CONSTRAINED JUSTICE: INVESTIGATING THE INFLUENCE OF THE U.S. COURTS OF APPEALS ON DISTRICT COURT SENTENCING BEHAVIOR

by

WILLIAM LEE GILLESPIE

(Under the Direction of SUSAN BRODIE HAIRE)

ABSTRACT

Employing principal agent theory as a heuristic, I examine whether the U.S. Courts of Appeals influence the exercise of judicial discretion at the district court level in sentencing decisions, specifically focusing on downward departures from the U.S. Sentencing Guidelines. The results of the legal analysis indicate that, prior to *Koon v. U.S,*. 518 U.S. 81 (1996), decisions of the U.S. Courts of Appeals provided meaningful guidance to district courts regarding the U.S. Sentencing Guidelines. After the *Koon* decision, the further development of sentencing caselaw on departures by the Courts of Appeals slowed.

The results of the aggregate analysis of federal judicial district departure rates in the 1990's indicated that an increase in the percentage of judges appointed by Democrats at the circuit or district level increased the frequency with which downward departures were granted at the district level. The aggregate analysis also suggests that the *Koon* decision contributed to more frequent downward departures being granted by district court judges in years after the decision. Still, downward departures were less likely in districts characterized by high crime rates and dockets

dominated by drug cases. A case level analysis of how appellate court treat lower court decisions to deny departures, indicates that "pro-defendant" decisions were more likely in panels made up of judges appointed by Democratic presidents. Sentencing appeals by criminal defendants were less likely to succeed when a female judge participated in making the panel decision. In addition, minority defendants were less likely to prevail when appealing the sentencing decision of the trial court. Thus, the partisan composition of the lower courts affects sentencing even under the guidelines but other factors matter as well.

INDEX WORDS: Sentencing, U.S. Sentencing Guidelines, Appellate Review, U.S. Courts of Appeals, *Koon v. U.S.*, downward departures, U.S. District Courts.

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WILLIAM LEE GILLESPIE

B.S., Arkansas State University, 1986

M.A., University of Arkansas, 1997

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WILLIAM LEE GILLESPIE

Major Professor:	Susan B. Haire
Committee:	Susette M. Talarico Jeffrey L. Yates M.V. Hood III

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
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DEDICATION

To my wife Pamela, my parents William and Myrna, and my in-laws Dean and Barbara, and our companion animals, Bailey and Princess, for your continued love, encouragement, and support in all of my endeavors.

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Chapter 1

Introduction:

Just how much authority should judges possess is an old political and legal question that predates the formation of the United States. Some prefer to maximize an individual judge's decision making ability and denounce attempts to limit judicial discretion as threatening judicial independence. Others believe that the judiciary, like any other branch of government, should be subject to constraints on its behavior. While the former view has often prevailed on many constitutional questions, the latter view has prevailed for questions surrounding decisions to punish criminal offenders.

Congress and the judiciary, not surprisingly, often have divergent views on how much discretion federal judges should possess. At times, Congress chooses to grant federal judges' more leeway on such matters as broadening the standing to sue, hearing certain appeals, or creating new rights for the judiciary to enforce. At other times, Congress will circumscribe and reduce the amount of discretion that a judge possesses.[1] In one such instance, Congress recently acted to curtail judicial discretion to sentence criminals by creating statutory minimum punishments and federal sentencing guidelines.

Trial judges have accepted that sentencing statutes by legislative bodies should be held valid unless constitutionally infirm, but as a practical matter, most trial judges believe that broad sentencing discretion should be preserved because they feel that the trial judge has the wherewithal to make the best decision on how to punish an individual (Kress 1980, 9). The sentencing judge can possess all of the necessary facts to tailor sentences to an individual offender. Consequently, judges feel they are in the best position to adjust a sentence to fit the individual offender. Congress, on the other hand, faces demands from the public that certain activities be illegal and punished. When

[1] While it is somewhat rare for the executive branch to be able to circumscribe a federal judge's discretion, the recent controversy over military tribunals trying suspects and other national security issues provide some examples.

some are granted lenient (or too harsh) a sentence, public pressure builds to restrict the amount of discretion available to judges to avoid future "mistakes" (Tonry 1996). Whereas Congress provided some relatively detailed sentences for some offenses, the Legislature generally lacks the institutional capacity to study and adjust sentencing laws except on an ad-hoc basis.

Before the passage of the Sentencing Reform Act, federal judges possessed broad discretion in the sentencing phase because Congress set broad ranges of potential sentence length and also allowed judges to sentence offenders to probation for a number of offenses[2]. In this practice, the U.S. government was not alone. State governments also tended to use indefinite sentencing because the predominate paradigm in offender sentencing emphasized the rehabilitation aspect over incapacitation and just deserts.[3] With offender rehabilitation the chief goal of the criminal justice system, judges along with other skilled professionals such as psychiatrists, psychologists, correctional officers, and parole commissioners would adjust the indefinite sentence to fit the individual offender's circumstances (Frankel 1973; O'Donnell, Churgin, and Curtis; 1977; Kress 1980; Knapp and Hauptly 1989; Tonry 1996; and Stith and Cabranes 1998). Those proving incorrigible would still be incapacitated because they would not get parole whereas those believed to be rehabilitated would be released. Under this system, appellate review of sentences (other than death sentences) was chiefly limited to cases in which a judge sentenced beyond the statutory limits or a judge disclosed illegitimate reasons for a particular sentence. Thus, beyond guilt and innocence, appellate courts had very little to do with the review of sentences for those found guilty.

The Sentencing Reform Act of 1984 and the subsequent Sentencing Guidelines dramatically changed how federal district court judges rendered sentences. Under this paradigm shift, the U.S.

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[2] Judge Irving Kaufman of the Second Circuit of the U.S. Courts of Appeal noted in 1962, "At present the United States is the only nation in the free world where one judge can determine conclusively, decisively, and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." (Kaufman 1962, 260-1).

[3] Just deserts means that society has a moral imperative to punitively punish those breaking the law while incapacitation entails locking up someone until they are no longer a threat to society.

Sentencing Commission sets sentences for a particular offense with a maximum variance of 25%, 28 U.S.C. § 994 (b)(2). The past criminal history of the offender and the seriousness of the current offense are employed as the primary factors in sentencing under the guidelines. These factors provide two axes for a numerical grid that mandate longer sentences as the number of previous crimes by the offender and the severity of the current offense increases. While trial judges are allowed to set a sentence outside of the guidelines (either higher or lower), they must state the reason(s). Appellate courts can review this departure using U.S. Sentencing Commission rules that categorize departure reasons as encouraged, discouraged, neutral, prohibited, or not considered by the Commission.[4] Congress was silent on what standard of review the appellate courts should apply, but both the defendant and the prosecutor have a statutory right to appeal the sentence rendered by the district court judge to the appropriate circuit court of appeals.

The present sentencing process begins with the defendant either being found guilty at trial or pleading guilty. Next, the prosecutor can make a motion that the defendant rendered significant assistance to prosecutors and should be given a lighter sentence. This is the most common type of departure. After guilt is established, the U.S. Probation Office prepares a pre-sentencing report on the particular offender and attempts to ascertain any prior offenses, including those where the defendant was merely charged but not convicted. The probation officer, who acts as a fact finder for the district judge, gathers the relevant facts for sentencing but also investigates circumstances that might warrant a departure. This report serves two purposes: it frees the judge's time so that sentencing hearings can be compressed, and it gives appellate courts considerable factual information that can be used to review whether a sentence was appropriate. Next, the defense can make a motion for a departure based on whatever circumstances might warrant lesser punishment.

[4] *Koon* v. *United States,* 518 U.S. 81 (1996), explicitly used this format to classify the different reasons for appellate review of district court sentencing departures following the reasoning of Breyer's 1993 opinion as Chief Judge of the 1st Circuit in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993).

The district court judge can then grant the departure and issue a sentence outside of the 25% variance range permitted for sentencing within the guidelines. If a departure occurs, the sentence is usually more lenient (a downward departure), although a harsher sentence (an upward departure) is possible. To permit adequate review of this departure, the judge is required to state the reason(s) for granting the departure, and either party can appeal this decision. Thus, the new system drastically curtails the previous discretion of the sentencing judge by creating an adequate record for review and by limiting discretion to relatively narrow sentence ranges. Not surprisingly, federal district court judges resented the loss of authority from the guidelines (see Tonry 1996; Sisk, Heise, and Morriss 1998; Stith and Cabranes 1998).

In May 2003, a recent controversy erupted over unrelated provisions included in the bill that established a National Amber Alert law. Certain provisions in the law (referred to as the "Feeney Amendment") direct the U.S. Sentencing Commission to pass rule changes to reduce the number of downward departures granted. First, the amendment overturns the Supreme Court's interpretation of the federal guidelines in *Koon v. U.S.* (1996) by establishing a *de novo* standard of appellate review of sentencing departures. Next, it mandates that chief judges of each district courts must report written reasons for all downward departures in that district to Congress and the U.S. Sentencing Commission within thirty days. A final provision of the amendment limits the number of federal judges on the U.S. Sentencing Commission to no more than three of seven commissioners where the previous law required that at least three members be judges (Bowman, 2003). The controversy over whether guidelines should be presumptive or voluntary provides one indication that the relationship between those sentencing offenders and those setting the sentences may be thought of heuristically as a principal agent problem.[5]

[5] I address the court's recent decision, (June 24, 2004) in *Blakely v. Washington* slip op. 02-1632 and the court's reemphasis of the central issue of juries instead of judges determining facts that enhance a sentence expressed in *Apprendi v. New Jersey* 530 U.S. 466 (2000) in the conclusion.

In this case, the principal (Congress) felt that federal judges granted too many lenient sentences that departed from the guidelines despite the fact that 80 percent of all downward departures are granted via prosecutors' discretion to give an offender a substantial assistance departures (U.S.S.C. 2003b).[6] In recent years, Congress has steadily pushed for harsher sentences in federal cases in response to perceived public opinion. Not only did the creation of the sentencing guidelines reflect this concern but Congress subsequently has mandated judges issue minimum sentences for an increasing list of crimes. These so-called mandatory minimums do not allow judges any discretion to depart below the minimum length of sentence that a statute provides.[7] However, the federal district judges who are the agents actually sentencing the offenders have balked, especially at harsh sentencing provisions for drug and immigration cases. When Congress set up the Sentencing Commission, the Commission decided to codify existing punishment ranges for offenses with a small 25 percent variance for sentences (Stith and Cabranes 1998, 53). The Commission also determined that federal district court judges were obliged to follow these guideline ranges unless a departure was merited pursuant to 18 U.S.C. § 3553(b) which allows judges to depart from the guidelines if they find "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission." Congress attempted to ensure trial court compliance with the Guidelines through appellate review. Defendants and prosecutors may challenge a sentencing decision by a federal district court judge on the grounds that the sentence was too harsh and a downward departure should be granted (offenders) or alternatively that the sentence was too lenient and a departure should not have been granted (prosecutors) 18 U.S.C. § 3742 (a,b,c).

[6] A downward departure from the guidelines indicates that the sentence length is below the 25 percent variance range allowed for a particular offense. An upward departure indicates that the sentence is more severe than the range of sentences provided by the Sentencing Commission for that offense but these departures are very rare.

[7] Congress did put in a "safety valve" provision in the U.S. Criminal Code, 18 U.S.C. § 3553(f), (and see U.S.S.G. §5C1.2, Application Note 8) that permits judges to sentence below the statutory minimum if the defendant had little past criminal history (1 criminal history point or less).

In addition, the Sentencing Commission was charged with gathering aggregate data that permitted Congress to monitor the compliance of the federal court system with the sentencing guidelines.

