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

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Positive political theories of judging suggest that much of the policy discretion exercised by judges is guided by political ideology, constrained by institutional competition between lower and higher courts, 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 paper, we examine how judicial discretion in sentencing has played out; in particular, we examine whether the United States Sentencing Guidelines[2] have been applied strategically by judges to affect sentencing outcomes, how they are so used, and what constraints exist on such discretion. Criminal sentencing should be especially amenable to positive political analyses given the conventional beliefs that liberals and conservatives widely differ on how "tough" the criminal justice system should be on criminals and the complex and manipulable set of sentencing rules and standards embodied in the Sentencing Guidelines.

We construct an "instrument choice" positive political theory of criminal sentencing and test it empirically with sentencing data from the United States Sentencing

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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.].

Commission. The theory suggests that, when determining prison time for a convicted felon, federal district court judges (1) are influenced by their political ideologies in setting prison length; (2) manipulate the rules and structure of the Sentencing Guidelines to the extent possible; and (3) make choices in anticipation of the likely response of the overseeing circuit court of appeals.

Under the Sentencing Guidelines, judges can alter the sentencing range for a convicted defendant through factual and legal determinations at the sentencing hearing (post-conviction or post-plea). The fact-based determinations relate to aggravating and mitigating factors and can lead to *adjustments* to the numeric base offense level (determined by the crime of conviction) which, in combination with a defendant's criminal history, ultimately sets the acceptable sentencing range. These adjustments are reviewed by the circuit courts of appeal with great deference to the district court's factual conclusions.

There is, of course, a limit to the number of adjustments that can be made in a given case, but judges may choose to "depart" from the Guidelines' range. This determination requires significant legal conclusions in addition to factual findings. The sentencing judge must hold that (1) the Sentencing Commission has neither proscribed nor considered this category of circumstances when it created the Sentencing Guidelines, and (2) the factual circumstances are sufficiently unusual that the Sentencing Guidelines ranges should not apply. This law-based conclusion allows the district court judge to make a *departure* from the Sentencing Guidelines, thereby leading to significant enhancements or reductions to the felon's calculated sentence. These departures, which are generally discouraged by the Guidelines, are reviewed by the circuit courts with much

less deference than that given to offense level adjustments; consequently, law-based departures carry greater risk for a sentencing judge in terms of review and reversal by higher courts.

Adding ideology and institutional competition between lower and higher courts to the mix, the theory suggests that when the lower and higher courts are politically aligned, the sentencing judge has the ability to use in a cumulative manner both fact-based adjustments and law-based departures to set the defendant's sentence to the term most preferred by the judge with less concern about reversal by the overseeing circuit court. When the lower and higher court are not so aligned, however, the risk of reversal increases. In that situation the district court judge relies less on law-based departures because they invite greater scrutiny by the overseeing circuit court.

The empirical test of our theory suggests that, as predicted: (1) ideology matters in sentencing (liberal judges give different sentences than conservative judges for certain categories of crime); (2) the length of sentence given by judges depends on political alignment with the circuit court; and, (3) sentencing judges selectively use fact determinations (offense level adjustments) and legal determinations (sentencing range departures) to enhance or reduce a criminal sentence, and such instrument choices are influenced by the judge's ideology as well as the political-ideological relationship of the sentencing judge to the overseeing circuit court.

We also note two important additions to the literature that come from this study. First, we show that instrument choice theory is not limited to the complexity of administrative law on which earlier decision instrument studies have focused.[3] We

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[3] Emerson H. Tiller and Pablo T. Spiller, "Strategic Instruments: Legal Structure and Political Games in Administrative Law," 15 *Journal of Law, Economics, & Organization* 349 (June 1999).

develop an instrument choice theory for criminal sentencing and show that basic constructs of a judicial system -- political ideology, fact and law-based decision making, and appellate review -- drive predictable results. Second, we offer an empirical study of instrument choice that measures the district court-appellate court political relationship, something only assumed in the one other empirical study on instrument choice.[4]

I. United States Sentencing Guidelines

In 1987, the United States Sentencing Commission, as authorized by the Sentencing Reform Act of 1984,[5] promulgated the U.S. Sentencing Guidelines to govern the sentencing of defendants convicted of federal crimes. Formerly, judges had nearly absolute sentencing discretion within broad statutory ranges. The Sentencing Guidelines were intended to limit judicial discretion and make sentences consistent via the introduction of binding regulations and appellate review of sentences.[6]

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

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[4] Smith and Tiller (2002).

