level, demographic characteristics. ***coefficient significant at less than 1% level, **coefficient significant at 5% level or less, *coefficient significant at 10% level or less.

In sum, the prison and offense level results for street crimes (drug, violent, theft) conform to both theory and conventional wisdom. Democrat appointees give lower sentences for these crimes and do so in part by manipulating the offense level. The results for white collar crime, while sometimes conforming to our theory, are sensitive to time trends in the case of offense level regressions and are quite weak in the case of prison regressions. This may be because there are no partisan differences, and trends toward harsher white collar sentencing simply biased our results.

The weak white collar results may also be due to smaller sample sizes and lower jail sentences for white collar crimes (making it harder to detect any differences). For example, the average sentence for white collar crime was just over nine months with an average base offense level of 6.4. In contrast, the average sentence for drug crimes was 70.2 months, with an average base offense level of 28.⁴⁴ It is particularly hard to detect resulting changes in prison terms in the case of crimes with very low base offense levels because changes to these levels cause little change to the actual number of months in the sentencing range. For example, a decrease of two levels for a drug crime with a base offense level of 28 reduces the minimum sentence by 15 months. By comparison, in the case of the average white collar crime with a base level of 6, a change of 2 levels (up or down) does not change the actual sentencing range at all. We therefore draw no conclusions concerning the presence or absence of a partisan effect on white collar crime.

No consistent results were evident in the case of the other crime categories, such as obstruction of justice and racketeering. But these remaining categories combined are under 6% of the sample. Moreover, conventional wisdom makes no predictions about political preferences in sentencing for some of these crimes, quite unlike the conventional wisdom on political attitudes towards white collar and street crimes. And like white collar crime, these other crimes have low base offense levels and low average prison sentences that make it difficult to detect partisan differences. For theoretical and practical reasons, then, we focus on street crimes for the remaining analysis.⁴⁵ These crimes comprise 65% of the sample and over 91% of prison time meted out.

⁴⁴ The same issues are true for environmental crimes for which the average sentence was only 4.5 months.

⁴⁵ Comparable analysis for white collar crimes yielded statistically insignificant results or results that were highly sensitive to time trends.

Political Alignment and Prison Term. Next we test whether Democrat-appointed district court judges give lower prison sentences for street crimes when politically aligned with the circuit court than when not aligned. We consider circuit alignment effects by including a dummy, CIRCDEM, equal to one when the circuit court is majority Democrat-appointed judges and zero when the circuit majority is Republican-appointed. We then interact this dummy with %DEMOCRAT and re-estimate equation 1 above. This interaction term (%DEMOCRAT*CIRCDEM) is the marginal effect that Democratic alignment has on sentencing. In later specifications we allow circuit effects to take a more flexible form by using measures that allow the ideological composition of the circuit to vary.

**TABLE 3: TOTAL PRISON SENTENCE IN MONTHS, CIRCUIT ALIGNMENT EFFECTS
(VIOLENT, DRUG, AND THEFT OFFENSES)**

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
%DEMOCRAT ^a	-6.98** (3.37)	-5.55 (3.84)	-6.39* (3.55)	-5.50 (3.81)	-13.29*** (4.88)	-10.01** (4.94)	-13.20*** (4.91)	-9.91** (4.29)
CIRCDEM		2.14 (2.05)		4.88 (3.29)		4.88 (3.29)		4.90 (3.12)
%DEMOCRAT *CIRCDEM ^b		-6.14 (4.02)		-8.15** (3.96)		-13.82** (5.83)		-14.23** (5.83)
Joint test of a & b		.0483		.0106		.0016		.0017
Crime-Specific Time Trends	No	No	Yes	Yes	No	No	Yes	Yes
Offense Control	Base Level	Base Level	Base Level	Base Level	None	None	None	None

OLS regressions, N=238,299. Not reported: District dummies, offense type, base offense level, criminal history, criminal history*offense level, demographic characteristics. ***coefficient significant at less than 1% level, **coefficient significant at 5% level or less, *coefficient significant at 10% level or less. All %DEMOCRAT coefficients multiplied by 100.