Initially, 179 out of 294 (60.9%) federal district court judges declared the Sentencing Reform Act as unconstitutional on various grounds (Sisk, Heise, and Morriss 1998). Ultimately, the Supreme Court upheld the constitutionality of the new law in *Mistretta* v. *U.S.* (1987) by an eight to one margin. After the constitutionality of the guidelines was settled, a complicated relationship between the Congress, the U.S. Sentencing Commission, federal district court judges, and appellate judges ensued. This bifurcated principal agent relationship has Congress overseeing the efforts of the Sentencing Commission (a bureaucracy) to codify mandatory guidelines for the federal district court judges to follow when sentencing offenders. Any amendments to the guidelines by the Sentencing Commission are then subject to congressional approval. Federal district judges will be monitored through appellate review of sentencing decisions. Thus, prosecutors and defendants sound the "fire alarm" to circuit court judges that a federal district court judges wandered out of the "heartland" of cases by either being too strict or too lenient when sentencing an offender.[8]

What makes this relationship different than other seemingly similar relationships between Congress, federal administrative agencies, and the courts is that members of the Sentencing Commission include federal judges serving as commissioners for codifying sentences. Moreover, federal district court judges are accustomed to giving edicts to administrative agencies rather than taking direction from one and had to revise their previous sentencing behavior virtually overnight. Given this situation, appellate courts should play an active role in compliance. Thus, one can

[8] For a description of the concept of the "heartland" of cases, see the opinion in *Koon* v. *United States,* 518 U.S. 81 (1996) and Breyer's opinion in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993) (Stith and Cabranes 1998, 73-74). The "heartland" of cases itself was originally mentioned in the introduction to the first 1988 Guideline Manual and states, "The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland', a set of typical cases embodying the conduct that each guideline describes" (U.S. Sentencing Commission, U.S. Sentencing Guidelines (U.S.S.G.) 1988, 1.6). Later this concept was directly embedded into the guidelines in a 1994 amendment to the §5K2.0 departure policy statement as, ". . .the case at hand must differ from the 'heartland' of cases in a 'way that is important to the statutory purposes of sentencing" (U.S.S.G. §5K2.0, 2003).

evaluate whether circuits can adequately enforce Congress's will in controlling how district court judges sentence offenders and what factors lead to better or worse compliance with the sentencing guidelines.

Since the founding of the United States, federal trial court judges possessed virtually unfettered discretion to sentence offenders except for the few statutes providing definite punishments, such as death. This happenstance occurred because (1) criminal statutes enacted by Congress gave vague directions as illustrated by a 1789 criminal statute that directed courts to punish those convicted of bribing a U.S. custom's agent via ". . .[a] fine or imprisonment, or both, in the discretion of the court. . ., so as the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months.", [9] (2) crimes punished by federal statute were few as most offenses were punished at the state level, (3) the federal government did not establish any federal prisons until the 1890's, and (4) crime for the most part was not a salient federal issue. Occasionally, Congress would establish a minimum prison term, but Congress usually provided only the maximum penalty that a judge could levy.[10] Congress did not provide any statutory means to appeal sentences, and appellate judges were extremely reluctant to overturn a sentence unless a trial judge was unwise and provided sufficient evidence of a flagrant "abuse of discretion" committed when sentencing an offender. Appellate courts seemingly ignored injustices committed when trial judges sentenced offenders. Nonetheless, as Judge Frankel (1973) describes in his book *Criminal Sentences: Law without Order*, appellate courts would occasionally seek other grounds to overturn an unjust sentence, including throwing out the convictions. Generally, federal trial judges for nearly two centuries possessed enormous discretion to sentence offenders with relatively little interference from Congressional statutes or appellate courts.

[9] An Act to Regulate the Collection of the Duties, ch. 5, section 35, 1 Stat. 29, 46-47 (1789).
[10] Judge Charles Richey wryly noted when describing the historical lack of appellate review of sentencing that during the common law period ". . .approximately 200 offenses were punishable by death; thus uniformity of sentences hardly presented a problem" (Richey 1978, 74).

However, Congress created a new era in federal sentencing in 1984 when it created the U.S. Sentencing Commission that led to the 1986 federal sentencing guidelines. Immediately after the guidelines were implemented, constitutional challenges to sentences issued under the sentencing guidelines occurred citing various grounds. After withstanding judicial review by the Supreme Court on constitutional grounds in *Mistretta v. U.S.* 488 U.S. 361 (1989), the sentencing guidelines went into effect. These new guidelines directs trial judges to sentence within a specific range for a particular offense and gives the appellate circuit courts the task of overseeing guideline compliance. To aid appellate courts in monitoring sentences, trial judges must now issue written explanations when they give a sentence that departed from the guideline sentence range. These reasons, along with the pre-sentencing report, permit greater scrutiny of any deviations from the guidelines by appellate courts. In addition, detailed information on district and appellate sentencing actions are required to be reported to the U.S. Sentencing Commission. Of course, the sentencing guidelines made these federal district court judges furious regardless of ideology. A recent Federal Judicial Center survey indicated that nearly three-fourths of federal district court judges either moderately or strongly favored discontinuing the current federal sentencing guidelines (Federal Judicial Center 1997). Interestingly, in the same survey, more than two thirds of appeals court judges felt the same way.

While the decision for a federal district judge to depart from the sentencing guidelines is completely voluntary, Congress made this decision subject to appellate review using criteria developed by the U.S. Sentencing Commission. Eight years ago, federal district court judges gained more breathing room when the Supreme Court broadened the grounds on which these district court judges could depart from the mandatory federal sentencing guidelines in *Koon v. United States,* 518 U.S. 81 (1996). Prior to the *Koon* decision (1988-1996), most circuit courts chose to enforce a relatively strict standard for departures by district court judges, which strongly discouraged departure activity. However, after the *Koon* ruling expanded the grounds for granting departures, departure

activity by federal district judges began to rise. As displayed in Table 1, federal district court judges granted roughly fifty percent more departures from 1996 to 1999 when compared to the average rate during the previous eight years of sentencing guidelines. But, this increase does not occur uniformly. Some circuits experienced much greater increases in the number of departures than others, and even the rates of departures among district courts in the same circuit display considerable variance. But, who or what accounts for these disparities?

Table 1: Aggregate Federal Sentencing Information FY95 to FY01

Year	Total number of criminal cases	Total number of appeals involving sentencing	Departures		Appeals based on Judge's Departure Decisions	Successful Appeals	Percent of Successful Appeals	Dates
			Downward	Upward				
FY 1995	38,500	4,314	3,110	335	709	81	11.42%	10/94-9/95
FY 1996	42,436	4,039	4,201	388	823	82	9.96%	10/95-9/96
FY 1997	48,848	3,691	5,574	387	638	74	11.60%	10/96-9/97
FY 1998	50,754	3,633	6,509	391	607	67	11.04%	10/97-9/98
FY 1999	55,557	4,024	8,304	313	793	80	10.09%	10/98-9/99
FY 2000	59,846	3,762	9,286	358	697	57	8.18%	10/99-9/00
FY 2001	59,847	4,226	10,026	307	604	45	7.45%	10/00-9/01
Totals	355,788	27,689	47,010	2,479	4,871	486	9.96%	

The shaded columns represent data where the identity of judges at the appellate and district level can be obtained. I chose Fiscal Y ear (FY) for the individual analysis because the Appellate Court judges codes were included in the U.S.S.C. appellate data for those years. Data for this table was obtained from statistical tables of the Administrative Office of the United States Courts and the United States Sentencing Commission for the years 1995 to 2001

The question of how judges choose to employ their discretionary decision-making powers has been one of the cornerstones of the study of judicial politics. Whereas considerable scholarly attention has been focused on the exercise of Supreme Court discretion, considerably less research has been conducted on the behavior of lower federal appellate and district judges (Baum 1997). Even less attention has been paid to the relationship between circuit judges and district courts beneath them. Given the fact that very few circuit court decisions are reviewed, circuit courts effectively serve as the immediate ultimate supervisor of the work of federal district court judges (Songer, Sheehan, and Haire 2000). Thus, the importance of research into the behavior of circuit courts cannot be understated.

The significant number of criminal cases on the docket under the sentencing guidelines provides an opportunity to examine the supervisory role circuit courts of appeal play in the federal

judicial hierarchy. District court judges preside over the trial, but also upon conviction, depending on their statutory authority, decide whether defendants go to prison and for how long. If defendants or prosecutors appeal the sentence, a court of appeals' panel can review, and perhaps reverse, the sentencing decision made by the district court. Thus, sentencing decisions by district court judges offer an additional avenue for defendants to appeal issues beyond those that relate to the conviction. Moreover, federal prosecutors are now permitted to appeal sentencing decisions as well. Because the federal sentencing guidelines envisaged active appellate review of sentencing decisions, the U.S. Courts of Appeals have taken on a new role in reviewing how federal district court judges exercise their sentencing discretion.

In the next chapter, I review research regarding factors that influence judicial behavior and examine the applicability of principal agent theory to my research. Previous research on judicial behavior will guide the selection of factors that should be examined for their effects on sentencing. The next chapter closes with how principal agent theory can be employed as a heuristic to examine the relationships between the district and appellate courts and also the relationship between Congress, the Sentencing Commission, and the courts.

Chapter 2

Review of Literature

Factors that Influence Judicial Behavior:

James Gibson (1983, 9) succinctly summarized how judges make decisions by noting that ". . .[j]udges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." This comment encapsulates much of the research in judicial behavior and links the different strains of thought to the question of how and why judges make their decisions. These strains of thought include the attitudinal, legal, and strategic models of judicial behavior (Segal and Spaeth 1993; 2002; and Baum 1997). Judicial research using these different explanatory models often focuses on the behavior of the justices on the U.S. Supreme Court (Baum 1997). Nevertheless, research on how judges decide on other courts, including the U.S. Courts of Appeals and federal district courts, has become increasingly common and sophisticated (Rowland and Carp 1996; Songer, Sheehan, and Haire 2000). Of particular importance to this dissertation is the increasing role the Courts of Appeals play in our federal judicial system. This increasing importance has led scholars to examine the complex role of these intermediate courts that are overseers of district courts but while subject to the oversight of the U.S. Supreme Court (Baum 1980; 1994; Songer, Segal and Cameron 1994; Cameron, Segal, and Songer 2000; and Haire, Lindquist, and Songer 2003).

This line of inquiry parallels a new emphasis in judicial research regarding the effects of institutional context on the decision-making of individual judges. In particular, judicial scholars have begun to grapple with the hierarchical nature of the federal and state court systems (Songer, Segal and Cameron 1994; Cameron, Segal, and Songer 2000; and Haire, Lindquist, and Songer 2003). Appellate courts can actively influence district court behavior through the development of legal doctrine. More directly, appellate courts' decisions to reverse serve to limit district court behavior.

In this review of the literature, I summarize current research to develop the general theoretical frameworks in judicial behavior necessary to explain how and why judges make the decisions that they do. Second, I review and examine factors that affect appellate monitoring of district court actions. In a subsequent chapter, I seek to place the Sentencing Reform Act of 1986 in the context of the history of sentencing and investigate its effect on judges and subsequent case law at the Supreme Court and Circuit Court levels.

Models of Judicial Behavior

As developed by Jeffrey A. Segal and Harold Spaeth (1993; 2002), the attitudinal model proposes that policy preferences generally predict how judges will decide cases. Although, judges contest this depiction of how they make decisions (Wald 1999), this model has received strong empirical confirmation from the existing literature, especially research that focuses on the behavior of U.S. Supreme Court justices (Baum 1997; and Segal and Spaeth 2002). In addition, the attitudinal model appears to have strong explanatory powers for judges' behavior on every level of federal and state courts.[11] Judicial scholars that investigate alternative legal, strategic, or institutional models concede some attributes of attitudinal model but seek to broaden the field of inquiry to include other factors as well:

> There is no reason to take issue with the observation that Supreme Court justices act in ways that reflect who they are and what they believe. . .there are good reasons to think that there may be much to be gained by focusing less on the policy preferences of particular justices and more on the distinctive characteristics of the Court as an institution, its relationship to other institutions in the political system, and how both of these might shape judicial values and attitudes (Gillman and Clayton, 1999, 3).

