

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

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We present a positive political theory of criminal sentencing and test it using data from the United States Sentencing Commission. Under the U.S. Sentencing Guidelines, judges can use "offense-level adjustments" (fact-based decisionmaking) to lengthen or shorten the Guidelines' presumptive sentences. Judges also can use "departures" from the Guidelines (law-based decisionmaking) to lengthen or shorten sentences. In general, departures are reviewed more strictly than adjustments by circuit (appeals) courts. Our theory predicts that a sentencing judge politically aligned with the circuit court will be more likely to alter sentences through sentencing departures than a judge not so aligned with the circuit; by contrast, our theory predicts that judges can more freely use fact-oriented adjustments to alter sentences, regardless of the circuit court's sentencing policy preferences. The theory's predictions regarding the use of adjustments and departures and the impact of political alignment between higher courts and sentencing judges is largely supported.

1. INTRODUCTION

Positive political theories of judging suggest that much of the policy discretion exercised by judges is guided by the judges' policy preferences, constrained by the prospect of higher court review, and accomplished 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 which may have competing policy preferences.¹ In this article, we construct an "instrument choice"

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positive political theory of criminal sentencing and test it with data from the United States Sentencing Commission. The theory suggests that federal district court judges (1) are influenced by their policy preferences in setting prison length under the United States Sentencing Guidelines;² (2) manipulate the rules and structure of the Sentencing Guidelines to maximize their sentencing preferences; and (3) make sentencing choices in anticipation of the likely response of the overseeing circuit court of appeals.

Under the Sentencing Guidelines, judges may alter the sentencing range for a convicted defendant through a variety of fact and law oriented determinations at the sentencing hearing. The fact-oriented determinations relate to aggravating and mitigating factors set out in the Sentencing Guidelines. If these factors are found to exist, the sentencing judge can make upward or 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 under the Guidelines. As we discuss below, a circuit court of appeals generally reviews the factual findings of the district court with great deference.

In addition to offense level adjustments, judges can choose a more dramatic alternative to lengthen or shorten the presumptive sentence – the district court may “depart” from the Guidelines’ sentencing range altogether. In order to depart, a judge must find that as a matter of law the circumstances are so unusual that the case lies outside the “heartland” of the Guidelines. This determination requires significant legal conclusions about the reach of the Sentencing Guidelines in addition to factual findings. These law-oriented departures allow the district court judge to make significant enhancements or reductions to the calculated sentence; but, as discussed below law-oriented conclusions invite greater scrutiny from circuit courts.

The theory suggests that when the lower and higher courts have similar sentencing preferences, the sentencing judge has the ability to use both adjustments and 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, especially for departure determinations. Consequently, the district court judge relies less on departures to maximize sentencing preferences under these conditions.

The empirical test of our theory suggests that, as predicted: (1) policy preferences (measured by political ideology) matter in sentencing -- liberal judges give different sentences than conservative judges for certain categories of crime; (2) the length of the 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

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¹ For recent Positive Political Theory models focusing on selection of decision instruments, see Spiller and Spitzer (1992); Tiller (1998); and Tiller and Spiller (1999). For empirical support, see Smith and Tiller (2002).

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

selectively use adjustments and departures to enhance or reduce sentences, 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.

2. 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 across defendants via the introduction of binding regulations for calculating prison terms and the introduction of circuit court review of district court sentencing determinations.⁴

The centerpiece of the Guidelines is a 258-box grid called the Sentencing Table, reproduced in Appendix A, 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 conviction. 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 presumptive sentencing range expressed in months (represented as a box in the Sentencing Table). If criminal history and offense level have been properly calculated by the sentencing judge, a sentence within the presumptive range cannot be reversed by the overseeing circuit court.⁶ The calculation of the final offense level is reviewable by the higher court.

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

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.

⁴ 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; 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.

offense level is 27. As the Sentencing Table illustrates, an offense level of 27 with a Criminal History Category of 1 results in a sentencing range of 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.

While the base offense level is set by the crime of conviction (a determination made prior to and separate from the sentencing hearing),⁷ the Guidelines direct the sentencing judge in the post-conviction proceedings to make “adjustments” to the base offense level if the judge finds that certain “specific offense characteristics” listed in the Guidelines – essentially facts constituting aggravating and mitigating circumstances – are present in the case.⁸ For certain crimes, for example, offense level points may be added to base offense levels when a victim sustained permanent bodily injury, when large quantities of cash were stolen, or 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, including: the existence of a vulnerable victim (add 2 to 3 levels);⁹ the convicted defendant’s role in the offense (add or subtract up to 4 levels depending on role);¹⁰ the defendant’s obstruction of justice (add 2 levels);¹¹ and the defendant’s acceptance of responsibility (subtract 2 to 3 levels).¹²

For the most part, determinations of these characteristics are *fact-driven*. If found by the judge to exist, these facts adjust the offense level up or down. The resulting “final offense level,” in combination with the convicted defendant’s criminal history, sets the sentencing range from which the judge may choose a prison term. Although the judge has discretion within the range set by the base offense level, the ability to adjust that offense level up or down with little threat of reversal expands that discretion. Judges can reduce 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.