Model 1 of Table 3 estimates the %DEMOCRAT effect, without consideration of political alignment, and Model 2 adds alignment effects. Model 1 shows that a Democrat-appointed district judge would issue a prison sentence for street crimes roughly 7 months shorter than would a Republican-appointed district judge. Compared to an average prison sentence of 70 months for these offenses, this represents a sizeable discount (approximately 10%). When circuit court alignment is considered, the results are not independently significant but are jointly significant at less than the 5% level. Taking the coefficients at face value, the alignment of a Democratic circuit with an all Democrat-appointed district would result in a sentence reduction of 9.5 months (the sum of %DEMOCRAT, CIRCDEM, and %DEMOCRAT*CIRCDEM coefficients), versus just 5.5 for an unaligned district.

The remaining models test the robustness of our results. The results remain largely intact when we enter crime-specific time trends in Models 3 and 4, and roughly double when we do not condition on the base offense level in Models 5 through 8. The effect of district political composition is larger than in the models that condition on base offense level. However, the relative effect of alignment remains; in Models 6 and 8, circuit alignment again roughly doubles the partisan effect. An all Democrat-appointed bench in a Democratic circuit would give roughly 18-month lower sentences, and an all Democrat-appointed bench in an unaligned circuit would give a 10 month lower sentence.⁴⁶

⁴⁶ Some specifications included additional characteristics of the bench: the percent judges who are African American, the percent Hispanic, and the percent female. Little was added by including these variables,

We also directly tested whether the coefficients of interest were the same when we removed the base offense level controls. The p-value for the test of equality of *%Democrat* across Models 1 and 5 was .052, just on the border of rejecting the null of no difference.⁴⁷ The p-value for the joint test of equality of *%Democrat*, *CircDem*, and *%Democrat*CircDem* across Models 2 and 6 was .143. Although these tests are inconclusive, the results imply that, as our theory suggests, conditioning on base offense level biases the *%Democrat* coefficient toward zero. (Tests across the regressions with time trends yielded similar inconclusive results.)

In sum, the prison sentence regressions are strong evidence that there are sizeable partisan differences in sentencing. Democrat appointees on average sentence street crime offenders to terms between 10% and 20% lower than Republican appointees, depending on whether we condition on base offense levels or exclude offense levels altogether. Base offense levels may capture important elements of the crime and hence should be included as a control. On the other hand, in drug cases base offense levels can be manipulated at the sentencing hearing and arguably are endogenous. Thus, we believe that the 10% figure (representing roughly seven months) is a lower bound estimate of partisan effects on sentencing. In other words, the differences between Democrat and Republican appointees may be much larger. Another important result is that partisan effects are amplified when there is circuit court alignment. When the circuit court is aligned, the effects are nearly doubled.

which are highly correlated with the percent Democratic appointees anyway, and they were not individually significant while %DEMOCRAT remained statistically significant.

⁴⁷ The test of all common coefficients rejected the null at the .0001 level. A comparison of coefficients suggests that this result is largely driven by offender race and sex dummies, which are much larger when base offense levels are not controlled for.

Political Alignment and Offense Level Adjustments. The prison sentence regressions cannot demonstrate that judges are using sentencing instruments strategically with respect to the prospect of higher court review. To understand this, we next calculate partisan effects on offense level calculations. Table 4 adds the political alignment variables to the offense-level regressions reported in Table 2 for street crimes.

**TABLE 4: FINAL OFFENSE LEVEL
(VIOLENT, DRUG, AND THEFT OFFENSES ONLY)**

	Model 1	Model 2
%DEMOCRAT ^a	-.48** (.24)	-.44* (.26)
CIRCDEM		.10 (.16)
%DEMOCRAT*CIRCDEM ^b		-.067 (.29)
R-Square	.8610	.8610
Joint test of a & b		.1549
N	238,229	238,229

N=238,229. Not reported: District dummies, offense type, base offense level, criminal history, criminal history*base offense level, demographic characteristics. ***coefficient significant at less than 1% level, **coefficient significant at 5% level or less, *coefficient significant at 10% level or less.