[5] 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.

[6] 28 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; Anderson et al., 1999, finding a decrease in inter-judge disparities; Lacasse and Payne, 1999, finding no change post-Guidelines.

horizontal axis of the Sentencing Table measures criminal history across six categories,[7] 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.[8]

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 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 of 4 results in a sentencing range of 6 to 12 months.

While the base offense level is set by the crime of conviction, 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 are present in the case.[9] For certain crimes, for example, points may be added to base offense levels when a victim sustained permanent

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[7] The horizontal axis of the grid, "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 and is not as easily manipulated as the adjustments to the offense level calculations. Both the offense level calculation and the criminal history determinations are subject to appellate review. A judge may depart from the Guidelines if he believes that a defendant's criminal history over or understates his "true" criminal history. Though regulated by the Guidelines, this is a specific departure and is reviewed as such. U.S.S.G. § 4A1.3.

[8] 18 U.S.C. § 3742.

[9] 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."

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);[10] the convicted defendant's role in the offense (add or subtract up to 4 levels depending on role);[11] the defendant's obstruction of justice (add 2 levels);[12] and the defendant's acceptance of responsibility (subtract 2 to 3 levels).[13] For the most part, determinations of these characteristics are *fact-driven.* If found by the judge to exist, these facts lead to adjustments that increase or decrease the base offense level and lead to a final offense level which, in combination with the convicted defendant's criminal history, result in higher or lower sentencing ranges from which judges choose a prison term. Although the judge has discretion within the range set by the base offense level, adjusting the offense level yields substantial changes. Judges can reduce the minimum sentence between 10% and 15% and increase the maximum sentence between 10% and 15% by moving up or down *a single offense level*, and most adjustments are 2 or 3 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.[14] 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 in the offense, but by four points if he was a "minimal" participant in

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[10] U.S.S.G. §§3A1.1-3.
[11] U.S.S.G. §§3B1.1-2.
[12] U.S.S.G. §§3C1.1.
[13] U.S.S.G. §§3E1.1.
[14] See Smith and Cabranes, The Fear of Judging, pp. 91-92.

the offense. 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.[15] Whether the action "significantly impeded" is a determination saturated with discretion. 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 of one, reducing the offense level from 30 to 28 reduces the minimum Guideline sentence by 21 months.

Although over 90% of sentences are the product of plea bargains, judicial discretion over sentencing still plays a major role for two reasons. First, sentences can be substantially adjusted after the plea bargain and, second, the plea bargain occurs in the shadow of the sentencing judge. The defendant pleads guilty to a crime that sets the base offense level. At the sentencing hearing, the judge can make findings of fact that adjust that level upward or downward, so in principle the defendant is unsure what sentence he will receive. For example, the defendant could plead guilty to fraud, but dispute the amount stolen at the sentencing hearing. Or the defendant could plead guilty to drug trafficking, but the judge could find that he accepted responsibility 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.[16] Even if the

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[15] 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.

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

prosecution and defense stipulate as to specific facts that bear on sentence enhancements or reductions, the judge need not accept them. Moreover, the stipulations were likely made with an eye toward who would be conducting the sentencing hearing and hence are still reflective of the judge's preferences.

The prosecution and the convicted defendant can appeal the sentencing judge's adjustments to the base offense level. These fact-based adjustments are reviewed by the circuit court for "clear error" – a legal standard giving substantial discretion to the sentencing judge's conclusion.[17] 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.' "[18] And a Fourth Circuit Court judge recently 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. 'Where there are two permissible views of the evidence, the factfinder's [sentencing judge's] choice between them cannot be clearly erroneous.' "[19]

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

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[17] 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 recently 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.

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

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

Guidelines that should result in a sentence different from that described."[20] Departures present law-based issues in addition to factual findings, much more so than do adjustment determinations. A departure involves the legal conclusion by the district court judge that the circumstances (facts) of the case "fall outside the 'heartland' of the Sentencing Guidelines" (a question of law) and thus was not preempted 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. 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.[21] The courts held that these types of departures were, by law, unavailable in the cases at issue. While undoubtedly there are factual determinations to be made in a departure, what distinguishes a departure from an adjustment is the added legal conclusion that a new category of circumstances justifies a sentencing enhancement or reduction. The government can appeal to the overseeing circuit court a downward departure from the Sentencing Table, and the defendant similarly can appeal an upward departure.