Judges are not completely unconstrained in making adjustments; in particular, there are a limited number of circumstances under the Guidelines for adjustments and there must be some plausibility in the fact-finding to match with those circumstances. Nonetheless, criminal sentencing scholarship has taken note that the factual circumstances under the Guidelines that lead to adjustments are often vague and allow for considerable discretion by the judge.¹³ Consider, for example, the distinction between

⁷ As discussed in greater detail below, base offense levels in drug crimes are not set entirely by the crime of conviction, but also by quantity of drugs involved.

⁸ 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.”

⁹ U.S.S.G. §§3A1.1-3.

¹⁰ U.S.S.G. §§3B1.1-2.

¹¹ U.S.S.G. §§3C1.1.

¹² U.S.S.G. §§3E1.1.

¹³ See Stith and Cabranes (1998: 91-92).

“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 because the distinction between “minor” and “minimal” is not especially clear. Another 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.¹⁴ Whether the action “significantly impeded” is a determination saturated with discretion. In total, these adjustments can lead to a substantial shift of the presumptive 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, the subsequent sentencing hearing provides the judge an opportunity to exercise her discretion in setting a sentence. At the sentencing hearing, the judge can make additional findings of fact that adjust the plea bargained base offense level upward or downward. For example, the defendant could plead guilty to fraud, but at the 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.¹⁵ 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.¹⁶ 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-oriented adjustments are generally 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

¹⁴ 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.

¹⁵ For these reasons, some have asserted that the most important part of the modern criminal process is the sentencing hearing. *See, e.g.*, Bibas (2001).

¹⁶ For an empirical verification of this phenomenon, see Lacasse and Payne (1999).

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 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.

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 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. ‘Where there are two permissible views of the evidence, the factfinder’s [sentencing judge’s] choice between them cannot be clearly erroneous.’”¹⁹ In sum, district court judges have much discretion in making adjustments.

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.”²⁰

To a much greater extent than adjustment determinations, departures present law-oriented 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 considered by the Sentencing Commission. Circuit courts have both reversed and upheld district court departures that were based, for example, on family history, post-arrest rehabilitation, family responsibility, health, and exemplary military service.²¹ 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 the type of circumstances involved in the case was not addressed by Guideline factors.

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).

²⁰ 18 U.S.C. 3553(b); see also U.S.S.G. 5K2.0 (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, United States Sentencing Commission (2003.)

²¹ See Stith and Cabranes (1998: 100), for examples of departures rejected by circuit courts.