The %DEMOCRAT coefficient in Model 1 is negative and significant at (barely) the 5% level. This suggests that for street crimes Democrat appointees calculate lower final offense levels -- that is, they make more downward adjustments to the base offense level -- than do Republican appointees. Model 2 adds the political alignment variable (%DEMOCRAT*CIRCDEM). The sign of that variable is negative and the coefficient estimate is very small (-.067) and not statistically significant. It is not surprising that political alignment may be relatively unimportant to offense level calculations. As discussed above, offense level calculations are inherently harder for circuit courts to

review, both because of the deferential doctrine (i.e., “clearly erroneous” standard) and the monitoring costs to the circuit court of reviewing fact-intensive findings. Consistent with our theory (Proposition B-2), political alignment does not appear to be very important for making adjustments to base offense levels.

In order to quantify the effect of adjustments to the base offense level and test whether political alignment matters to instrument choice, we consider the months change in prison sentence for street crimes resulting from such adjustments as follows:

$$(3) \text{BASECHANGE}_{ijt} = \alpha \text{Constant} + \beta \text{YEAR}_t + \gamma \text{DISTRICT}_j + \delta \text{OFFENDER}_{ijt} + \epsilon \text{OFFTYPES}_{ijt} \\ + \zeta \text{SBOL}_{ijt} + \eta \text{SCRIMHIST}_{ijt} + \theta \text{SBOL} * \text{CRIMHIST}_{ijt} + \rho \text{AVAGE}_{jt} \\ + \tau \% \text{DEMOCRAT}_{jt} + E_{ijt}$$

BASECHANGE is the difference between the final prison sentence (the sentence after all adjustments and departures have been applied) and the minimum Guidelines Table sentence permitted by the *base* offense level/criminal history combination. In order to focus solely on the effect of offense level calculations, we exclude from some BASECHANGE models those cases in which downward departures were granted.⁴⁸ In Models 1 and 2 of Table 5, which include all departure cases, Democrat appointees prefer lighter sentences (though the results are fairly weak). The importance of alignment is unclear since the alignment coefficient is not significant. Models 3 and 4 of Table 5 exclude cases in which a substantial assistance departure was granted. A strong partisan effect is evident in Model 3. In Model 4, the coefficient on %DEMOCRAT*CIRCDEM is insignificant and smaller than the %DEMOCRAT coefficient. In Models 5 and 6, we

⁴⁸ Note that because we are measuring the change in sentence as the distance from the base offense level, we are implicitly conditioning on the base offense level. As such, our coefficients represent lower bounds.

exclude cases in which any departure was granted. Thus, changes in prison sentences in these cases come entirely from offense level adjustments, and similar results are obtained.

Overall, the %DEMOCRAT coefficients in Table 5 indicate that sentences in Democratic districts relative to Republican districts are seven months lighter for street crimes. The coefficient on %DEMOCRAT*CIRCDEM suggests, consistent with Table 4, that alignment is not important when sentencing differences are driven solely by changes in offense level calculations. In other words, the results suggest that district court judges' ability to manipulate offense levels, while perhaps bounded by the Guidelines and the facts themselves, are not bounded by the amount of political alignment with the circuit court.