Thus, while the attitudinal model provides a great deal of explanatory power and is elegant in its simplicity, it does have some serious shortcomings.

[11] The attitudinal model in judicial research provides a good example of a dominant research paradigm. Its preeminence in the judicial research literature can be likened to King Kong clutching the pinnacle of the Empire State Building while swatting at nagging alternative models seeking to displace the champ.

The attitudinal model, as applied to the Supreme Court, is explained succinctly by Segal and Spaeth as ". . .justices make decisions by considering the facts of the case in light of their ideological attitudes and values" (1993, 73). The attitudinal model's intellectual underpinning comes from the legal realism movement. In the 1920's and 1930's, legal scholars such as Jerome Frank, Benjamin Cardozo, and Carl Llewellyn were in the vanguard of the "legal realism" movement, and these legal realists called for a scientific study of how judges made their decisions. Political scientists including Herman Pritchett (1941; 1948; 1954), Glendon Schubert (1959; 1965; 1974), and later, David Rohde, Harold Spaeth, and Jeffrey Segal took their cue from legal realism and the burgeoning behavioral movement in social sciences. These researchers applied political behavioral research methods instead of the traditional legal research to the study of judicial behavior (Rohde and Spaeth 1976; Segal and Spaeth 1993; 2002; Spaeth and Segal 1999). At first the attitudinal model sought only to explain Justices' behavior on the U.S. Supreme Court, but gradually other scholars have successfully extended and generalized this model so that the attitudinal model provides an important predictor of the behavior of judges sitting on lower federal courts as well (Carp and Rowland 1983; Rowland and Carp 1980; 1996; Songer and Davis 1990; Songer, Sheehan, and Haire 2000).

Notably, Segal and Spaeth, who are the influential proponents of the current attitudinal model, modestly claim that this model, in its pure form, best addresses Supreme Court Justices' votes on the merits (2002, 97). Even in this context, the maximization of preferences does not always mean that a justice ranks policy over other such values as legal clarity, collegiality with colleagues, or even leisure. Other political scientists disagree about how relevant competing theories of judicial behavior are. Songer and Lindquist (1996) note that when different coding conventions are applied to cases that Segal and Spaeth (1996) analyze, other factors than simply judicial attitudes seems to be at work. Brenner and Stier (1996) also provide indications, that at least for swing justices, respect for precedent appears to influence subsequent voting behavior of the

Justices. Others such as Epstein and Knight (1998) follow Murphy (1964) and emphasize that justices may act strategically from time to time and thus deny themselves the liberty of voting their sincere policy preferences in order to win (or not to lose). Thus, the primacy of the attitudinal model is not generally denied for explaining behavior of Supreme Court Justices but some judicial scholars argue that other factors such as legal and strategic considerations matter as well.

Judges themselves with the exception of the legal realists such as Jerome Frank often disagree with the characterization of judges in the attitudinal model (see Wald 1999). Either these judges are deluded, disingenuous, or they see their decision-making performance quite differently. Given the legal training of lawyers that emphasizes the case method and legal reasoning, it would be amazing if they felt that their role is simply that of a legislator enacting their preferences into law (Cross and Tiller 1998). The legal training given lawyers, its emphasis on case law, and the hierarchical nature of the judiciary, appear the most troubling to those who seek to apply the attitudinal model to explain decision making by district and appellate court judges.

For intermediate appellate courts, empirical evidence does not provide a clear answer how appellate courts balance competing goals of making good legal policy or following one's policy preferences. Those arguing for the primacy of good legal policy emphasize that judicial decisions derive primarily from similar socialization experiences provided by the legal training of judges (Howard 1981; Kritzer 1978; Johnson 1987; and Swinford 1991). This training stresses the value of precedent and other legal considerations instead of following one's policy preferences. Judge Frank Coffin, who served on the Second Court of Appeals, provides some of the flavor of the traditional legal view in his typology of the types of cases were decided at merits. He characterized cases in the following ways:

(1) "Rope of Sand" cases—where the judges come to quick agreement to affirm the lower court's legal analysis as correct.
(2) "Cafeteria" cases—where judges have a choice of grounds such as jurisdiction, procedural waiver, standing, merits, and harmless error to decide the case.

(3) "Technical Weighing" cases—where facts of the case are weighed against a legal standard.
(4) "Abuse of Discretion" cases—where the issue turns on whether the hearing official made a decision that abused their discretion given by law.
(5) "The Dispositive Fact" cases---a complicated case that might turn on one fact such as when a contract was signed.
(6) "The Dispositive Legal Issue" cases---a legal issue readily recognized resolves the case.
(7) "The Value-Added Weighing Decision" cases---a case that might cause a judge to weigh the case in terms of their personal experiences.
(8) "Judicial Creativity" cases---where a judge's independent thoughts about the case through a novel theory or scrutiny of the case facts might spur resolution.
(9) "Blockbuster" cases—those cases that require deciding among a multiplicity of legal issues and huge record (Coffin 1994, 154-159).

Within these criteria is sensitivity to both legal issues and Coffin's attitudes and experiences. Oral arguments at the appellate level have also led some justices and judges to declare their usefulness which would tend to undercut the idea that prior attitudes alone provide answers to judicial behavior (Wasby 1982; Rehnquist 2002). Finally, Posner provides a useful discussion that sheds light on why the attitudinal model may be collinear with the legal model.

> I concede that the line between "principled" and "results-oriented" decisionmaking is sometimes a fine one. Suppose it turned out that some judge always voted against labor unions when they were parties to cases before him. If he did this because he disliked unions we could properly describe his decisions as results-oriented. But if the consistency of his votes resulted simply from the fact that he had formulated and was applying a principle that determined the outcomes, the label "results-oriented" would be inappropriate (1996, 311).

Thus, the legal model of clarity, principles, and reaching the "correct" decision still seems to at least attract the favor of judges if not judicial behavior scholars.

Nevertheless, the alternative view held by many judicial scholars proposes that judges rely primarily on their policy preferences instead of legal considerations to make their decisions has attracted widespread empirical support in "hard cases"(Goldman 1966; Rowland and Carp 1983; Stidham and Carp 1987; Lyles 1997; and Songer, Davis, and Haire 1994, Songer, Sheehan, and Haire 2000, but c.f. Rowland and Carp 1996). In "easy" cases, the legal training of judges appears

foremost. The question about whether sentencing is seen as a hard or easy case remains to be seen. However, most judicial behavior scholars have found considerable evidence that judges employ their policy preferences as an important factor for decision-making in trial and intermediate appellate courts alike but they vary when considering whether legal and other factors also play an influential part in judicial decision making.

Appellate and District Court Behavior

Research about how the U.S. District Courts and U.S. Circuit Courts of Appeal make decisions closely resembles research conducted on the behavior of Supreme Court justices. J. Woodford Howard (1981) in a path breaking analysis of the Circuit Courts of Appeal concluded that role conceptions provide a clearer cue to policy choice than past political outlooks. While individual Court of Appeals' judges have considerable institutional freedom to express their political preferences, the three circuit courts that Howard investigated did not demonstrate much conflict. Instead, he characterized the relationship on the appellate courts as demonstrating more consensus than conflict. Howard stated that "(c)onverging political and professional values made agreement the norm in the great mass of cases; ideological differences tipped the balance at policy outcroppings, where open roles and close cases made personal preferences permissible guides to decision." (Howard 1981, 185). Thus, judges' concepts of their professional role that comes from their legal training seems to outweigh these judges' personal preferences when making decisions.

On the other hand, Songer, Sheehan, and Haire (2000) find a very different judiciary. They conclude that appeals court judges exercise discretion in roughly 1/3 of all cases they decide (Songer, Sheehan, and Haire 2000, 105), and judges' votes demonstrate considerable conflict within the court. They also find significant partisan differences between circuit court judges. These researchers find that judges appointed by a Democrat provide consistently greater support for liberal outcomes in civil rights, civil liberties, and criminal cases than do judges appointed by a Republican

in the post World War II era.[12] When predicting judicial voting, not surprisingly the attitudinal model provides a better explanation of this type of behavior.

The differences between these two studies may come from their different methodology and the different time spans of the studies. Howard (1981) used a survey of judges to examine how they made decisions and then compared their response on the survey with a sample of convenience of their voting behavior. Songer, Sheehan, and Haire (2000) employ secondary data analysis using a weighted scientific sampling of published cases from the Courts of Appeal. Since a considerable (and rising) number of cases are considered not important enough to publish, a sample using published cases only may accentuate divisions while Howard's survey results may reflect that unpublished cases demonstrate little conflict. Also, Howard's survey responses from judges may be biased toward consensus because it is a socially acceptable norm. But, Songer, Sheehan, and Haire (2000) admit that most non-published cases probably demonstrate little conflict, and perhaps using only published cases may overstate how much conflict exists within a circuit. As a result, the question remains open whether the attitudinal or the legal model alone adequately explains the behavior of judges sitting on the circuit courts.[13]

District Court Research on Decision-Making and Sentencing

Recent research by Lyles (1997) finds that federal district court judges follow the legal constraints of precedent, statute, and constitutional law in a majority of cases. However, he did find that instances exist when judges did demonstrate differences in behavior that can be attributed to the judges' attitudes and values. These differences varied across the five policy areas that Lyle

[12] While the size of the gap varied over time (1946-1988), the gap ranged between 4.9 and 6.6 percent difference with judges appointed by a Democrat making more liberal votes than judges appointed by a Republican (Songer, Sheehan, and Haire 2000, 114).

[13] Recently an opinion written by Eighth Circuit Chief Judge Richard Arnold declared that a circuit rule that denied the value of unpublished decisions as binding circuit precedent was unconstitutional (*Anastasoft v. U.S.* 223 F. 3d 898 (8th Cir. 2000), vacated as moot, 235 F. 3d 1054 (8th Cir. 2000) *en banc.* For a description of this decision, see Quitschau (2002). Serfrass and Cranford (2001) conduct a broad discussion of federal and state court rules on publication and the citation of these opinions.

studies, but the main impetus for the differences seems to be which president appointed the judge. Research conducted by Rowland and Carp (1996) and Carp and Stidham (1998) also finds that federal district court judges demonstrate differences in behavior due to political attitudes. For example, they examine the percentage of liberal decisions by judges from 1932 to 1995 and find that judges appointed by Democrats issue a liberal opinion on criminal convictions 43 percent of the time (Carp and Stidham 1998,127). Judges appointed by Republicans issue liberal decisions on criminal convictions only 30 percent of the time. Like Lyles, Carp and Stidham find different rates of liberal decisions coming from judges depending on the issue. Additional research supports the idea that trial and even intermediate court judges may operate with multiple goals (See Baum 1997, 28-30). Thus, empirical evidence indicates that trial judges at the federal level use both their legal training and their political attitudes to make decisions.