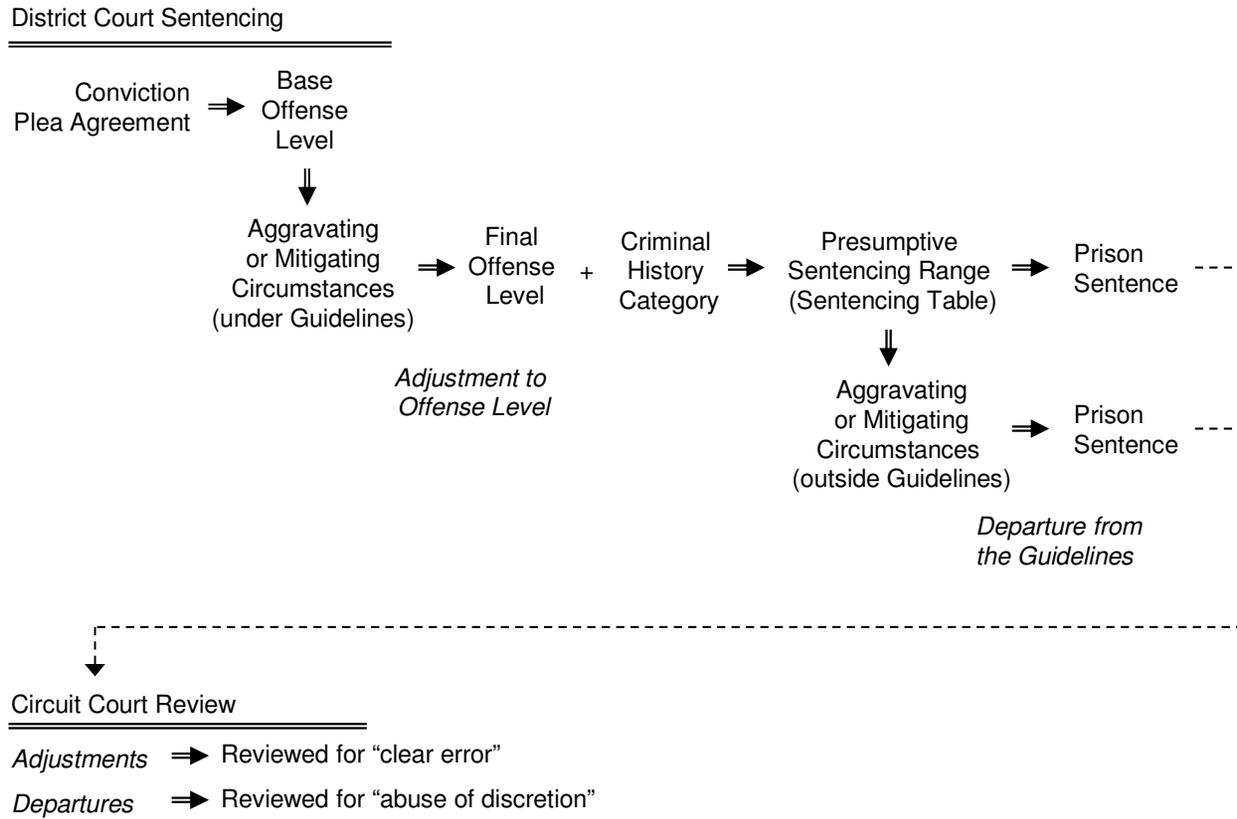


Figure 1. Sentencing Process.

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.²² If the district court judge makes a departure, 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 determinations.

3. POSITIVE POLITICAL THEORY OF CRIMINAL SENTENCING

The theory we present here builds on the growing “judicial hierarchy” scholarship in Law and Positive Political Theory.²³ 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 attempted to bring analyses of traditional legal structures such as decision instruments and doctrines into the strategic model (Spiller and Spitzer, 1992; Cross and Tiller, 1998; Tiller and Spiller, 1999),²⁴ and our model here is consistent with that broader effort.

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 and others preferring shorter sentences for those same classes of crimes.²⁵

²² 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.

²³ See Songer et al (1994); McNollgast (1995), Cameron et al. (2000). Earlier work focused on Congress and its interactions with regulatory agencies and courts. See, McNollgast (1987), McNollgast (1989); Gely and Spiller (1990); Spiller (1992); Spiller and Tiller (1997).

²⁴ For a discussion of the difficulties, and opportunities, in modeling legal doctrine in a positive political theory, see Tiller and Cross (2006).

²⁵ In addition to having preferences over sentencing outcomes, we assume that district court judges, for various reasons, do not want to be reversed. 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

Next, we emphasize the role of decision instruments – fact-oriented adjustments to base offense levels and law-oriented departures from the presumptive sentencing range. 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 details not easily observable by the circuit courts on review and not worth much investment given the low precedence value of the case -- 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, out of concern for reputation or a sincere belief in the limits of its role, may 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.^{26, 27}

To the extent that adjustments are insufficient to maximize the sentencing judge’s preferences on the length of a prison term (due perhaps to the inelastic nature of the facts at hand or the limited Guideline factors plausibly available given the circumstances of the case), the judge may depart from the Guidelines’ presumptive sentencing range that resulted from offense level and criminal history calculations. As discussed, departures are more susceptible to review and reversal by the circuit court because they introduce a legal determination in addition to any factual findings. Legal determinations may carry high policy impact if they result in precedent and reach well beyond the instant case. Higher courts manage precedents for lower court obedience and thus care very much about such legal conclusions. 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 not as demanding as *de novo* review, but still more

reputation benefits from a reversal. For example, a Democrat appointed judge reversed by a Republican majority circuit court could improve the chances that the Democrat appointed judge could be appointed to an even higher court. But sentencing decisions are not the typical high profile decision on which a judge might want to impress a policy maker who holds appointment powers.

²⁶ 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 and type of factual categories for which an adjustment can be made.

²⁷ 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.

inviting than the clear error standard, mostly because of the law-oriented nature of the review. In addition, the Guidelines themselves discourage departures and emphasize that they should be rare events. Under such a legal framework, it may be easy for a circuit court so inclined to find that a sentencing judge abused her discretion.²⁸ These conditions suggest that the sentencing judge is at much greater risk of reversal when a departure from the presumptive 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. 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 have different preferences, the calculus changes. Adjustments will still be reviewed with deference by the circuit court of appeal because such deference is generally accorded to fact-oriented decisions. However, the sentencing judge bears a greater risk in making a law-oriented departure because (1) the circuit court's review costs are lower relative to the payoff from a legal precedent, and (2) the review doctrine – *abuse of discretion*– justifies a close review of the lower court's law-oriented conclusions. In short, the reversal risks increase.²⁹

To summarize the theory: (1) sentencing judges and the reviewing circuit courts have preferences over sentencing outcomes; (2) sentencing judges set prison sentence length based in part upon the amount of sentencing preference alignment between the sentencing judge and the overseeing circuit court, and (3) the sentencing judge's use of departures is dependant upon alignment of sentencing preferences with the circuit court; in contrast, the use of fact-oriented adjustments to enhance or shorten prison length are fairly independent of alignment.