TABLE 5: MONTHS CHANGE IN PRISON SENTENCES FROM MINIMUM BASE OFFENSE LEVEL SENTENCE (VIOLENT, DRUG, AND THEFT OFFENSES)

	Model 1	Model 2	Model 3	Model 4	Model5	Model 6
%DEMOCRAT ^a	-5.48* (3.18)	-4.20 (3.48)	-7.16** (3.01)	-6.42** (3.20)	-7.79*** (2.86)	-7.04** (3.16)
CIRCDEM		2.49 (1.77)		4.02 (2.57)		3.78* (2.26)
%DEMOCRAT* CIRCDEM ^b		-4.49 (3.81)		-4.00 (4.86)		-5.31 (3.59)
Joint test a & b		.0465		.0150		.001
Sample	All cases	All cases	No Sub. Ass. Depts.	No Sub. Ass. Depts.	No departures	No departures
R-Square	.5012	.5013	.5107	.5108	.5296	.5264
N	236,368	236,368	176,093	176,093	147,589	147,589

Not reported: District dummies, offense type, base offense level, criminal history, criminal history*base offense level, demographic characteristics. ***coefficient significant at less than 1% level, **coefficient significant at 5% level or less, *coefficient significant at 10% level or less.

Political Alignment and Departures We now consider whether Democrat-appointed district court judges grant larger downward departures from the recommended sentencing

range for street crimes when politically aligned with the circuit court than when not aligned.

Our dependent variable under this analysis is FINALCHANGE, which is the difference between the final prison sentence and the Sentencing Table minimum sentence permitted by the *final* offense level calculation (FOL). Thus, upward departures are positive and downward departures are negative. Sentences above the minimum but within the range are positive, while sentences at the minimum (the majority of all sentences) are recorded as zero. Therefore, FINALCHANGE regressions quantify the change in prison sentences that result from departures from the minimum Guidelines sentence.⁴⁹

$$(4) \text{ FINALCHANGE}_{ijt} = a\text{Constant} + \gamma\text{YEAR}_t + \beta\text{DISTRICT}_j + \theta\text{OFFENDER}_{ijt} + \phi\text{OFFTYPES}_{ijt} \\ + \sigma\text{BOL}_{ijt} + \kappa\text{SCRIMHIST}_{ijt} + \sigma\text{BOL} * \text{CRIMHIST}_{ijt} + r\text{AVAGE}_{jt} \\ + d\% \text{DEMOCRAT}_{jt} + E_{ijt}$$

The results in Table 6 conform nicely to the theory's predictions. The partisan effect in Model 1, which does not consider alignment, is small and not statistically significant. However, Model 2 suggests that political alignment between the district court and the circuit court must be considered. While the coefficient on %DEMOCRAT remains small and insignificant, the coefficient on %DEMOCRAT*CIRCDEM is negative and significant at the 5% level.⁵⁰

⁴⁹ We also estimated probits on the likelihood of a downward departure being granted, but failed to find any significant effects. Schanzenbach (2005a) makes a similar finding. As mentioned, the size of the departure will undoubtedly factor into the abuse of discretion analysis. We therefore believe that it is more fruitful to examine the magnitude of the departure.

⁵⁰ We also estimated probits on the likelihood of a downward departure being granted, but failed to find any significant effects, although the coefficients were signed as expected and sometimes significant at the 10% level. Schanzenbach (2005a) reports a similar finding. The size of the departure will undoubtedly factor both into the abuse of discretion analysis and in the prosecution's decision on whether to appeal. It

is not surprising therefore that we can detect partisan differences in the magnitude but not in the probability of a departure.

**TABLE 6: MONTHS CHANGE IN PRISON SENTENCES FROM MINIMUM FINAL OFFENSE LEVEL SENTENCE
(VIOLENT, DRUG, AND THEFT OFFENSES)**