Baum (1997) employs the metaphor of a pyramid for the judicial hierarchy with the U.S. Supreme Court at the apex, the Circuit Courts of Appeals beneath the Supreme Court, and the federal district courts beneath the Courts of Appeal. As one moves from the apex to the base, the number of goals that judges use to make decisions begins to proliferate. Likewise, the number of constraints also increase. For example, federal district court and circuit appeals judges must face an increasing docket of cases while the U.S. Supreme Court can effectively control its workload.[14] Under these circumstances, lower court judges may well follow legal precedent for a great majority

[14] For a description of how the Supreme Court handles its caseload, see Coleman (1983). Concerning the Courts of Appeal, these courts have increasingly adopted shortcuts to handle their growing workload. Judge Cardamone of the 2nd Circuit (1999) bemoans the decline of collegiality due to the lack of time to discuss cases. However, Cardamone feels that pre-conference voting memorandums, an increase in the number of law clerks, and technology actually have helped the overall work flow of the Courts of Appeal. Other effects of a crushing workload are mentioned by Cohen (2002) are increased reliance on staff, reduced relationships between judges, decreasing proportion of cases heard with oral arguments, greater reliance on visiting judges, and formal rules and procedures governing workflow within the courts. For changes at the district court level, Heydebrand and Seron (1990) discuss at length the increasing professionalization and bureaucratization of district courts. Also, Packer (1968, 159) who noted that the "crime control model" emphasizes "speed and finality" especially applies to trial court. Thus, trial courts would prefer informal processes such as plea bargaining over formal processes such as trials. As a result, a court's concern with due process concerns would decrease and managerial efficiency would be emphasized instead.

of cases due to the simplification of decision rules for deciding cases. The appellate court also faces workload constraints that may thwart a judge's desire even to create good legal policy.[15] Judges below the Supreme Court must also reckon with courts above them. While monitoring of decisions may be rare, most judges should prefer that their decisions are not reversed from a workload standpoint alone but also due to their concern for their legal reputation (Landes and Posner 1976; Posner 1992; and Miceli and Cosgel 1994)[16].

Judges below the Supreme Court level also may be more susceptible to factors such as public opinion or promotion opportunities. Considerable research indicates that district courts can be influenced by public opinion especially during the desegregation era in the South (Vines 1964; Giles and Walker 1975; and Cook 1977 but see Kritzer 1979). Unfortunately for judicial scholars, getting judges to admit to deciding cases due to a desire for promotion or surrendering to public opinion can only be speculative in nature (Schauer 2000). However, it seems reasonable to assume that most judges would like promotion, higher status, and the goodwill of other citizens given that all other considerations are equal.

Sentencing and Judicial Behavior

The literature on criminal sentencing and judicial behavior is considerable. While a great deal of the research on criminal sentencing comes from sociologists and criminologists, political scientists do contribute to this literature by emphasizing the role of the trial court judge. Jaros and Mendelsohn (1967), in an early study of sentencing in a Detroit traffic court, found that judges

[15] A law review article by Merritt and Brudney (2001) investigates what factors influence the decision to publish a decision in the U.S. Courts of Appeal. Using unfair labor practice claims under the NLRA, they find that circuits encouraging the publication of opinions with concurrences or dissents published a significantly lower percentage of these opinions than did other circuits. Their chief findings were that courts declined to publish almost 15% of opinions carrying a dissent. Also they declined to publish 14.96% of reversals and 5.92% of opinions carrying separate concurrences. Of the unpublished decisions, 8.44% of the decisions displayed some indication of conflict within the court or with the NLRB (p. 107). They also find evidence that judicial attributes such as partisan affiliation, prior legal career, and race affected support for unions in unpublished cases when compared to those published.

[16] Howard (1981) in his study of the Courts of Appeals finds that certain district court judges appeared unfazed by the prospect of being overturned with some of judges approaching 50 percent of their decisions being overturned by the supervising circuit.

appeared limited by their role expectation that they sentence according to legal criteria, did not appear to indulge personal biases, but did punish those challenging the judge's authority more severely. Gibson (1978a; 1979) investigated how the role conceptions of Iowa trial court judges affected their decision-making on sentences. He found that judges who stress the importance of legal precedent were less likely to employ additional factors when sentencing. Gibson also found that the intervening variable between attitudes and decision-making is the role conception of the judge. Judges adopting a broad view of their discretion are more likely to base sentencing decisions on their attitudes. On the other hand, judges choosing a more narrow conception of judicial discretion are less likely to view their attitudes as legitimate factors for making sentencing decisions. However, other research supports the premise that judicial policy preferences do affect sentences (Diamond, Seidman and Zeisel 1975; and Ryan, et al., 1981). Thus, research on sentencing decisions demonstrates that judges can choose to employ their policy preferences when sentencing; but some do not choose to do so.

In a recent development, legislatures have instituted sentencing commissions or mandatory minimum sentences to reduce unlimited judicial discretion. In contrast to permitting judges to individualize sentences, sentencing commissions or mandatory minimums seek to treat offenders alike. The institution of the U.S. Sentencing Commission owes its existence to the fact that sentencing reform was seen by Congress as a way to reduce disparities in sentences. Liberals in Congress supported sentencing reform because the Sentencing Commission dictated to judges that certain factors such as race, gender, national origin were forbidden to influence sentencing decisions. Conservatives in Congress believed that the Commission would restrain liberal judges from issuing light sentences (Tonry 1996; and Cabranes and Stith 1998). Given that the only ground that liberal and conservative members of Congress agreed upon was the elimination of disparity, Congress

created a Sentencing Commission to reduce the sentencing discretion of federal district court judges and then tasked appellate courts to oversee the district court judges.

Some research exists on how judges' make sentencing decisions under guidelines. Under guidelines, judges make decisions constrained by the legal requirements of the guidelines but do not abandon their policy preferences. Not surprisingly, judges vary in how well they balance these requirements (Ross and Foley 1987; Ross 1992; and Tonry 1996). In addition, judges will demonstrate greater compliance with mandatory guidelines like the U.S. Sentencing Guidelines than to voluntary guidelines (Bureau of Justice Assistance 1996). One reason might be that departures from mandatory sentencing guidelines carry the risk of being overturned by an appellate court while voluntary sentencing guidelines lack adequate sanctioning mechanisms for non-compliance. Given the relatively recent institution of the sentencing guidelines in 1987, a large number of district court judges currently serving can remember having unbounded sentencing discretion that was not reviewable by the appellate courts. These judges understandably resent the loss of discretion and would prefer that the guidelines be made voluntary (Federal Judicial Center 1997).

Judicial Hierarchy and Appellate Review of the Decisions of Lower Courts

The Constitution gives the U.S. Supreme Court the power of appellate review so it can overturn lower court decisions that the Court feels exceeds or mistakenly interprets federal law. By statute, Congress has extended this power of review to Courts of Appeals judges as well. One criterion that the U.S. Supreme Court and the Courts of Appeals use to guide subsequent lower courts' decisions comes from checking decisions of those courts beneath them for errors of law. "Error correction" allows appellate courts to reverse lower courts that have strayed from the Supreme Court's and the Courts of Appeals' current interpretation of the law. The Supreme Court's designation as the final tribunal of constitutional and federal statute interpretation gives the Court the power to correct "wrong" decisions. For the most part, judicial researchers admit that the

Supreme Court seeks to correct "bad" law, but given the limited workload of the Court, how often the Court uses this criterion for selecting cases is unknown. However, the U.S. Courts of Appeals, have this power via statute, and it is one of the primary tasks of these intermediate courts to oversee and correct erroneous district court decisions.

Justice William J. Brennan, who was first a justice on the New Jersey Supreme Court and later a United States Supreme Court justice, sought to explain why his later federal opinions seemed inconsistent with his opinions as a state judge by stating that the ". . .roles of a state supreme court justice and a United States Supreme Court justice in dealing with the same problems, indeed with the same cases, are functionally different" (Brennan, 1990, 72). Brennan approvingly quotes Justice Holmes' assertion, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states" (as quoted by Brennan, 1990, 72). Thus, Brennan reserves for the U.S. Supreme Court the power to have the final word in interpreting the Constitution and the power to resolve federal and state legal conflicts. Brennan and other justices of the Supreme Court use the power of being the final tribunal to correct "erroneous" lower court rulings that they believe do not follow the precedents of the U.S. Supreme Court. This rationale has been termed error-correction.

Error correction plays an even more important role for intermediate appellate courts such as the U.S. Courts of Appeals. These courts effectively serve as the final review tribunal for most appeals from federal district courts (Howard 1981; and Songer, Sheehan, and Haire 2000). Thus, the circuit courts determine day to day how the law applies within their circuits. While the U.S. Supreme Court has the final say, the U.S. Courts of Appeals provide the bulk of the appellate review for finding legal errors committed by federal district court judges. As a result, district court judges know that reversal by the Courts of Appeals on a direct appeal is much more likely to occur.

Studies of decision-making under judicial hierarchies indicate that judges attempt to balance their individual policy preferences with those of the reviewing (higher) court (Songer, Segal, and Cameron 1994; McCubbins, Noll, and Weingast (McNollgast) 1995; Cameron, Segal, and Songer 2000; and Haire, Lindquist, and Songer 2003). These researchers use principal agent theory to investigate the relationship between the reviewing court and lower courts. While lower court judges want to make policy as close as possible to their ideal point, reviewing courts constrain their behavior. Thus, judges attempt to craft decisions as close to their policy preference as possible without triggering a reversal from the reviewing court.

The empirical evidence is mixed about how responsive lower courts are to higher courts. In some situations, lower courts successfully evade guidance from above while in other situations lower courts remain highly responsive to doctrinal changes from the higher court.[17] Examples of non-responsiveness to higher courts come from several sources. First, during the Civil Rights era, many southern district courts used "all deliberate speed" at a very deliberate rate to implement school desegregation (Rosenberg 1991). During the late 1980's and early 1990's, the Ninth Court of Appeals fought a losing battle with the U.S. Supreme Court on stays of executions (Fried 1993). Nevertheless, much empirical research indicates lower courts follow doctrinal changes by upper courts (Baum 1980; Stidham and Carp 1982; Songer and Haire 1992; and Songer, Segal, and Cameron 1994; 2000; but see Kilwein and Brisbin 1997). Research by Songer, Segal, and Cameron (1994) suggests judges on the U.S. Courts of Appeals do respond and follow Supreme Court rulings on search and seizure despite probable differences in policy preferences. Baum (1980) provides some evidence that a similar relationship exists between district courts and the Courts of Appeals. Patent rulings by the supervising circuit court resulted in changes for the number of patents upheld as valid by the district courts within that circuit. Thus, the policy issue and how much the Court of

[17] Using the terminology of principal agent theory, "faithless" agents who does not follow the orders of principals are successfully "shirking" their duty as an agent.

Appeals chooses to monitor lower courts provides the context about how successful the Courts of Appeal will be in reducing shirking behavior by lower courts.

Principal Agent Theory: the Analytical Framework

As mentioned before, a pyramid metaphor has been used to describe the federal court system with the Supreme Court at the apex, the U.S. Courts of Appeals beneath the Supreme Court and above the federal district courts, and district courts composing the base of the system. While most research has focused on the upper tier of the pyramid, the relationship between circuit courts and district courts can also be thought of as an example of a principal-agent relationship (Songer, Segal, and Cameron 1994). While circuits (principals) create a considerable mass of rulings for district courts to follow, making sure that district courts (agents) follow these precedents is no easy task. Judges on the U.S. Courts of Appeals face staggering workloads that make monitoring decisions of federal district courts costly. This disadvantage is heightened when considering that federal district courts initially possess more information about cases than does the circuit court. This information asymmetry between the agent and principal can only be overcome by substantial effort by the circuit courts. Another problem for circuit courts is that they often lack effective ways to reward faithful agents or punish recalcitrant ones. Using the principal-agent theory as a heuristic device, however, will allow an examination of the relationship without strictly adhering to the requirements of economic theory.

General Principles and Assumptions of Principal Agent Theory

Ross (1973), an economist, is generally credited with providing the first mathematically rigorous examination of the delegation of tasks by a principal to an agent for accomplishment. Lupia and McCubbins (1995) provide a useful summary of his and later work by others. They describe the principal agent model as a means of examining the agency problem, and also give an excellent brief description of the principal agent model (Lupia and McCubbins 1995, 203-205). At

least two actors are involved: the principal and the agent. The principal possesses the authority to take actions while the agent has been delegated some of the principal's authority to take action for the principal. Thus, the case of the court of appeals overseeing district judges' sentencing behavior illustrates a principal agent problem in which the appellate courts monitor whether district courts are faithfully conforming to the sentencing guidelines.