4. EMPIRICAL ANALYSIS

4.1 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. Conventional wisdom suggests that liberals (Democrat appointees) prefer more lenient sentences than do conservatives (Republican appointees) for “street” crimes (violent, theft, and drug crimes).³⁰ Conventional wisdom also

²⁸ See *infra* note 20.

²⁹ 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.

³⁰ 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%

suggests that Republican appointees prefer more lenient sentences than Democrat appointees for environmental and white collar crimes.³¹ Our empirical analysis below tests this conventional wisdom in the context of strategic judicial behavior. For ease of exposition, we denote a Republican appointed district court judge as “Republican judge”, and a Democrat appointed district court judge as “Democrat judge.” With respect to circuit courts, we denote a circuit on which a majority of the appointees are Republican appointees a “Republican circuit”, and a circuit on which a majority of the appointees are Democrat appointees a “Democrat circuit.”

We now set out the testable propositions relating to judicial strategies in sentencing for street crimes:

Sentencing Preferences, Prison Term, and Political Alignment

- Proposition A-1: Democrat judges give lower prison sentences relative to Republican judges for street crimes.
- Proposition A-2: Democrat judges give lower prison sentences for street crimes when politically aligned with the circuit court than when not aligned. Conversely, Republican judges give longer sentences for street crimes when politically aligned with the circuit court than when not aligned.

Sentencing Preferences, Sentencing Instruments, and Political Alignment

- Proposition B-1: Democrat judges calculate lower adjusted offense levels than Republican judges for street crimes.

were sentenced for fraud, and 8.5% for immigration offenses. 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).

³¹ 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> (viewed January 27, 2006). 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 between Democrat and Republican court appointees (decisions involving environment, labor, etc), particularly at the circuit level. See Pinello (1999) for a meta-analysis and George (2001).

- Proposition B-2: Democrat judges calculate lower adjusted offense levels than Republican judges for street crimes *independent of whether the sentencing judge is politically aligned with the circuit court*.
- Proposition B-3: Democrat judges grant larger downward departures from the presumptive sentencing range for street crimes when politically aligned with the circuit court than when not aligned. Conversely, Republican judges impose 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 judges, when compared to Democrat judges, would seek lower prison sentences through the use of adjustments and departures). However, as explained more fully below, lower presumptive sentencing ranges (resulting in less sentencing variance) in the Sentencing Guidelines for environmental and white collar crimes make empirical measurement of these propositions less reliable. Thus, we focus mainly on street crimes, which make up the largest part of the case sample.

4.2 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.³² 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 2001.³³ 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 406,670.³⁴ We eliminated immigration cases

³² 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>.

³³ Note our data are prior to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which made the Guidelines "advisory" and directed circuit courts to review sentences for reasonableness in light of the Guidelines.

³⁴ 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

because of the widely noted trends in immigration offenses in this time period.³⁵ We also excluded other miscellaneous, traffic, and national defense related offenses, leaving a sample size of 365,062.

Table B1 in Appendix B 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 (53%) of cases are adjusted to levels below the base level, and 38% are adjusted to levels above the base level. Judge-induced departures occurred in approximately 11% of the cases; 10% of them are downward departures, less than 1% are upward departures.³⁶

Ideally, we would match the sentencing judge to each sentencing outcome, but the sentencing data do not identify the sentencing judge. Therefore, we rely on district-level variation in political party affiliations of judges 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 or Republican president on that district's bench.³⁷ The data on the political composition of the district courts comes from the Federal Judicial Center biographical data on federal judges.³⁸ 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.³⁹ District dummies (DISTRICT) are included in every regression to capture any district-specific effects. Including district

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.

³⁵ 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).

³⁶ By "judge-induced" departures, we mean departures that are not dependent on the prosecution requesting a departure based on the defendant's substantial assistance to the prosecution.

³⁷ Note that this is the typical convention used in political science. See Pinello (1999) and Sunstein et al (2004).

³⁸ History of the Federal Judiciary, available at <http://www.fjc.gov> (last viewed January 27, 2006). 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 (2001) 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.