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
%DEMOCRAT ^a	-1.44 (2.58)	1.03 (2.87)	-3.24* (1.89)	-1.68 (2.23)	-.30 (4.24)	-2.45 (3.50)
CIRCDEM		2.23 (1.61)		3.42* (1.75)		
%DEMOCRAT *CIRCDEM ^b		-7.75** (3.32)		-6.56** (2.91)		
CIRCDEM25-49%					-.34 (1.65)	-.67 (1.11)
CIRCDEM50-75%					3.43 (2.57)	2.21 (1.51)
CIRCDEM76-100%					2.15 (3.51)	3.73 (2.79)
CIRCDEM25-49 *%DEMOCRAT ^b					2.22 (3.80)	.85 (3.14)
CIRCDEM50-75% *%DEMOCRAT ^b					-6.92 (5.23)	-4.19 (3.38)
CIRCDEM76-100% *%DEMOCRAT ^b					-6.75 (8.08)	-8.34 (5.31)
Joint test a & b		.0468		.011	.0342	.0216
Sample	All cases	All cases	No sub-assist departures	No sub-assist departures	All	No sub-assist departures
R-Square	.3004	.3005	.3382	.3383	.3005	.3384
N	238,155	238,155	176,939	176,939	238,155	176,939

Not reported: District dummies, offense type, base offense level, criminal history, criminal history*base offense level, demographic characteristics. ***coefficient significant at less than 1% level, **coefficient significant at 5% level or less, *coefficient significant at 10% level or less.

Models 3 and 4 remove substantial assistance downward departures. These departures must be requested by the prosecution and are contingent on the ability of the defendant to provide valuable information regarding other crimes. With substantial assistance departures removed, the partisan effect of Model 3 is barely significant at the 10% level, but the partisan and alignment effects of Model 4 are jointly significant at the 1% level (and much stronger than before).

In Models 2 and 4, the interaction effect is large and negative, while the coefficients on CIRCDEM and %DEMOCRAT are small and insignificant. This implies that when Democratic appointees face review from Republican circuits, the magnitude of their departures is not measurably different from their Republican-appointed colleagues. When the circuit is majority Democrat, however, Democrat appointees make departures of greater magnitude. In sum, these results are consistent with our instrument choice theory that the district court judges are deterred from making significant departures unless there is circuit court political alignment (Proposition B-3).

We do not find that Republican alignment leads to longer sentences. The CIRCDEM coefficient is small, statistically insignificant, and positive. If Republican-appointed district court judges give longer sentences via upward departures when they move to Republican-majority districts, the CIRCDEM coefficient should be negative. We are not surprised by this non-finding for several reasons. First, upward departures occurred rarely (only 1% of the sample) and this presents obvious measurement issues. Second, sentences for street crimes are quite high to start with and may already conform to the preferences of Republican appointees. Third, judges who wish to impose higher

sentences may do so easily through adjustments because the increase in sentencing ranges is exponential, so high sentences may be handed out regardless of alignment (this may be why there are relatively few upward departures). Finally, upward departures are costly in that they will almost certainly be appealed.

We next test the robustness of these results in Models 5 and 6, which provide a more flexible specification by dividing the circuit court dummies into four categories: 0-24%, 25-49%, 50-74%, and 75-100% Democratic appointee, with 0 to 25% being the excluded category.⁵¹ These categories suggest varying levels of alignment with the circuit court. The coefficients are not independently significant, but the point estimates conform nicely to the expectation of the theory. Taking the coefficients at face value, there is little or no effect of having 25-49% of the circuit as Democrats relative to 0-24%. When we exclude substantial assistance departures in Model 6, the circuit alignment effects increase as the district and circuit become more aligned, almost doubling when we move from 50-74% to 75-100%. This is precisely what we would expect to observe.

In sum, it is difficult for the judge to depart significantly from the Guidelines unless there is circuit alignment. Since upward departures are so rare, it is unlikely that the effects are being driven much by Republican alignments. Rather, Democrat district court judges in Democrat circuits are granting more downward departures for street crimes.⁵²

⁵¹ If we entered a percent figure for circuit judges or a numeric probability of drawing a majority Democratic panel, however, we would be specifying a levels effect in the interaction term, which is hard to interpret. Adding a more flexible form accomplishes much the same thing.