To make principal-agent models work, theorists must make several assumptions. Bendor (1990, 386) provides a simple introduction to these assumptions. Usually, both parties are assumed to optimize their own utility. The principals must care whether their instructions are carried out, and the agents must care about their own interests. Principal-agent models, for the most part, ignore cases where the agents totally agree with the principal about the means and methods of implementing policy because these cases are so rare and theoretically unremarkable. Thus, most models assume at least some conflict between the principal and the agent.

Most principal agent models commonly employ limiting general features and assumptions. First, a principal faces the tradeoff between getting its agents to do what the principal desires with the fact that monitoring their agents results in costs accruing to the principal. An unmonitored agent has no incentive to perform resulting in agency loss by the principal while a principal that decides to monitor an agent faces at the least the opportunity cost of time and effort. Principals also face the fact that usually their agents have better information about the specific task than do the principals thus complicating the monitoring process. This informational asymmetry between principals and agents increases the risk of agency loss when the preferences of the principal and of the agent diverge.

Other key features of principal agent models include several assumptions necessary for these models to be described mathematically. An assumption that formal modelers usually employ is that the principal and the agent are assumed to have unitary preferences even if the agent for example is

a bureaucratic agency with thousands of people. Likewise, even principals such as Congress with 535 members are usually assumed as unitary actors when dealing with exogenous actors such as the bureaucracy. A third assumption common to most formal theory holds that actors have single peaked preference orderings and are rational.

An assumption that agents know more about their conditions than principals is also usually made. Scholars investigating principal agent models typically use the term information asymmetry to indicate a difference in information capabilities of the principal and the agent. Using a continuum, under market conditions, no informational asymmetry exists between principals and agents. For example, an individual (principal) purchasing a share of stock in a company from a broker (agent) has both the broker and individual knowing the market price of the stock and both sides knowing whether the agent actually bought the stock. On the other hand, an agent may possess complete freedom to undertake a task when the principal cannot observe the performance. Unless the principal and the agent pursue the same interest and values, the delegation usually does not occur or will be withdrawn (Pratt and Zeckhauser 1985, 4).

The real crux of most principal-agent analysis takes place because interests of the principal and agent do not totally coincide and because the agent attempts to exploit superior knowledge about the task situation such as sentencing. This situation could be compared to a buyer-seller situation wherein the buyer (principal) wants to buy a product and the seller (agent) wants to sell that same product. However, the seller has superior knowledge of the product being sold. Under these circumstances, a seller (agent) can sometimes take advantage of the buyer (principal) for gain. The maximization (optimization) indicates that both the principal and the agent optimize, but an agent

can use the additional information to gain more utility than if both sides had all relevant information.[18]

Other assumptions address monitoring by principals of agents. First, only the agent is assumed to be completely informed of consequences from the agent's actions. Second, the principal must spend time and effort to monitor an agent's actions and seek information about an agent's performance. Thus, a tradeoff exists between a principal's willingness to accept monitoring costs and the benefit gained by the delegation. Some circumstances exist when the cost of monitoring an agent outweighs potential benefits from delegating to the agent. A legislature facing this problem would not rationally delegate authority to an agent. Nevertheless, extensive delegations of authority do exist. Thus, legislatures must either be getting their desired policies, or they are ignorant of what their agent is doing. To address the oversight and monitoring problem, Pratt and Zeckhauser explain why different relationships correspond with how much scrutiny that principals give to agents and how incentives are structured to minimize monitoring costs.

> 1. We tend to get less monitoring, or monitoring of poorer quality when monitoring is expensive and/or substitutes for monitoring are cheap.
> 2. The agency loss is most severe when the interests or values of the principal and agent diverge substantially, and information monitoring is costly. (Pratt and Zeckhauser 1985, 5).

Key variables that should be examined in a principal-agent analysis include the principal's abilities to monitor agent performance and to create an appropriate incentive structure. Another variable for analysis considers the efficiency of agent effort to translate a principal's interests into outcomes in the light of a given incentive structure. These variables provide a basic framework to begin to analyze the relationship between principals and their agents.

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[18] However, the application of formal models of this sort becomes difficult because of numerous possible outcomes that require investigation. Formal mathematical modeling becomes more and more difficult with each increase in the number of potential outcomes. As a result more assumptions must be made to narrow the possible outcomes to a mathematically and analytically manageable size. Thus, the existence of multiple principals and multiple agents can drastically complicate formal models using principal agent theory

To ease monitoring problems due to asymmetry of information, Pratt and Zeckhauser (1985) propose that contract considerations play a role in determining the principal-agent relationship. Contracts, or laws, regulations, etc. create a status quo that subsequent changes in these rules will result in retroactive implications. Through contracts, the relationship between the principal and agent is specified and can specify monitoring, incentives, and sanctions for misbehavior as well. Thus, using its lawmaking powers, Congress (the principal) through changing statutory wording, can specify how the courts (its agent) should decide cases. Changes in the law can result in a redistribution of power between Congress or its designated intermediates and the court. If no contracts (laws) exist then Congress and the courts can benefit or lose from creating new laws (Congress) or making constitutional rulings (the courts) because both players are rational and self interested. When no prior commitments (laws or constitutional rulings) exist for either side, optimization becomes easier because both principal and agent can each bargain to create an optimal solution without requiring costly changes by either party. Thus, we should expect and did see considerable unhappiness when Congress created the Sentencing Commission as it redistributed sentencing power away from the district courts to prosecutors, appellate courts, and the Sentencing Commission. Of course, the initial response of many district courts to this change in the relationship was to declare the legislation unconstitutional.

To control the agent, the principal faces a moral hazard or hidden action problem. The principals know what outcome they prefer but are uncertain about whether they can make the agent provide the desired outcome. Thus, the principals must create the proper incentive/sanction structure that will induce the agent to work toward the principal's desired optimal outcome while allowing agents to optimize the agents' utility with respect to other opportunities. Pratt and Zeckhauser (1985, 17) provide a concise analysis of the agency problem as ". . .the question of how

the principal can reap the greatest advantage through incentives that influence the agent's behavior, yet reward the agent enough so that he will not quit."

In reality, complex schedules of incentives for agents do not exist (Arrow 1985). For example, Arrow uses the physician (agent) and patient (principal) relationship to indicate that a physician's fees are not based on performance. Because of the problems with evaluating complex contracts depend on many different variables, principals and agents prefer simpler contracts than called for by theory. However, the problematic nature of incentive structures and more broadly attributing utility structures to judges has been addressed by several scholars (Landis and Posner 1976; Higgins and Rubin 1980; Posner 1992; Miceli and Cosgel 1994; and Cohen 2002). Posner (1995, 135) provides a particularly succinct summary of what might affect a judge's utility function including such factors as income, popularity, prestige, public interest, avoiding reversal, reputation, leisure, and voting. He believes that power and leisure provide the most important factors in determining a judge's utility function because through voting the judge can exercise power and one can only work so much. Thus, determining utility for judges appears a tractable issue.

The U.S. Courts of Appeals serve as the primary provider of incentives and monitoring for district court behavior. Congress through the nomination and impeachment process can sanction behavior either before or after the fact but really lacks the tools to enforce and monitor district court behavior. Only the Courts of Appeals can act as a supervisor on a day to day basis and provide the primary incentives for district court judges to behave within the law. The incentives to sentence within the guidelines for district court judges are several. First, by sentencing within the guidelines and not exercising the discretion to depart from those guidelines, a district judge cannot be reversed. While some judges may not care about reversal, others pride themselves on their legal decision making and equate legal correctness with not being reversed by a higher court. Others may fear a

loss of reputation. Second, departure cases in general can affect the chances for judicial promotion which reflects on a judge's ambitions.

Recently, federal district judge Charles Pickering was harshly questioned during Senate confirmation hearings about his role in forcing a reduction in sentence for an individual accused of illegal acts of racial intimidation (Hatch 2003). The apparent ringleader and another co-defendant received no jail time under the guidelines due to prosecutors granting a substantial assistance departure and allowing these defendants to plead to a misdemeanor. This 17 year old individual was the apparent instigator, had a history of racial animus, and also previously fired a pistol into a couple's home for racial reasons. Judge Pickering demanded that prosecutors drop part of the charges that carried a statutory minimum of five years for Daniel Swan, a co-defendant, who did not plead guilty. Swan rejected the original plea agreement with prosecutors who mistakenly thought he was the ringleader because Swan would serve 18 month in prison while the other co-defendants would not serve any time in jail. After the trial and conviction, prosecutors sought a 7 ½ year sentence which Judge Pickering felt was the worst kind of disparate treatment. Pickering forced a reluctant Justice Department to drop part of the charges that carried a mandatory minimum sentence of five years and subsequently sentenced Swan to 30 months. Such actions give fodder for those seeking to defeat judicial nominees.

Reversals of such decisions by appellate courts allow opponents in the Senate to avoid sticky ideological questions and instead oppose a judicial nominee as incompetent or acting beyond the law. A final incentive would be the desire to avoid adding to one's workload by granting a departure that the district judge is sure that the appellate court will overturn. Reversal would mean simply that the judge would have to go through the process all over again possibly with more restrictive instructions from the appellate court. Thus, if leisure (time) is important to a district judge, they

would generally prefer not to engage in pointless rebellion and instead seek to maximize their preferences within the existing system.

Decision-theoretic models such as Calvert's (1985) provides a useful insight that might seem counterintuitive about how an appellate court could lower its monitoring costs of district courts. Calvert proposes that principals may find more value in information from sources generally biased against the principal's positions than from sources that generally agree with the principal. For example, a parsimonious congressional committee that knows a particular agency generally wants more staff might tend to discount agency requests for staff increases. But, this committee would not discount information when that agency proposes staff cuts. Under these conditions, a committee could well believe that this agency would not propose cuts unless the agency really believed that they were necessary. When applied to court actions, a lenient sentence handed down by a judge known for sentencing strictness gives the reviewing court significant information that this case might well warrant a lenient sentence.

In the case of ensuring fidelity to the law, employing the U.S. Courts of Appeals as overseers helps homogenize discordant rulings by district judges. Thus, Congress avoids most of the onerous monitoring costs of directly monitoring district court behavior through delegation. Congress also avoided the cost of having to prescribe precise punishment legislation with the creation of the U.S. Sentencing Commission. Interestingly enough, the old sentencing regime of unfettered district judge discretion left Congress ignorant of the degree of agency loss because no formal monitoring of judges' sentencing behavior existed. Principal-agent theory provides a rationale why Congress would change the indefinite sentencing regime. Congress curtailed the broad discretionary powers of the Parole Commission and the district courts because of unacceptable agency loss caused by a divergence in the interests and values of Congress from its agents.

Monitoring raises problems with the principal agent framework because objective repeatable criteria for judging agent performance usually do not exist. Arrow (1985) mentions the problem with using exclusively monetary sanctions or incentives to reward agent performance. In particular, Arrow calls for including social sanctions and incentives in principal-agent analysis. For example, a district attorney (agent) may feel compelled to bring the state's case despite personal distaste because of professional norms and sanctions. Social sanctions and incentives should particularly be investigated for its effects on judicial behavior because of the independent nature of the courts in American society.