³⁹ 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.

dummies means that we identify the political effects 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 sentence (Democrat circuit), and 0 if majority is Republican in the year of the sentence (Republican circuit). In some specifications, we will allow CIRCDEM to take on a more flexible form by further subdividing it.⁴⁰

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:

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

⁴⁰ 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.

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 B2 in Appendix B 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 judges being tougher on street crimes than Democrat judges, 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 most of these areas is less clear; but we continue to include them in the analysis as an initial matter.

We also enter dummy variables for year of sentencing (YEAR). 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.⁴¹

4.3 Results

4.3.1 Sentencing Preferences (by Political Orientation) and Prison Term Length

We first consider generally whether Democrat-appointed district court judges give lower prison sentences than Republican-appointed judges. If judges are selectively using sentencing instruments to lengthen or shorten sentences, then we should detect differences in the actual prison terms imposed by Democrat and Republican judges. For prison term length, we estimate the following equation:

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

where *i* indexes individual sentenced, *j* indexes district, and *t* indexes year.

⁴¹ 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.

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 δ , which is interpreted as the effect on prison sentences from increasing the percentage of Democrat judges on the district bench by 1%. Because judges are either Republican or Democrat-appointed, δ 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 Democrat bench on sentencing compared to an entirely Republican bench. If our identification strategy is ideal, 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.⁴² 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, when we condition on final offense level, there are no discernable political effects in sentencing.

⁴² 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. Differences in Total Prison Sentence (in Months)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7
%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 Interactions (p-value)		.1572		<.0001	.0013		.0051
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. Regressions are Tobit. 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 these tobit specifications, offense levels are controlled for via a fifth-order polynomial in offense level.

Our theory suggests, however, that the final offense level is not exogenously given; conditioning on final offense level is problematic because it removes from the analysis the discretion that judges exercise through offense level adjustments. Rather than rely on final offense level, then, Models 3 through 5 condition on the base offense level (BOL), the offense level existing prior to any adjustments by the sentencing judge. 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. These assumptions are defensible. The base offense level is determined by the crime of conviction, it is set by the Sentencing Guidelines, and is taken by the judge as given at the sentencing hearing. Consistent with our theory, when we condition only on base offense level strong political-ideological 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 judges 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 judges compared to Republican 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 judges. We also note that the interaction between %DEMOCRAT and white collar crime, while not significant at the 5% level, now has a large positive coefficient. The joint test of the %DEMOCRAT/offense type interactions is highly significant (p-value <.0001), indicating strong partisan differences across categories. The results are strongest in the case of street crimes and white collar crimes, which together comprise nearly 95% of the sample.⁴³

The next few columns test the robustness of the results obtained in Models 3 and 4. A possible concern is that secular changes in sentencing practices occurred over the 1990s and were simply correlated with the increasing proportion of Democrat judges 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 (although the weak white collar crime effect from before entirely disappears).

A final concern is that conditioning on the base offense level may cause us to *understate* the political effects. The base offense level may be influenced by the charges

⁴³ Consistent with these results, Boylan (2004) finds evidence suggesting that judges retired earlier after the Guidelines (presumably because of a distaste for them). Some of his results indicate that this effect was stronger for Democrat judges. In contrast, another study of district court judges found little in the way of political effects in civil rights civil cases (Ashenfelter et al. 1995). Likewise, Schanzenbach (2005) finds no political effects on racial or sex disparities in prison sentences. The empirical study presented here is comparatively nuanced, focusing on serious crimes in which small adjustments to offense levels may greatly impact final sentences.

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 addition, 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.⁴⁴ 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.⁴⁵ 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 (and although the judge need not abide by the stipulation, it is likely to be highly influential).

In unreported regressions, we examined directly whether or not the base offense level is correlated with the political composition of the district court and did not detect a correlation. Columns 6 and 7 also address this point by removing the base offense level dummies. In principle, as long as our variable of interest, %DEMOCRAT, varies exogenously, we need not condition the regressions on base offense level. Column 6 groups all crime categories, and the coefficient on %DEMOCRAT is almost statistically significant (the p-value was .069). Column 7 allows varying impact by individual crime category. Given the foregoing discussion, we would expect to see the biggest change in sentences for drug crimes because adjustment calculations are taking place both in the initial base offense level and the final offense level calculation (whereas for most other crimes, adjustments are calculated only into the final offense level). 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. In sum, the results suggest that any bias from controlling for base offense level is toward zero; when we removed the base offense level control altogether, the size and significance of the %DEMOCRAT interactions increased. This is not surprising. The more instruments or decision stages under the judge's discretion, the larger should be the observed political effects.

The conclusion we draw from this analysis of prison term length 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 and Propositions A-1 and B-1 above.

⁴⁴ This is widely recognized. For a discussion, see *Blakely v. Washington*, 124 S.Ct. 2531, 2546 (J. O'Connor, dissenting) (2004).