The government can facilitate downward departures by itself 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

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[20] 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.)

[21] See Stith and Cabranes, *The Fear of Judging*, p. 100.

on the motion of the government. Some of the analysis below removes 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.

II. Positive Political Theory of Criminal Sentencing

The theory we present here builds on the growing work in "law and positive political theory." While many of the early papers focused on Congress and its interactions with regulatory agencies and courts,[22] positive theorists eventually turned their attention to strategic behavior within judicial hierarchies.[23] This judicial hierarchy literature generally views the behavior of judges as "strategically" political, rather than merely political or naively legal-minded. Specifically, judges are modeled as 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. Much of the work has incorporated game theory and institutional economics. A branch of this work has

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[22] 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).
[23] 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); 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).

attempted to bring legal structures such as decision instruments and doctrines into the strategic model.[24]

The work most directly related to our study here is the strategic instruments framework proposed by Tiller and Spiller (1999) which modeled the behavior of agencies, lower courts, and higher courts in the context of administrative law.[25] That model suggested that an agency would chose adjudication over rulemaking if it wanted to protect a policy agenda in the face of a court that would not favor the agency's new policy agenda. Similarly, the model suggested that lower court judges, when faced with a higher court whose preferences are aligned with the agency rather than the lower court, would choose "reasoning process" failures by the agency (predominantly a fact-based decision making by the lower court) for protecting its reversal of the agency policy, rather than relying on statutory interpretation (a law-based decision instrument). Smith and Tiller (2002) tested the theory using appellate court decisions reviewing the Environmental Protection Agency and found support for the theory.[26]

From a theoretical perspective, we note that criminal sentencing decisions differ from other judicial decisions in important respects. A sentencing hearing provides the judge with a richer set of options than she usually confronts in doctrinal decisions. Many of the previous positive political theory models that assumed a policy continuum over which judges could strategically pinpoint a policy location lacked realism. Many

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[24] 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).

[25] 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).

[26] Joseph L. Smith and Emerson H. Tiller,"The Strategy of Judging: Evidence from Administrative Law", 31 J. Legal Stud. 61 (2002); A separate study by Richard Revesz (1997) that also examined circuit court review of EPA decisions had empirical findings consistent with the basic constructs of the model. Richard L. Revesz, "Environmental Regulation, Ideology, and the D.C. Circuit", 83 Va. L. Rev. 1717 (1997).

doctrinal decisions are "yes"/"no" decisions, or use the status quo as a reversion point if the new policy is not adopted. Sentencing, by contrast, offers more "ranges" or continuums and thus, may allow more strategic choices for a sentencing judge, thereby making a strategic model more realistic.[27]

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 policy preferences regarding criminal sentencing. In assigning preferences, we adopt the conventional wisdom that liberals (Democrats) prefer more lenient sentences for "street" crimes (violent, theft, and drug crimes) than conservatives (Republicans).[28] Conventional wisdom also suggests that Republicans prefer more lenient sentences than Democrats for environmental and white collar crimes than do Democrats. This 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.[29] In 2002, 77% of self-identified Republicans said sentences were not harsh enough compared to 65% of self-identified Democrats.[30] Two-percent of self-identified Republicans said that sentences were too harsh compared to 11% of self-identified Democrats. There is no reason to believe that such widespread partisan differences

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[27] Although the Sentencing Guidelines provided more limits to this discretion than before their adoption in 1987, there remains considerable latitude through the use of adjustments and departure for the sentencing judge to pinpoint her sentencing preferences.

[28] We use the word "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] Sourcebook of Criminal Justice Statistics Online, table 2-50 (2004), available at http://www.albany.edu/sourcebook/1995/pdf/t243.pdf.