⁵² As a final note, there are times when mandatory minimum sentences may trump the minimum Guidelines sentence, although in drug cases judges can often override the minimum sentences. We performed an analysis in which we measured changes in sentences from binding mandatory minimums instead of Guidelines minimums, and reach similar conclusions to those presented here. This result is not too

IV. Conclusion

The theoretical and empirical analyses presented here lead to three important conclusions. First, Democrat and Republican appointees prefer different sentences for different crimes. Even in the constraining framework of the Sentencing Guidelines, the judge's preferences matter. Sizeable partisan effects were evident throughout and were fairly consistent: Democrat appointees favored lighter sentences than Republican appointees for drug trafficking, theft, and violent offenses. Democrat appointees also calculated higher offense levels than Republican appointees for white collar crimes, but we could not detect any resulting differences in prison time for these crimes (likely because of a smaller impact of offense level changes in these areas and smaller sample sizes). In addition, we found evidence of secular trends in white collar sentencing that may confound the estimate of partisan effects.

Second, judges mask their sentencing discretion through the calculation of the final offense level. For prison sentence regressions conditioned on the base offense level -- the condition under which the manipulation of offense level adjustments could be measured -- large and statistically significant partisan effects were evident.

The use of the departure instrument to shorten or lengthen prison terms was more dependent upon political context than the use of adjustments. Specifically, how judges expressed sentencing preferences depended on the political alignment between the district and circuit courts. In Democrat circuits, Democrat-appointed district court judges gave

surprising. As pointed out by Bowman and Heise (2002), mandatory minimums are not often binding, and when they are they generally do not change the minimum sentence greatly. Also, under U.S.S.G. §5C1.2, judges may make findings of fact to void mandatory minimums in drug cases. Of course, mandatory minimums do not prevent upward adjustments from enhancing the sentence.

larger downward departures than when under Republican circuits. In fact, when we considered changes in prison sentences relative to the final calculated offense level, partisan effects were only measurable in districts that were aligned.

A final, important normative point should be made. While our work finds substantial differences between Democrat and Republican-appointed district court judges, our work also suggests that the sentencing reforms -- the promulgation of the Sentencing Guidelines and appellate review of district court sentencing decisions -- have served an important role in constraining judges' sentencing practices. Prior to the sentencing reforms, district court judges had great discretion over sentencing and, without appellate review, no one to rein in that discretion. Essentially, district court judges acted as if the circuit court was ideologically aligned as no discipline was likely to come. Our finding that alignment between district and appellate courts affects the sentencing judge's behavior regarding departures suggests that sentencing reforms may have reduced the overall discretion of district court judges, at least when those judges were overseen by a circuit with different political-ideological preferences. Moreover, the Guidelines, by setting out a recommended sentencing range, and then listing the acceptable factual circumstances for which an adjustment could be made, helped to limit the district court's options. It created a new fact (adjustment) versus law (departure) classification which pushed a large set of case circumstances (factors outside the heartland of the Guidelines) into stricter review conditions. There can be little doubt, then, that a return to a system of absolute discretion for district court judges within broad statutory boundaries and no appellate review would increase sentencing disparities.

Bibliography

Albonetti, Celesta A., *Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 31 LAW & SOC'Y REV. 789 (1997).

Anderson, John M. et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. L. & ECON. 271, 303-04 (1999).

Ashenfelter, Orley et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995).

Bibas, Stephanos. *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L. J. 1097 (2001).

Bowman, Frank O., III & Michael Hiese, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L. Rev. 477, 487-491 (2002).

Boylan, Richard T., *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEG. STUD. 231 (2004).

Cameron, Charles M., Jeffrey A. Segal, and Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 American Political Science Review 101-16 (2000).

Cross, Frank B., *Decision Making in the U.S. Circuit Courts of Appeal*, 91 CAL. L. REV. 1457 (2004).

Gely, Rafael and Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. Econ. & Org. 263 (1990)

George, Tracey E., *Court Fixing*, 43 ARIZ. L. REV. 9, 9-37 (2001).