⁴⁵ For a discussion, see Bibas (2001; 1160-67). 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.

4.3.2 Sentencing Preferences and Offense Level Adjustments

The above analysis focused on prison term length. We now test more directly whether Democrat judges calculate different (lower) final offense levels than Republican judges with respect to street crimes (drug, violent, theft crimes) (Proposition B-1). To test this proposition, we estimate the following equation, taking final offense level as the dependent variable:

$$\begin{aligned}
 FOL_{ijt} = & \alpha \text{Constant} + \lambda \text{YEAR}_t + \psi \text{DISTRICT}_j + \eta \text{OFFENDER}_{ijt} + \theta \text{OFFTYPES}_{ijt} \\
 & + \sigma \text{BOL}_{ijt} + \sigma \text{CRIMHIST}_{ijt} + \sigma \text{BOL} * \text{CRIMHIST}_{ijt} \\
 & + \rho \text{AVAGE}_{jt} + \delta \% \text{DEMOCRAT}_{jt} + E_{ijt}
 \end{aligned}
 \tag{2}$$

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 for all offenses combined as well as for offenses by category. In Model 1, the coefficient on %DEMOCRAT implies that Democrat judges would calculate .45 lower final offense levels on average for all combined offenses, although the result is not statistically significant.

Table 2. Adjustments to Base Offense Level

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

N=365,062. Regressions are OLS. 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. Standard errors in parentheses.

Model 2 allows varying impacts by offense category, and a clearer picture is revealed. Democrat judges calculate higher offense levels for white collar and environmental crimes, and generally lower offense levels for street crimes, than do Republican judges (the result for drug crimes is independently significant, and the signs for violent and theft crimes are as expected). Again, the test of joint significance of %DEMOCRAT interactions 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. Thus, the empirical results are consistent with our theory and Proposition B-1 above.

In sum, the prison term and offense level results for street crimes (drug, violent, theft) conform to both theory and conventional wisdom. Democrat judges give lower, and Republican judges higher, sentences for these crimes and do so in part through offense level calculations rather than merely choosing different extremes within the presumptive sentencing range. Fact-oriented adjustments -- unlikely to be reviewed strictly by the circuit courts -- are key to district judges realizing their assumed sentencing policy preferences for street crimes.

The results for white collar crime, while sometimes conforming to our theory, appear weak and are sensitive to time trends in both the offense level regressions and prison term length regressions (Table 1). 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 in the prison sentence regressions 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 28.⁴⁶ 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. These remaining categories combined are under 6% of the sample. Moreover, conventional wisdom is a weaker guide 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

⁴⁶ The same issues are true for environmental crimes for which the average sentence was only 4.5 months.

practical reasons, then, we focus on street crimes for the remaining analysis.⁴⁷ These crimes comprise 65% of the sample and over 91% of prison time meted out.

4.3.3 Political Alignment and Prison Term Length

Next we test whether Democrat judges give lower prison sentences for street crimes when politically aligned with the circuit court than when not aligned (Proposition A-2). We consider circuit alignment effects by including a dummy, CIRCDEM, equal to one when the circuit court is a Democrat circuit and zero when the circuit is a Republican circuit.⁴⁸ We then interact this dummy with %DEMOCRAT and re-estimate equation 1 above for prison term length. This interaction term (%DEMOCRAT*CIRCDEM) plus CIRCDEM is the effect of aligning a Democratic judge with a Democrat circuit.

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 judge would issue a prison sentence for street crimes roughly 7 months shorter than would a Republican 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 a Democrat judge 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 there are no offense level controls in Models 5 through 8. The relative effect of alignment remains; in Models 6 and 8, circuit alignment roughly doubles the partisan effect.⁴⁹ An all Democrat bench in a Democratic circuit would give roughly 19-month lower sentences relative to an all Republican bench in a Republican circuit (the excluded category), and an all Democrat bench in an unaligned circuit would give 10 month lower sentences relative to an all Republican bench in a Republican circuit. The results support the theory and Proposition A-2.⁵⁰

⁴⁷ Comparable analysis for white collar crimes yielded statistically insignificant results or results that were highly sensitive to time trends.

⁴⁸ 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.

⁴⁹ Unreported 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 of Democratic judges anyway, and they were not individually significant while %DEMOCRAT remained statistically significant. This is consistent with Schanzenbach (2005).

⁵⁰ Note that there is no statistically significant difference in moving a Republican judge from a Democratic circuit to a Republican circuit. We explore this result in more detail below.

Table 3. Political Alignment and Prison Term (in Months)
(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

N=238,299. Regressions are OLS. 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. Standard errors in parentheses.