[30] Sourcebook of Criminal Justice Statistics, 2002, page 141.

would not reflect themselves among judicial appointees in setting sentences for convicted felons. A considerable amount of research shows ideological differences between Democrat and Republican court appointees (decisions involving environment, labor, etc), particularly at the circuit level.[31]

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. In other words, the circuit court may put limits on what factors can be considered in the particular case that could lead to a longer or shorter prison term on re-sentencing. 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.[32]

Next, we emphasize the role of decision instruments – fact-based adjustments to base offense levels and law-based departures from the sentencing range. District court judges have the power to change the sentencing range through adjustments to base offense levels, or to go outside a recommended sentencing range in the Guidelines Table with a departure. Fact-based adjustments receive less stringent review by the circuit courts and thus allow the sentencing judge considerable leeway in changing the

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[31] See Daniel Pinello, 1999, for a meta-analysis and George, 2001. The controversial Feeney Amendment to the guidelines, which makes downward departures much more difficult, was passed at the behest of congressional Republicans and exposed partisan divides over sentencing practices. For a full discussion of the origins and the particulars of the Feeney Amendment, see the *The Feeney Amendment: Roots and Reactions*, 15 FEDERAL SENTENCING REPORTER (June 2003).

[32] 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.

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 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 reputation 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.[33] In either case, the model predicts substantial deference by the

circuit courts to factual determinations by the district court judges.[34, 35]

　　　　To the extent that adjustments are insufficient to maximize the sentencing judge's

preferences on the length of a prison term, the judge may departure from the Guidelines'

presumptive range resulting from 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

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[33] Although we do not model the Supreme Court into the framework, it could be that the deference level is affected also by the alignment conditions between the Supreme Court, Circuit Court and the district court judge.

[34] 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.

[35] 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 the condition for a future theory of doctrine creation.

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 determinations.[36] 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 next introduce political competition effects and, in particular, the role of political-ideological alignment between the sentencing judges and the overseeing circuit courts. To the extent that an overseeing circuit court is politically aligned with the district court (both courts liberal or both conservative) 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 the two courts are not aligned, however, 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.

To summarize the theory: (1) district and appellate judges have ideological preferences over sentencing (that is, Democrat appointees prefer less prison time for street crimes); (2) sentencing judges adjust prison sentence length based upon the relative political alignment between the sentencing judge and the overseeing circuit court, and (3)

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[36] *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.)

the sentencing judge's use of sentencing departures is dependant upon political alignment with the circuit court – specifically, sentencing judges increase their use of law-based departures (legal determinations) when politically aligned with the circuit court and reduce them when not aligned; by comparison, the use of fact-based adjustments are fairly independent of alignment conditions.

The theory leaves us with the following sets propositions:

Ideology and Political Alignment

- Proposition A-1: Democrat-appointed district court judges give lower prison sentences than 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.

Political Ideology, 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 when politically aligned with the circuit court than when not aligned.

III. Empirical Analysis

The United States Sentencing Commission collects information on every individual sentenced under the Sentencing Guidelines and makes available a public use data file.[37] 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, 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. 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 many individuals, such as offense type, total prison sentence, or demographic variables, the sample was reduced to 406,670.[38] We also eliminated immigration cases

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[37] 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.

[38] 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 also top-coded

because of the widely noted trends in immigration offenses in this time period and other miscellaneous, traffic, and national defense related offenses, leaving a sample size of 365,062.[39]

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.

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 data for calculating political orientation of district court judges. We know from the Sentencing Commission data the district in which an offender was sentenced, and we know the proportion of judges appointed by a Democrat and Republican president on that district's bench. The data on the political composition of the district courts comes from the Federal Judicial Center biographical data on federal judges.[40] We use the political variation within the

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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.

[39] 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).

[40] 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.

district to measure the impact of political ideology on sentencing.[41]   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.   Of course, it is possible that the character of the district may be changed by the proportion of judges on the bench.   For example, local rules and sentencing norms may be determined by judges, and one may wish to keep in step with one's close colleagues.   In other words, adding Democrats or Republicans may change the attitudes of judges of the opposite party as well.   The coefficients should be interpreted with this caveat.

To control for possible age effects, we include the average age of the district court judges as an independent variable.   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.   District dummies are included in every regression and should 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.

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

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[41] 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).

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.[42]

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;

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:

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[42] 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.

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)

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.[43]

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:

$$(1) \text{Total Prison}_{ijt} = \alpha \text{Constant} + \lambda \text{YEAR}_t + \psi \text{DISTRICT}_j + \eta \text{OFFENDER}_{ijt} + \theta \text{OFFTYPE}_{ijt} + \sigma \text{GRID}_{ijt} + \rho \text{AVAGE}_{jt} + \delta \% \text{DEMOCRAT}_{jt} + \text{E}_{ijt}$$

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[43] 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 indication 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.