Hofer, Paul J., Kevin R. Blackwell, & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239 (1999).

Hofer, Paul J. et al., *Departure Rates and Reasons After Koon v. United States*, 9 FED SENTENCING REP. 284 (1997).

Lacasse, Chantale & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?* 42 J. L. & ECON. 245 (1999).

McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. Cal. L. Rev. 1631, 1641-47 (1995)

McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243 (1987);

McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431 (1989).

Mustard, David B., *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001)

Pinello, Daniel, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219 (1999).

Revesz, Richard L., *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997).

Schanzenbach, Max *Have Federal Sentencing Practices Changed? The Shaky Empirical Foundations of the Feeney Amendment*, J. EMPIRICAL LEG. STUD (forthcoming 2005).

Schanzenbach, Max, *Racial and Sex Disparities in Sentencing: The Effect of District-Level Judicial Demographics*, J. LEG. STUD. (forthcoming 2005).

Smith, Joseph L., and Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002)

Songer, Donald R., Jeffrey Segal, and Charles Cameron, *The Hierarchy of Justice: Testing a Principal Agent Model of Supreme Court-Circuit Court Interactions*, 38 American Journal of Political Science 673-96 (1994)

Spiller, Pablo T., "Agency Discretion Under Judicial Review", 16 Mathematical and Computer Modeling 185-200

Spiller, Pablo T. & Matthew L Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992)

Spiller, Pablo T. and Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. Legal Stud. 347 (1997).

Sunstein, Cass, David Schkade, and Lisa Ellman, *Ideological Voting on Federal Courts of Appeal: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

Stith, Kate & Jose A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

Tiller, Emerson H. "Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making," 14 *Journal of Law, Economics, & Organization* 114-135 (April 1998).

Tiller, Emerson H. and Frank B. Cross, *What is Legal Doctrine?*, Northwestern Law Review (forthcoming, 2005).

Tiller, Emerson H. & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. L. ECON. & ORG. 349 (1999)

United States Sentencing Commission, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (IN RESPONSE TO SECTION 401(M) OF PUBLIC LAW 108-21), (2003).

APPENDIX 1: SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	Life	Life	Life	Life	life	Life

APPENDIX 2

Table 1a: Means and Proportions (Standard Errors in Parentheses)

Variable	Mean or Proportion Sentenced Offenders in Sample
Total Prison Sentence	45.77 (64.45)
Jail Time Given	.809 (.392)
Sentence Within Range	.644 (.477)
Downward Departure (Substantial Assistance)	.208 (.406)
Downward Departure (Judge Initiated)	.103 (.302)
Upward Departure	.0088 (.0934)
Base Offense Level	18.79 (10.82)
Final Offense Level	19.02 (9.36)
Average Offense Level Adjustment From Base Level	.22 (5.06)
Proportion Net Upward Adjustment	.379 (.48)
Proportion Net Downward Adjustment	.527 (.499)
Age	34.83 (11.03)
Male	.837 (.369)
Female	.163 (.369)
White	.612 (.487)
Black	.323 (.468)
Hispanic	.239 (.427)
Asian	.022 (.145)
Other	.019 (.136)
Citizen	.809 (.393)
Jury	.078 (.263)
Less than High School	.484 (.498)
High School	.440 (.496)
College	.057 (.232)
Advanced Degree	.019 (.138)
No Dependents	.377 (.484)
One Dependent	.192 (.394)
Two Dependents	.175 (.377)
N	365,066

Table 2a: Distribution of Crimes

Crime of Conviction	Proportion Sentenced Offenders in Sample	Average Prison Sentence for Offense (months)
Violent	.151	72.5
Theft	.0093	16.8
Drug	.492	70.1
Racketeering	.034	42.2
Pornography/Obscenity	.0066	37.7
Obstruction	.018	13.3
Civil Rights	.0027	24.9
Environmental	.0055	4.2
White Collar	.281	9.1