Several means do exist to reduce these problems and have been utilized in the sentencing structure set up by Congress. First, Congress requires a separate fact-finder, the probation officer, to create a pre-sentencing report with relevant facts. Second, Congress also required the judge wishing to depart from the guidelines to provide reasons for that departure. Third, the right of appeal for defendants and prosecutors meant that these parties could alert the monitoring appellate panel about outcomes diverging from Congress's will and ask for sanctioning behavior from the appellate court. Thus, Congress attempted to create a proper incentive structure that results in optimal performance by federal district courts by permitting sentencing appeals. Thus, the U.S. Courts of Appeals provide the key incentive through their reversal activity to reduce agency loss through non-compliance with the sentencing guidelines.

Gibson (1978a) provides one such way to investigate how judicial attributes might affect the desirability of the incentives for guideline sentencing. Employing his role conceptions to the sentencing problem, some judges who adopt the legal role would sentence within the guidelines without attempting to shirk regardless of their personal distaste for the sentence. Of course, those judges who see a broad discretionary role for judicial decision making would certainly be more likely to depart from sentencing within the guidelines. These judges would fear reversals less. Appellate

judges may likewise feel compelled to reverse decisions by lower courts that the appellate judges like because that is what they feel the law dictates. Thus, those choosing the legal conception of their role would be reluctant to step outside of the guidelines due to perhaps cognitive dissonance or potential for the sanction of being overturned. These possibilities buttress Arrow's assertion that principal-agent analysis must go beyond the usual boundaries of economic analysis and extend into resolving these weaknesses in principal-agent theory. Because of the necessity of surveying judges, little has been done since Gibson, but generally we should expect to see a greater proportion of Democrats that favor freer exercise of sentencing discretion at the district level and a greater proportion of Republican judges favoring the narrow legal role when it comes to sentencing.

Multiple Principals

A complication to principal agent analysis comes from the existence of multiple principals and multiple agents such as the case of Congress, the Sentencing Commission, and the courts. One method to dodge the increased complexity is by collapsing individual actors into an institution. Thus, many formal theorists simply assume that each actor is unitary, and they often simplify further by assuming a dyadic relationship of one principal and one agent. This institutional view assumes that a strict hierarchy determines the choice, or that the institution represents the summed utility functions of the individual actors within that institution. For example, one method would be to assume that either the President or the agency head's preferences represent the preferences of the entire executive branch or the whole agency. A common assumption for Congress is that its preferences are determined by aggregating the preferences of individual legislators by the device of a majority vote (Ferejohn and Shipan 1990). Thus, Congress' preferences reflect those of the majority without regard for its bicameral structure. Recently, more complex formal theory has relaxed both the unitary actor assumption and the need for a single dyadic relationship between one principal and one agent.

Ferejohn (1986) proposes that models with multiple principals promote agent autonomy in a multidimensional setting. Other researchers support this view (Moe 1987; Ferejohn and Shipan 1990; Wood and Waterman 1991). For example, Moe (1987) and Ferejohn and Shipan (1990) argue that in the case of multiple principals, a single agent can play the principals against one another in a series of dyadic relationships. Moreover, Bendor (1990) and Waterman and Meier (1998) note that implementation (or advocacy) coalitions could also be used resulting in a blurring of who is principal and who is agent. Thus, district court judges that desired to "shirk" could, in theory, attempt to play the U.S. Sentencing Commission against the appellate courts. However, this would be difficult given the context of sentencing and the norm of obeying precedent from the courts above.

Perhaps some of the most complex formal models that nonetheless investigate important themes include Ferejohn and Shipan (1990) and Eskridge and Ferejohn (1992). These two articles employ game theoretic models to examine how multiple principals affect agency policymaking. Ferejohn and Shipan (1990) conclude that congressional committees often do not have a credible means to threaten legislation overturning an unfavorable decision because of the parent chamber's opposition. Second, judicial review and presidential veto powers also limit the influence of congressional committees on agency policymaking. Thus, a principal such as Congress or the Sentencing Commission may lack a credible threat to district court judges to reduce departure activity because enforcement is in the hands of the appellate courts.

Eskridge and Ferejohn (1992) examine the effects on agency and political bodies from *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983) and *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984). They propose that these decisions weakened the position of the Congress and the judiciary, and thus strengthened the executive when dealing with policymaking by bureaucratic agencies. Thus, bureaucratic agencies may now be more responsive to executive influence on policymaking and are influenced less by Congress and the judiciary. As a result,

agencies may now try to please the president first and worry less about the Congress and judiciary. Implications for the sentencing decision would be how assistant district attorneys handle appeals of sentencing decisions and how often they seek substantial assistance departures.

In the case of the sentencing policy, Congress uses the incentive/sanctioning behavior of the appellate courts to enforce agent compliance from the district courts. The Sentencing Commission actions are controlled through congressional powers to curtail or reverse by statute any amendments to the Sentencing Guidelines. In this system, Congress derives its authority from the people as their elected and constitutional agent, but Congress subsequently acts as a principal itself by delegating its monitoring/sanctioning duties to the U.S. Courts of Appeals and its lawmaking duties to the U.S. Sentencing Commission. Congress itself acted to reduce the multiple principals confusion by bifurcation. One agent is charged with general monitoring and guideline (contract) development i.e. the Sentencing Commission, and the other with monitoring and enforcing the guidelines in specific cases i.e. the U.S. Courts of Appeals. In turn, the appellate courts act as a principal who attempts to prevent shirking from the guidelines by federal district court judges. By using dyads to form the principal-agent relationships and by splitting the roles, Congress makes it much harder for district court judges to pit the U.S. Sentencing Commission's guidelines versus the appellate court's decisions.

Criticisms and Limitations of Principal-Agent Frameworks

Formal models do not always demonstrate a close resemblance to reality as seen by empirical researchers in public administration or political science. Formal models often include unrealistic assumptions that appear to dangerously simplify complex relationships. Another general reason that formal models are attacked stems from modelers attempts to deduce specifics from general propositions. Ultimately, positive theory proposes that a universal rigorous theory of politics is

possible. However, critics charge that a multiplicity of formal models exist that use assumptions in such a way that unfalsifiable hypotheses are obtained (Green and Shapiro 1994).

These general criticisms also can be seen regarding principal-agent theory. However, some theorists believe that improvement can occur by adding complexity through new assumptions etc. (Moe 1987; Bendor 1990; Waterman and Meier 1998). However, Spence (1997) attacks formal models of the delegation of power. First, he charges that positive models "tend to omit much of the politics of legislative-bureaucratic interaction" and thus assume away the collective action problem. Second, models do not address "the myriad ways agencies can evade procedural control (or at least make it more difficult) when they make policy (Spence 1997; 206-207)." Spence's charges remain relevant for examining how the hierarchy of the courts behave in relation to Congress.

A question exists of how useful principal agent theory may be for practical application in describing judicial behavior. Those examining the courts find themselves investigating a complex political environment that does not correspond with the nice, simple, and logically deduced formal models produced by positive theorists. Given some differences between the courts and bureaucratic agencies, one might conclude that principal agent analysis cannot provide a method for explaining court actions. However, principal agent analysis does provide some theoretical explanations and perhaps guidance about how principals such as legislatures, and appellate courts, ensure district court compliance with what these principals wish.

Role of Institutions

An early example of formal models involving institutions comes from Fiorina (1982.). He proposed that legislatures delegate tasks to the bureaucracy to gain agency expertise or to avoid onerous tasks. Thus, Congress delegating the making of sentencing changes to the Sentencing Commission and appellate review of district court sentencing appears perfectly appropriate given this understanding of principal agent relations. Alternatively, McCubbins, Noll, and Weingast

(1987), suggest that administrative procedures can serve as a means of controlling agencies. Simply monitoring and/or sanctioning agencies may not provide enough leverage to force an agency to comply with the wishes of Congress, the executive, or the courts. McCubbins, et al. conclude that administrative procedures serve as an additional means to control the agency. McCubbins, et al. also believe that administrative procedures help the agency avoid sanctions from the political bodies by avoiding inadvertent non-compliance by the agency. The development of the guidelines by the U.S. Sentencing Commission, case law by the appellate courts, and the requirement of sentencing reports by the district court all serve this function. As a result, the use of sanctions may be lessened because agencies can avoid accidentally opposing the newly revealed preferences of principals.

An amusing but serious model put forward by McCubbins and Schwartz (1984) characterize different methods of congressional oversight as either resembling a police patrol looking for trouble or a firefighter responding to a fire alarm. They propose Congress should prefer to oversee agencies like a firefighter responding to a 'fire alarm' rather than acting as a policeman on 'police patrol'. Because 'police patrolling' the bureaucratic agencies for wrongdoing involves time and effort without much electoral rewards, Congress prefers to respond to problems in the bureaucracy only when an alarm is raised by citizens. These circumstances leave Congress free for other activities while retaining the ability to instigate oversight over unpopular agency action. In this case, Congress avoids the tiresome cost of direct continuous oversight and gains valuable electoral credit for restraining "rogue" agency actions.

McCubbins and Schwartz (1984, 176) may be using colorful language to describe how Congress conducts oversight, but they note that "(s)ometimes Congress appears to do little, leaving important policy decisions to the executive or judicial branch." However, they continue, "But appearances can deceive. A perfectly reasonable way for Congress to pursue its objectives is by ensuring that fire alarms will be sounded, enabling courts, administrative agencies, and ultimately

Congress itself to step in. . ." Thus, the widespread perception that Congress has little appetite for oversight may not be correct because scholars have concentrated on the type of oversight that Congress rarely uses ('police patrols'). Again, formal models provide a non-intuitive insight that other scholars have ignored. Similarly, appellate courts rely on attorneys to appeal cases (fire alarm) instead of having a roving commission to right legal errors on their own (police patrolling).

Alternatively, Kiewiett and McCubbins (1991, 36) propose that ". . .members in Congress, in their creation of agency control mechanisms, are in pursuit of objectives that are much more far-reaching than that of getting the next few votes to come out right." They continue that ". . (control) arrangements are not meant to assure the choice of a particular policy, but rather to prevent policy being blunted and dissipated by agency losses." To prevent agency loss from happening, Congress and the executive branch create structures to reduce control (agency) problems. Thus, Congress and executive do not usually shirk their responsibilities to provide control to bureaucratic agencies. Instead they create structures such as congressional committees or presidential offices to maintain oversight and control of agencies. Applying the Kiewett and McCubbins understanding to the sentencing problem would stress the creation of appellate review of sentencing and the collection of information and the codification of the sentencing guidelines by the U.S. Sentencing Commission as examples of structures meant to ensure sentencing patterns that follow legislative preferences. By giving appellate courts a measurable standard through the specificity of the sentencing guidelines, review by these courts is translated from a "hard" case into an "easy" case. Thus, the primary tool that the U.S. Sentencing Commission has to prevent a creeping divergence by appellate courts is to codify desired appellate and district court rulings into the guidelines through amendments. Because the Supreme Court anointed the Sentencing Commission and Congress as the final arbiters of what the guidelines say and mean, individual circuits are constrained further with each iteration of "clarifying" amendments to the guidelines. Thus, the Sentencing Commission and Congress hold

the Courts of Appeals in check by law and the sentencing guidelines and in turn, the Courts of Appeals hold the district courts in check by reversals and the development of legal doctrine through precedent.

Applying this standard, these principal agent models should be judged by how well they explain how institutions act to control (or not to control) their agents. Clearly principal-agent analysis provides a better formal description of how principals such as Congress attempt to control their agent—the bureaucracy. For example, Niskanen (1971) argued that the bureaucracy can exploit the difference in information to gain additional autonomy from the legislature thus the bureaucracy can use their expertise to gain agenda setting powers. Re-examining agency agenda control through information asymmetry, Miller and Moe (1983) and Bendor, Taylor, and Van Gaalen 1985; 1987) find that agency agenda control over budgets may be weaker than thought because of legislators anticipating agency actions. Similarly, appellate judges may anticipate and seek to pre-empt potential disruptive district court actions through the use of *obiter dicta* that would seek to forestall undesirable district court behavior.