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. There are some important reasons to examine total prison sentences before turning to the more offense level and departure magnitude. First, it makes our study more comparable to other Guidelines studies (e.g., Mustard, 2001). Second, prison term is the most socially relevant variable since it actually measures the cost to the prisoner (and society). Third, prison sentences are where the full effect of adjustments and departures are revealed. Violent and drug trafficking offenses start at very high base offense levels. Small offense level adjustments can lead to large changes in the minimum sentence (a one unit reduction in offense level reduces the minimum possible sentence by 10% -- about 10 months in the serious crimes we are considering). This is very important if the judge favors a lower sentence.

Because we are using district-level variation on individual data, the standard errors are Huber-White robust and reflect clustering by district. The coefficient of interest is δ, which is interpreted as the effect on prison sentences from increasing the percentage of Democrats on the district bench by 1%.

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 valid, the reported coefficients mimic a dummy variable specification based on individual judge identity. We also note that, because

judges are either Republican or Democrat-appointed, δ 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.

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.[44] There are two ways to control for offense level position on the Sentencing Table (GRID). Models 1 and 2 below condition on final offense level (FOL), while Models 3 through 6 condition on base offense level (BOL). 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 as 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.

In Models 1 and 2, 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, when we condition on final offense level, there are no discernable political effects in sentencing.

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[44] 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.

TABLE 1: TOTAL PRISON SENTENCE IN MONTHS

	Model 1 (Tobit)	Model 2 (Tobit)	Model 3 (Tobit)	Model 4 (Tobit)	Model 5 (OLS)	Model 6 (Tobit)	Model 7 (Tobit)
%DEMOCRAT * 100	-.13 (2.65)		-3.56 (2.83)				
%DEMOCRAT* VIOLENT		-6.41* (3.92)		-8.85** (4.25)	-7.45** (3.94)	-9.45* (5.64)	-9.75* (5.73)
%DEMOCRAT* THEFT		-3.62 (4.44)		-7.62 (5.48)	-3.92 (4.22)	-9.85 (6.12)	-9.71 (8.45)
%DEMOCRAT* DRUG		1.73 (3.29)		-7.12** (3.49)	-6.98** (3.29)	-5.42 (3.94)	-15.00** (6.00)
%DEMOCRAT* RACKETEER		-.59 (5.46)		3.46 (7.14)	1.72 (5.43)	-.72 (.44)	8.29 (11.3)
%DEMOCRAT* PORN		2.98 (4.96)		6.32 (7.13)	-1.60 (5.69)	-10.3 (6.57)	-2.57 (6.52)
%DEMOCRAT* OBSTRUCT		1.22 (4.45)		6.53 (7.13)	9.19 (5.03)	-2.52 (4.73)	-2.57 (6.50)
%DEMOCRAT* CIVILRIGHT		-11.39 (7.86)		-11.69 (14.3)	-8.98 (10.3)	-24.3* (12.3)	-20.05 (17.3)
%DEMOCRAT* ENVIRON		-9.34 (6.25)		1.12 (4.25)	2.15 (4.02)	-1.73 (8.35)	-5.59 (9.53)
%DEMOCRAT* WHITECOL		1.66 (3.22)		6.89* (4.23)	1.82 (3.76)	-.72 (4.24)	3.81 (5.75)
Joint test of %DEMOCRAT Interactions (p-value)		.1572		<.0001	.0006	.0013	.0051
Crime-Specific Linear Time Trends	No	No	No	No	No	Yes	No
Offense Level Control	FOL	FOL	BOL	BOL	BOL	BOL	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 stronger political effects are evident and are 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. Model 4 allows for differing political impacts by crime category, and the results strongly indicate a partisan sentencing effect. Sentence lengths for violent, theft, and drug 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 Republicans and Democrats. 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 next few columns test the robustness of the results obtained in Model 4. Because Tobit models require strong distributional assumptions and are sensitive to unobserved heterogeneity, we use an OLS regression in Model 5 and obtain surprisingly

similar results. Another 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 6 includes crime-specific linear time trends to check for the possibility that our results are conflated with trends for specific crimes, and they 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.