In sum, the prison sentence regressions are strong evidence that there are sizeable partisan differences in sentencing. Democrat judges on average sentence street crime offenders to terms between 10% and 20% lower than Republican judges, 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 judges may be much larger. Another important result is that partisan effects are amplified when there is circuit court alignment.

4.3.4. Political Alignment and Offense Level Adjustments

The prison term length regressions above do not test directly whether judges are using sentencing instruments strategically with respect to the prospect of higher court review because they do not separate the effects of departures and adjustments. Thus, we next calculate political alignment effects on offense level calculations for street crimes. Table 4 adds the political alignment variables to the offense-level regressions reported in Table 2 for street crimes.

Table 4. Political Alignment and Adjustments
(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. Regressions are OLS. 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. Standard errors in parentheses.

The %DEMOCRAT coefficient in Model 1 is negative and significant at (barely) the 5% level. This suggests that for street crimes Democrat judges calculate lower final offense levels -- that is, they make more downward adjustments to the base offense level -- than do Republican judges. 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 relative to the value for any precedent effects. 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 any effect of adjustments to the base offense level under political alignment conditions, we consider the months change in prison sentence for street crimes resulting from such adjustments as follows:

$$\begin{aligned} \text{BASECHANGE}_{ijt} = & \alpha \text{Constant} + \lambda \text{YEAR}_t + \psi \text{DISTRICT}_j + \eta \text{OFFENDER}_{ijt} \\ & + \theta \text{OFFTYPE}_{sijt} + \sigma \text{BOL}_{ijt} + \sigma \text{CRIMHIST}_{ijt} + \sigma \text{BOL} * \text{CRIMHIST}_{ijt} \\ & + \rho \text{AVAGE}_{jt} + \delta \% \text{DEMOCRAT}_{jt} + E_{ijt} \end{aligned} \quad (3)$$

BASECHANGE is the difference between the final prison sentence (the sentence after all adjustments and departures have been applied) and the minimum sentence permitted by the *base* offense level/criminal history combination in the Sentencing Table. 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. In Models 1 and 2 of Table 5, which include all departure cases, Democrat judges prefer lighter sentences. The results are fairly weak and consequently the importance of alignment is unclear.

Table 5: Political Alignment, Adjustments, and Prison Term (Violent, Drug, and Theft Offenses)

	Model 1	Model 2	Model 3	Model 4	Model 5	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-assist depts.	No sub-assist 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

Regressions are OLS. 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. Standard errors in parentheses.

Models 3 and 4 of Table 5 exclude cases in which a substantial assistance departure was granted.⁵¹ A strong partisan effect is now evident in Model 3. In Model 4, the coefficient on %DEMOCRAT*CIRCDEM is insignificant and the %DEMOCRAT coefficient hardly changes from that of Model 3. In fact, taking the coefficients as given, the marginal effect of alignment is zero (the CIRCDEM coefficient and the %DEMOCRAT*CIRCDEM cancel out). In Models 5 and 6, we exclude cases in which any departure was granted, which means that changes in prison sentences come entirely from offense level adjustments, and nearly identical results are obtained.

Overall, the %DEMOCRAT coefficients in Table 5 indicate that sentences by Democrat judges relative to Republican judges are seven months less 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.

4.3.5 Political Alignment, Departures and Prison Term

We now consider whether Democrat-appointed district court judges grant larger downward departures from the presumptive 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.⁵²

$$\begin{aligned} \text{FINALCHANG } E_{ijt} = & \alpha \text{Constant} + \lambda \text{YEAR}_t + \psi \text{DISTRICT}_j + \eta \text{OFFENDER}_{ijt} \\ & + \theta \text{OFFTYPE}_{ijt} + \sigma \text{BOL}_{ijt} + \sigma \text{CRIMHIST}_{ijt} + \sigma \text{BOL} * \text{CRIMHIST}_{ijt} \quad (4) \\ & + \rho \text{AVAGE}_{jt} + \delta \% \text{DEMOCRAT}_{jt} + E_{ijt} \end{aligned}$$

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

⁵¹ Prosecutors have significant control over sentences under these departures, which reduce sentences based on the provision of information concerning other crimes.

⁵² We also estimated probits on the likelihood of a downward departure being granted, but failed to find any significant effects. 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. In other words, absent alignment, there are no statistically significant differences between Republican and Democrat judges. When we add alignment as a consideration, differences clearly emerge and are due entirely to alignment.

If we take the point estimates of Model 2 as given, we see that the magnitude of the alignment effect is plausible and similar to the alignment effects estimated in Table 3. In particular, placing a Democrat judge in a Democrat circuit reduces sentences by 5.5 months (this difference was significant at the .01 level and is simply calculated by summing CIRCDEM and the interaction term). Thus, as our theory predicts, Democrat judges are freer to make use of the departure instrument in a Democratic circuit.