These understandings can be usefully extended to appellate review as well. By tweaking such legal doctrines as standing to sue and standards of appellate review, appellate courts can enable whistleblowers, i.e. appellants, to appeal unwarranted decisions of administrative agencies and district courts. Congress, by allowing defendants to appeal their sentences, enables appellate courts to act as their fire alarm rather than bothering to enact specific sentencing statutes. In addition, Congress subsequently has from time to time enacted statutory mandatory minimums that make appellate review of any contrary district judge's sentence an open and shut case of legal error to be reversed. Because the appellate courts are limited to what cases are appealed, a fire alarm metaphor is more useful than the police patrol to characterize appellate review.

The implications of most of the models are that institutional factors may serve as effective constraints on the principal-agent relationship. Rules and institutions such as congressional committees, vetoes, and court decisions extend the means of political bodies for controlling the bureaucracy. For this reason, agencies appear quite effectively constrained by their structure, administrative procedures, congressional committees, and the judiciary. Formal models of agency control serve to remind the public that excessive worry about unchecked bureaucratic discretion does not appear warranted. The same could be said as well for many of the actions undertaken by federal courts.

Empirical Assessments of Compliance

Despite the obstacles to effective control of agents, empirical evidence indicates decisions by lower court judges to intentionally defy Supreme Court rulings are relatively rare (Gruhl 1982; Songer and Sheehan 1990) and also that broadly speaking, lower federal courts adjust their decisions to match changes in Supreme Court pronouncements (Songer and Haire 1992; and Songer, Segal, and Cameron 1994). Also, Baum (1980) finds that district courts follow the lead of their court of appeals in patent cases. Thus, agency loss by delegation appears to be minimal in the circuit court-district court relationship despite what pure theory would predict. Carp and Stidham (1998) provide one answer to the question of why district court judges generally follow the lead of appellate courts. They note the nature of legal reasoning, adherence to precedent, and maxims of judicial self-restraint create a legal subculture that effectively conditions judges to consider these values important (Carp and Stidham 1998, 121). Thus, seeing most cases as "routine" applications of law and fact, lower court judges act contrary to their own ideological preferences on a regular basis because they consider most cases through the prism of legal reasoning.

Routine decision-making often characterizes the federal district and circuit courts where judges exercise little control over their docket. As a result, much of their workload is composed of

mandatory cases that given the law and case fact patterns suggest a clear outcome. In this respect, preferences do not affect the outcome of "easy" cases. Preferences also may play a minimal role because lower court judges must at least give a nod in obeisance to a higher court's decisions or risk being overturned.[19] In addition, judges below the Supreme Court may hope for advancement, which dictates prudence instead of giving free rein to their preferences through controversial decisions.[20]

For these and other reasons, lower court judges interact in a far more complex environment that often accentuates constraints rather than freedom of opportunity. The implications for sentencing decisions are clear. Prior to the institution of sentencing guidelines, federal district court judges were free to employ their preferences in sentencing decisions that were reviewed by higher courts under an "abuse of discretion" standard. Not surprisingly, lawyers and law school professors were concerned in the 1970's and early 1980's about the wide variation in sentences for the same crime (Blumstein, Cohen, Martin, and Tonry 1983; also see Tonry 1996, 9-11). Absent any effective sentencing review by appellate courts and because indefinite sentences were used to punish offenders of most federal crimes, many federal court judges felt free to sentence defendants according to their individual preferences about how defendants should be treated. This situation eventually led Congress to adopt the current sentencing regime through the Sentencing Reform Act of 1984.

After the institution of sentencing guidelines, sentencing discretion was constrained particularly in the case of departures from the sentencing guidelines. A district court judge is required to give a written reason for departing from the sentencing guidelines, and this departure decision itself is reviewable by federal appellate courts. Thus, a decision by a federal district court

[19] However, this circumstance also opens the door to strategic activity by district judges.
[20] Finally, it should be noted that empirical judicial research studies, which examine the effects of preferences on decision making in lower courts, are limited by the available data. Judicial researchers usually know considerably more about Supreme Court justices' behavior and actions because of increased media and legislative scrutiny but intense scrutiny of lower court judges is more rare. Thus, behavioral research attempting to ascertain the attitudes of district or circuit court judges absent any actual survey data becomes one of predicting their actions through partisan affiliation, previous career path, or other externally obtainable data.

judge to depart from the sentencing guidelines requires a judge to make a voluntary written decision to sentence a defendant outside of the guidelines (U.S.S.G. 2003). Given that Congress and the U.S. Sentencing Commission wish these departures to be relatively rare, the departure decision itself yields an interesting way to determine the effects of appellate courts on either encouraging or discouraging sentence departures of trial judges.

In the next chapter, I describe the development of the sentencing guidelines. Later in the chapter, I examine judicial opinions from the Supreme Court and Courts of Appeals that affect district judges, departure behavior. After this discussion and subsequent legal analysis, I build on the framework suggested by this literature review to test hypotheses associated with principal-agent models and empirical research on lower federal courts.

Chapter 3

History and Legal Development of the Sentencing Guidelines

This chapter investigates how the sentencing guidelines came to be established, the creation and operation of the U.S. Sentencing Commission, a brief legislative history of the guidelines, Supreme Court cases involving the sentencing guidelines, and the doctrinal development of case law regarding departures from the Courts of Appeal.

A Brief History of Sentencing Reform

Historically, trial judges possessed broad discretion to sentence defendants as long as the sentence fit within the statutory range that the legislature had enacted into law (Cabranes and Stith 1998). During much of the 20th century, the states and the federal government employed indefinite sentencing for those convicted of a crime. Indefinite sentencing simply means that judges were provided wide ranges of sentences by legislatures that maximized the discretion of a judge to tailor the sentence to the particulars of the criminal offense. To avoid overly harsh sentences by judges from actually being executed, parole boards and executive commutation served to re-examine whether a convict's sentence should be reduced. The emphasis of this sort of sentencing was rehabilitating those who could be set on the right path, but continuing to incarcerate those deemed dangerous to society. Nevertheless, this system inevitably results in at least some disparity because judges, parole boards, and even executive commutations are subject to normal human foibles such as prejudice, political pressure, and poor judgment (Kress 1980). In addition, the spiraling increases in the rate and severity of crimes committed during the 1960's and 1970's made getting tough with crime an important political issue at the federal and state level (Dershowitz 1976; O'Donnell, Churgin, and Curtis 1977; American Law Institute 2003). To add fuel to the fire, news reports and political spot advertisements became common about parolees or those on probation committing

new offenses.[21] As a result, the rehabilitative sentencing model was under attack from those on the left as treating individuals differently and thus was unfair to those lacking social and economic standing. Those on the right attacked rehabilitation as naïve and dangerous to society and sought to elevate punishment and incapacitation of offenders to the primary focus of the criminal justice system (Stith and Cabranes 1998; and American Law Institute 2003).

At the height of turmoil in this country, Richard Nixon won the presidency in 1968 as the "Law and Order" candidate by promising to crack down on crime and disorder and to put similarly minded judges on the federal bench. Other politicians running for municipal, state, and federal offices such as Frank Rizzo, mayor of Philadelphia, Ronald Reagan, governor of California, and numerous candidates for Congress sought to impress the citizenry with their toughness on crime. At the same time, attorneys, sociologists, criminologists, who were often quite liberal recognized that the indefinite sentencing system had resulted in widespread disparities in sentences handed down and this disparate treatment indicated both racial and socio-economic bias in the system. Parole boards also came under fire for their susceptibility to political pressure, parole corruption scandals, and racial disparities in who received parole. As a result, pressure built for Congress and state legislatures to address these problems either by wholesale reformation the criminal code or piece-meal adoptions of such things as statutory minimum sentences for certain crimes, structured sentencing, abolishment of parole, and truth-in-sentencing laws.

At the federal level, Marvin Frankel, a district court judge, issued a scathing critique of the indefinite sentencing system used by the federal government in his book, *Criminal Sentences: Law without Order,* and contended that sentencing had become essentially lawless. His primary critique of

[21] Political advertisements for candidates about the perils of probation and parole also became more frequent. One of the most famous such ads was employed by George Bush against Massachusetts governor Michael Dukakis citing the case of "Willie" Horton. This defendant was released on a furlough program in Massachusetts and subsequently raped a Maryland women, stabbed and severely injured her fiancee, and subsequently stole their car. This political ad effectively portrayed Dukakis as "soft" on crime. Other publicity problems for the parole system came from Tennessee Governor Ray Blanton's sale of pardons and his removal from office and subsequent imprisonment.

the system was that federal trial judges lacked any meaningful criteria for issuing sentences and thus any reasonable appellate review of those sentences could not be undertaken (Frankel 1973; Hirsch, Knapp, and Tonry 1987, 18). Frankel was not alone. During the 1970's, disparate groups such as civil rights leaders, conservatives, social science researchers investigating rehabilitation effectiveness, and those wanting a more predictable legal procedure for sentences came together to oppose indefinite sentencing at the state and federal level (Tonry, 1996, 9). This motley coalition pushed the federal and state governments to eliminate indefinite sentencing systems through limiting the discretion of judges, parole boards, and correctional authorities. Instead, they proposed a technocratic solution: sentencing commissions staffed by dispassionate professionals should be employed to provide detailed criteria for judges to follow when sentencing. In addition, the detailed criteria should give appellate courts crucial information to review sentences instead of relying on the old "clearly erroneous" standard that seldom resulted in meaningful appellate review of sentences.

Not surprisingly, the "laboratories of democracy", the states, acted first to revise sentencing although the U.S. Parole Commission was the first to implement guidelines for the issuance of a paroles which affected an offender's sentence.[22] Minnesota was the first state to enact "sentencing guidelines" for judges followed by Pennsylvania and Washington. Other states that have attempted to put guidelines into effect but failed in their task include Maine, South Carolina, New York. Connecticut, while abandoning indefinite sentencing, instead chose to employ legislatively set sentences with narrow ranges. Since the 1970's, nineteen states, excluding Florida which revoked its guidelines in 1997, have adopted sentencing guidelines in some format with ten states choosing voluntary sentencing guidelines and nine adopting presumptive (mandatory guidelines) for their state judges to follow. Several other states including Alabama, Georgia, Iowa, Massachusetts, South

[22] The U.S. Parole Commission tested guidelines for issuing paroles in 1972 and subsequently adopted explicit guidelines for parole decision making in 1976 which required written reasons for parole denial and permitted administrative review (U.S. Parole Commission 2003).

Carolina, and the District of Columbia are currently studying whether to implement sentencing guidelines (Gillespie, 2003). Only five states, Arizona, California, Florida, Illinois, Maine, and New Mexico, have adopted legislatively set determinative sentencing statutes without guidelines.[23]

[23] Presumptive sentencing guidelines are based on the idea that a certain ideal sentence is presumed and judges should explain why they did not follow the guidelines. Appellate review of this sentence may or may not occur but departures are tabulated. Voluntary sentencing guidelines simply suggest to a judge seeking guidance what the range of sentences ought to be. No new rights for appealing sentences are created for sentencing above or below the guideline recommendations and sentencing behavior of individual judges may or may not be reported. Determinative sentencing means that the legislature (instead of a sentencing commission) provides narrow sentencing ranges that judges must follow.