However, the base offense level is determined in a unique way in drug trafficking cases. The quantity and type of drugs at issue determines the base offense level, whereas in general the base offense level is determined 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.[45] Because drug trafficking cases frequently involve broader conspiracies to distribute, the amount of drugs at issue is often in dispute and plays an important role in the sentencing hearing.[46] In addition, prosecutors and defendants can stipulate in a plea

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

[46] 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

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. Column 7 removes the base offense level dummies, but continues to include criminal history dummies. Given the foregoing discussion, we would expect to see the biggest impact on drug crimes. Not surprisingly, the coefficient on %DEMOCRAT*DRUG more than doubles in size, while interactions with violent crime and theft slightly increase.

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).[47]

Political Orientation, Circuit Court 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

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influence over sentencing factors, but *Apprendi* was decided in 2000 and therefore has little effect on our sample. *Id*. at 1160-167

[47] 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.

above. This interaction term (%DEMOCRAT*CIRCDEM) is the marginal effect that

Democratic alignment has on sentencing.

TABLE 2: 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**	-5.55	-6.39*	-5.50	-13.29***	-10.01**	-13.20***	-9.91**
	(3.37)	(3.84)	(3.55)	(3.81)	(4.88)	(4.94)	(4.91)	(4.29)
CIRCDEM		2.14		4.88		4.88		4.90
		(2.05)		(3.29)		(3.29)		(3.12)
%DEMOCRAT *CIRCDEM[b]		-6.14		-8.15**		-13.82**		-14.23**
		(4.02)		(3.96)		(5.83)		(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 2 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.[48] Taking the coefficients at face value and ignoring the CIRCDEM coefficient, the alignment of a Democratic circuit with an all Democrat-appointed district would result in a sentence reduction of nearly 12 months, versus just 5.5 for an unaligned district. [49]

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. In Models 6 and 8, circuit alignment again more than doubles the partisan effect. Ignoring the insignificant CIRCDEM dummy coefficient, an all Democrat-appointed bench in an

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[48] Schanzenbach (2005) found that these judge characteristics did not greatly affect the overall sentence, but in certain cases affected the sentences of minority and female offenders.

[49] The same prison sentence analysis was performed for white collar and environmental crimes for which Republican-appointed judges might be expected to be more lenient than Democrat-appointed judges. When these offenses were analyzed independently, however, partisan differences were not discernable. This may be because there are no partisan differences, or because of smaller sample sizes, lower jail sentences for these crimes in general (making it harder to detect any differences), and less of an impact on sentencing ranges from altering low offense levels. For example, the Sentencing Commission statistics indicate that, during 2001, the average sentence for white collar crime was just over 20 months, while the average sentence for drug and violent crimes was 71.7 and 89.5 months, respectively. U.S. Sentencing Commission, 2001 Sourcebook of Federal Sentencing Statistics 32 fig. E (2001). As discussed below, secular trends toward higher offense level calculations in white collar cases were evident and also conflate the results.

aligned circuit would give roughly 24-month lower sentences, and an all Democrat-appointed bench in an unaligned circuit would give a 10 month lower sentence.[50]

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. 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.

The prison sentence regressions cannot demonstrate that judges are using sentencing instruments strategically. To understand this, we next calculate direct partisan effects on offense level calculations and the effect on prison sentences from departures and adjustments.

Political Orientation, Circuit Court Alignment, and 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, and

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

whether political alignment matters to the calculation. To test these two propositions, we estimate the following equation, taking final offense level as the dependent variable:

$$(2)\text{FOL}_{ijt} = \alpha\text{Constant} + \lambda\text{YEAR}_t + \psi\text{DISTRICT}_j + \eta\text{OFFENDER}_{ijt} + \theta\text{OFFTYPEs}_{ijt} + \sigma\text{BOL}_{ijt}$$
$$+ \sigma\text{CRIMHIST}_{ijt} + \sigma\text{BOL} * \text{CRIMHIST}_{ijt} + \rho\text{AVAGE}_{jt} + \delta\%\text{DEMOCRAT}_{jt} + \text{E}_{ijt}$$

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. To test for circuit court alignment effects, we simply include CIRCDEM and %DEMOCRAT*CIRCDEM in the equation.[51]

Table 3 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 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. In sum, the empirical results are consistent with our theory (Proposition B-1).

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[51] Although the equations are estimated by OLS, given that the dependant variable, final offense level (FOL), is a strictly positive integer, negative binomial regression is arguably more appropriate. Negative binomial regressions yielded the same results, so OLS is presented for ease of interpretation.