On the other hand, there appears to be no effect of alignment on Republican judges (a similar result obtained in Table 3). The CIRCDEM coefficient is small, statistically insignificant, and positive. 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 judges. 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 is one reason why there are few upward departures). Finally, upward departures are perhaps more risky than downward departures because they almost certainly will be appealed by defendants.

Models 3 and 4 remove substantial assistance downward departures as a check for robustness. 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 slightly stronger than before). In this case, Democrat judges in a Democrat circuit reduce sentences by 3 months relative to Democrats in a Republican circuit (significant at the .053 level).⁵³

⁵³ As a final note, in both Models 2 and 4 moving from an all Republican judge in a Republican circuit to the opposite, a Democratic judge in a Democrat circuit, decreases sentences by about 5 months. This difference was significant at the .052 level in Model 2 and the .011 level in Model 4. The Democratic judge-Democrat circuit combination was also significantly different from a Republican judge in a Democrat circuit at less than the 1% level in both models. In short, the only measurable differences are between aligned Democrat judges and circuits and all other combinations.

Table 6: Political Alignment, Departures, and Prison Term
(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 5 and 6 test the robustness of these results, by using a more flexible specification in which we divide the circuit court dummies into four categories: 0-24%, 25-49%, 50-74%, and 75-100% Democrat judges, with 0 to 25% being the excluded category.⁵⁴ These categories suggest varying levels of alignment with the circuit court. The coefficients are not independently significant (though they are jointly 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 Democrat judges 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 under the theory.

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 upward departures. It appears that Democrat judges in Democrat circuits are granting larger downward departures for street crimes than are Democrat judges in Republican circuits, or Republican judges in any type of circuit.⁵⁵ This could mean that Democrat judges are granting downward departures when they should not (during instances of alignment) or it may mean that Republican judges are not granting downward departures when they should (or both). In any case, alignment matters, and matters differently, for Republican and Democrat judges.

5. CONCLUSION

In spite of the U.S. Sentencing Guidelines, significant disparities in the sentencing of federal criminal defendants remain. Much of the disparity can be explained by the differing sentencing preferences among judges associated with partisan identifications (i.e., the political party of the appointing president). We found that Democrat appointed judges and Republican appointed judges gave different sentences – Republicans longer, Democrats shorter – for “street crimes” (violent, theft and drug crimes). There was some, although much weaker, evidence that Democrat appointees preferred longer sentences than Republican appointees for white collar and environmental crimes.

Our positive political theory of criminal sentencing suggested how fact and law-oriented decision instruments – adjustments and departures associated with the U.S. Sentencing Guidelines – were used by judges to maximize their sentencing policy

⁵⁴ 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.

⁵⁵ 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.

preferences. Our theory suggested that sentencing judges mask much of their sentencing discretion through adjustments to the offense level -- a fact-driven process of calculating a final offense level which, in combination with the defendant's criminal history, sets a presumptive sentencing range within which the judge can select a prison term. In addition to adjustments, judges can lengthen or shorten sentences by making the law-oriented conclusion that there are facts and circumstances to the case that are not covered by the Sentencing Guidelines. This allows the judge to go outside the presumptive sentencing range. The results of our empirical analysis found, consistent with the theory, that significant differences in sentencing were accomplished through these instruments.

Key to our theory is the political relationship between the sentencing judge and the overseeing circuit court. We hypothesized that adjustments could be made fairly independent of political alignment between the sentencing judge and the overseeing circuit court because circuit courts would be less likely to review decision instruments driven primarily by fact-finding where little precedent value could be extracted. By contrast, we hypothesized that political alignment between the sentencing judge and the circuit court would be important for making departures from the presumptive sentencing range because that decision encompassed a significant law-oriented conclusion that the Sentencing Guidelines did not cover the type of circumstances at issue. The results of our empirical analysis were consistent with the theory. Both Republican and Democrat appointed judges appeared to use adjustment calculations with little regard to the political orientation of the overseeing circuit court. For departures, however, political alignment appeared to be a significant determinant of whether to use a departure from the Sentencing Guidelines, at least for Democrat appointees in Democrat controlled circuits. Democrat appointees gave larger downward departures for street crimes when under Democrat controlled circuits than when under Republican controlled circuits. In sum, the positive political theory of criminal sentencing was well supported by the empirical results.

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Strategic Judging Under the United States Sentencing Guidelines

Appendix A:

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

	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

	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	Life	Life	Life	Life	life	Life

Appendix B:

Table B1. Means and Proportions

Variable	Mean Number/Proportion of Sentenced Offenders in Sample	Standard Errors
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	5.05
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	.175
N	365,066	

Table B2. 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