TABLE 3: FINAL OFFENSE LEVEL

	Model 1	Model 2	Model 3
%DEMOCRAT	-.45 (.29)		
%DEMOCRAT*VIOLENT		-.49 (.30)	-.32 (.31)
%DEMOCRAT*THEFT		-.74 (.66)	-.74 (.72)
%DEMOCRAT*DRUG		-1.26*** (.35)	-.56* (.31)
%DEMOCRAT*RACKETEER		-.14 (.56)	-.32 (.70)
%DEMOCRAT*PORN		.61 (.60)	-.30 (.50)
%DEMOCRAT*OBSTRUCT		1.32 (1.32)	-1.01 (1.62)
%DEMOCRAT*CIVILRIGHT		-.10 (1.44)	-1.62 (1.24)
%DEMOCRAT*ENVIRON		2.30*** (.68)	1.72** (.78)
%DEMOCRAT*WHITECOL		.84** (.36)	-.054 (.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.

Table 4 adds the political alignment variables. We limit the sample to street crimes (violent, drug, and theft offenses) for which earlier results on total prison time suggested that Democrat-appointees express a desire for lower sentences.

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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 just 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 resulting from such adjustments by running the following regression using only those offenders sentenced for violent, theft, and drug offenses:

$$(3)\ \text{BASECHANGE}_{ijt} = \alpha \text{Constant} + \lambda \text{YEAR}_t + \psi \text{DISTRICT}_j + \eta \text{OFFENDER}_{ijt} + \theta \text{OFFTYPEs}_{ijt}$$
$$+ \sigma \text{BOL}_{ijt} + \sigma \text{CRIMHIST}_{ijt} + \sigma \text{BOL} * \text{CRIMHIST}_{ijt} + \rho \text{AVAGE}_{jt}$$
$$+ \delta \% \text{DEMOCRAT}_{jt} + \text{E}_{ijt}$$

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 analyses cases in which downward departures were granted.[52] In Models 1 and 2 of Table 5, which include all departure cases, Democrats 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 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.

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[52] 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.

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 Ideology, Circuit Court 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.[53]

$$(5)\ \text{FINALCHANG E}_{ijt} = \alpha\text{Constant} + \lambda\text{YEAR}_t + \psi\text{DISTRICT}_j + \eta\text{OFFENDER}_{ijt} + \theta\text{OFFTYPEs}_{ijt}$$
$$+ \sigma\text{BOL}_{ijt} + \sigma\text{CRIMHIST}_{ijt} + \sigma\text{BOL}*\text{CRIMHIST}_{ijt} + \rho\text{AVAGE}_{jt}$$
$$+ \delta\%\text{DEMOCRAT}_{jt} + E_{ijt}$$

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.

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

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[53] 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.

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.

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 addition, all of the partisan effect is concentrated in the circuit alignment variable; there appears to be little or no effect apart from alignment. Ignoring the insignificant coefficients on %DEMOCRAT and CIRCDEM, the coefficient on %DEMOCRAT*CIRCDEM suggests that an all Democrat-appointed bench in a Democrat majority circuit gives 6.5 months lower prison sentences due to departures relative to all other combinations. Of course, this can be stated conversely as well, so that an all Republican bench in a Republican majority circuit gives 6.5 months higher prison sentences. This is 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).

Our simple dummy specification for circuit court alignment provides an easy interpretation, but it is not an ideal proxy for what concerns the district court judge-- probability of reversal. 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 a levels effect in the interaction term, which is hard to interpret. With this in mind, Models 5 and 6 provide a more flexible specification and divide 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. As can be seen, 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 larger downward departures for street crimes.[54]

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 and environmental crimes, but we could not detect any resulting differences in prison time for

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[54] 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 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.

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. While prison sentence regressions conditioned on the final offense level failed to reveal a significant partisan effect in sentencing, large and statistically significant partisan effects were evident when we condition on base offense level -- the condition under which the manipulation of offense level adjustments could be measured.

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 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.

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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)
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
10	6-12	8-14	10-16	15-21	21-27	24-30
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
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

Zone A: Offense Levels 1-8
Zone B: Offense Levels 9-10
Zone C: Offense Levels 11-12
Zone D: Offense Levels 13-43

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