Table 2: State Adoption of Sentencing Guidelines

State	Mandatory/Voluntary	Year Implemented	Year Revoked	Appellate Review	Active Sentencing Commission	Notes
Alabama					Yes	A
Alaska	M	1980			No	
Arkansas	V	1994		No	Yes	
Delaware	V	1990			Yes	
Florida	V	1983	1997		No	B
Georgia					No	A
Iowa					No	A
Kansas	M	1993		Yes	Yes	
Louisiana	V	1992			Yes	
Maryland	V	1983		No	Yes	
Massachusetts	M				Yes	A
Michigan	M	1981,1999		Yes	Yes	C
Minnesota	M	1980		Yes	Yes	
Missouri	V	1997		Yes	No	
N. Carolina	M	1994		Yes	Yes	
Ohio	M	1996		Yes	Yes	
Oklahoma					Yes	A
Oregon	M	1989		Yes	Yes	
Pennsylvania	M	1982		Yes	Yes	
S. Carolina					?	A
Tennessee	M	1989		Yes	No	
Utah	V	1993		No	Yes	
Virginia	V	1995		No	Yes	
Washington	V	1983		Yes	Yes	
Wisconsin	V	2003		No?	Yes	D
Washington, DC					Yes	A
U.S.	M	1987		Yes	Yes	

Notes: A= Currently considering sentencing guidelines, B= Revoked sentencing guidelines in 1997 and replaced with determinate sentences, C= Instituted voluntary guidelines from 1981-1999, changed to mandatory guidelines in 1999, D= Instituted temporary sentencing guidelines to be replaced later with permanent guidelines.

States using determinate sentencing without guidelines: Arizona, California, Florida, Illinois, Maine, and New Mexico

In the federal sentencing system that existed before 1986, federal law and Supreme Court precedent gave broad sentencing discretion to a federal district court judge that was intended to adjust the prison terms to fit the circumstances of each convicted defendant. In addition, the U.S. Parole Commission and prison officials acted to adjust the time actually served to fit the individual.

The resulting widespread disparities in sentences handed down by federal district court judges and sentences served after adjustments by parole officials led Congress to restrict sentencing discretion in several ways. The first way was to create a federal Sentencing Commission that would first investigate federal sentencing disparities and later propose a method to deal with these disparities in sentences. The second was to bind judges' sentencing discretion through creating mandatory minimum sentences for some crimes. Third, parole was abolished and only a limited adjustment to sentences for good behavior during time served was allowed. Congress hoped as a result that sentences rendered by district judges would be equalized, and also that truth in amount of time served by offenders would be achieved.

Thus, after the implementation of the sentencing guidelines began in 1987, district court judges had to contend with the complexity of the federal sentencing guidelines as well as the proliferation of mandatory minimum sentences issued by Congressional statute. The sentencing guidelines used existing statutory ranges and sentencing patterns to create a range of sentences for a particular crime with 25 percent variance allowed. Judges were permitted to depart upward and downward from the presumptive sentencing range but had to give reasons for the departure which was subject to appellate review. On the other hand, mandatory (statutory) minimums specified the minimum sentence length that a judge could set but judges could not normally give a sentence below that set by statute.[24]

The federal sentencing guidelines issued in 1987 also gave the appellate courts a new task: the circuits had to oversee the district court judges and make sure that the guidelines were applied appropriately. Not surprisingly, federal district court judges resented their diminished discretion and claimed either that Congress lacked the constitutional power to enact the guidelines or that the U.S. Sentencing Commission's structure violated the separation of powers provisions in the Constitution.

[24] Excluding those offenders with no criminal history that qualified for the "safety valve" provision mentioned earlier.

Over 179 federal district court judges (60.9%) ruled that the guidelines were unconstitutional and only 115 federal district court judges (39.1 %) upheld the constitutionality of the law (Sisk, et al. 1998, 1403). This two year rebellion by many federal district court judges who declared the new sentencing guidelines unconstitutional was quashed when the U.S. Supreme Court upheld the constitutionality of the sentencing guidelines by an 8-1 vote in *Mistretta v. U.S.* 488 U.S. 361 (1989) and thus ushered in the brave new world of implementing the sentencing guidelines.[25]

The U.S. Sentencing Commission

The U.S. Sentencing Commission is one of the more distinctive and relatively powerful agencies in the federal government despite its small size. Congress chose to grant considerable legislative and investigatory powers to the Sentencing Commission for the study of sentencing problems and more importantly how to address sentence disparities among judges under the aegis of U.S.C. 28 § 994(a).[26] This substantial grant of lawmaking power was confirmed subsequently by the Supreme Court in its *Mistretta* decision. Initially, the U.S. Sentencing Commission saw its chief congressional mandate as reducing disparity of sentences given for the same offense by choosing uniformity of sentences as the primary goal of the guidelines. For virtually all federal criminal and misdemeanor cases, the Sentencing Commission attempted to ensure that offenders are treated alike given the same case circumstances.

In the creation of the federal sentencing guidelines, the Sentencing Commission decided that offense severity could be distinguished between different types of charges and that previous criminal history should also be considered when sentencing offenders. The Commission also studied the various factors that could be considered aggravating or mitigating for a particular offender's case. The resulting guidelines use offense severity coupled with past criminal history as the primary basis

[25] Justice Scalia dissented from the ruling chiefly on the grounds that the Sentencing Commission violated the separation of powers doctrine.
[26] The Senate Report of the Judiciary Committee, S. Rep. No. 97-307, is replete with criticism of how district judges employed their sentencing discretion.

to determine the basic sentence range (§1B1.1, U.S.S.G., 2003). However, judges then apply any aggravating or mitigating factors to adjust the basic sentence range. If a judge decides to depart from the guidelines altogether, then she must provide reasons for such departure, and either the defendant or the government can appeal that departure (18 U.S.C. § 3553(b), 18 U.S.C. § 3742) .

This structured approach has served to reduce differences between sentences, but many federal judges have subsequently attacked the guidelines. These judges believe that the guidelines create considerable injustice because discretion is limited in reducing sentences for some offenders based on their unique circumstances[27]. Empirical evidence that supports this contention comes from Mustard (2001) who finds substantial sentencing disparity based on race and gender still exist under the sentencing guidelines. Examples of responses to a 1997 Federal Judicial Center's survey of district and circuit judges highlight these criticisms:

> I believe there should be advisory guideline, with discretion to depart, appeal only if judge goes outside guidelines. The present system works injustices in individual cases. Kids who take $500 to act as courier and sentenced to six to eight years on basis of weight in drugs. We never see an entrepreneur.
>
> I think guidelines which were not mandatory would be helpful for all federal and state judges. It is the mandatory nature which creates the unfairness and the unfairness is outrageously unjust. All of us who sit on the trial bench can recite many, many stories about defendants who are unfairly treated.
>
> I appreciate that many people have worked long and hard to make the guidelines work. It has put judges time after time in the position of having to fudge in order to do justice. It would be much more honest if they (the guidelines) were made advisory, as I suspect that society doesn't benefit in the long run if judicial officers from the bench (as well as the lawyers) have to struggle with and strain at gnats to do right by the public and the defendant. I have often wondered why much simpler methods could not have been used to assure against extreme sentences. It would have been so easy to do so (Federal Judicial Center 1997, 4).

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[27] Kate Stith with Judge Cabranes of the 2nd Circuit produced a book, *Fear of Judging: Sentencing Guidelines in the Federal Courts,* criticizing the Commission's approach. Another judge, G. Thomas Eisele, criticisms of the guidelines include this quote, "Not only is the new system not a "guideline" system, but it does not deal exclusively with 'sentencing.' On the contrary, the new system establishes a fact-finding criminal law protocol by which to establish criminal liability, contrary to our Bill of Rights. So neither the term "sentencing" nor the term "guidelines" fairly and forthrightly describes this strange system or hints at its all-encompassing breadth. " (Eisele, 1991).

Subsequently, federal district court judges have cooperated grudgingly with the sentencing guidelines despite their general dislike for the current mandatory nature of sentencing guidelines (FJC 1997, 3).

The Enabling Act of the Sentencing Commission

The alleged widespread disparities among sentences handed down by federal judges eventually led both conservatives like Sen. Strom Thurmond (R-SC) and Sen. John McClellan (D-AR) and liberals such as Sen. Edward Kennedy (D-MA) and Gary Hart (D-CO) to propose that a Sentencing Commission be empowered to reduce differences between judges in sentencing offenders. When Congress created the U.S. Sentencing Commission in 1984, it sought to curb the discretion of federal judges for sentences without attempting to codify every circumstance that might justify departing from the sentencing guidelines. It chose this route because earlier attempts at a comprehensive revision of the U.S. Criminal Code undertaken during the late 1970's and early 1980's foundered due to philosophical differences between the members of the House and the Senate (U.S.S.C. 2003b).

The Sentencing Reform Act of 1984 makes several changes to how and why criminal defendants are sentenced. First, this Act rejects imprisonment as simply promoting rehabilitation. Instead, punishment should be retributive, educational, deterrent, and incapacitative in nature (18 § U.S.C. 3553(a)). Second, the Act unifies the power to sentence that had been delegated to trial judges and the Parole Commission by repealing 18 § U.S.C. 3561 to 3580. Instead, this Act makes most sentences determinate with only good prison behavior credits shortening the length of the sentence (18 U.S.C. § 3624 (b)). Next, the Act charges the U.S. Sentencing Commission to promulgate binding guidelines for sentencing with adjustments for aggravating or mitigating circumstances (28 U.S.C. § 994(a)). The final change that the Act promotes is the limited appellate review of sentences focusing chiefly on misapplication of the guidelines rather than the underlying sentence itself (18 U.S.C. § 3742; and Wilkins 1989).

The Act places the new U.S.S.C. in the judicial branch with appointments made by the President and confirmed by the Senate. Judges must make up at least three appointees of the seven commissioners and these judges must come from a list of six judges that are recommended by the Judicial Conference of the United States. However, there is no requirement that all the commissioners must be judges, and the Attorney General of the United States or her designee sits on the Commission as an ex-officio non-voting member. Like most federal commissions, the President may only remove members of the Commission for "neglect of duty, malfeasance in office, or for other good cause reasons" (U.S.C. 28 § 991).

Congress charged the Sentencing Commission with several tasks that include promulgating the sentencing guidelines, proposing amendments to those guidelines to fit new circumstances, resolving legal conflicts between circuit courts of appeal through guideline revision, and conducting research through monitoring federal sentences and reporting to Congress on an annual basis or as requested (U.S.C. 28 § 991). The Commission's sentencing guidelines also must meet the statutory requirement of U.S.C. 18 § 3553 (a)(2) that states the sentences should "reflect the seriousness of the offense, (to) promote respect for the law, and (to) provide just punishment for the offense." Other requirements that Congress expects the Sentencing Commission to meet are that sentences should be certain and fair without unwarranted sentence disparities. At the same time, Congress expects that the Commission's guidelines supply sufficient flexibility for adjustments to sentences due to aggravating or mitigating circumstances of individual cases that are not fully addressed by the guidelines. The Sentencing Commission is also expected to apply current research on the criminal justice process and develop means of monitoring how well the federal justice system is meeting the purposes of sentencing expressed in U.S.C. 18 § 3553 (a)(2). Thus, the U.S.S.C. has to meet several statutory requirements for the sentencing guidelines as well as monitoring adherence to the

guidelines. The U.S.S.C. also is charged to conduct current research and then apply the information gathered to change the federal guidelines when appropriate.

The Sentencing Commission's complex legal environment chiefly comes from its mixed nature of being a judicial agency making and then implementing changes to mandatory sentencing guidelines for judges without much participation from Congress or the President. Even the composition of the agency is somewhat strange with sitting federal judges serving both as commissioners and as federal judges. Nevertheless, after *Mistretta*, courts generally followed the sentencing guidelines despite their relative unpopularity with judges. Perhaps the greatest challenge to the Sentencing Commission does not come from judges, but rather from Congress. Congress makes the Sentencing Commission's job much more difficult when it institutes statutory mandatory minimums for certain offenses. These mandatory minimums make juggling the various elements of offense severity, criminal history, and other factors much more difficult when attempting to address other statutory requirements of the Commission. However, the current Sentencing Commission provides an interesting agency to observe as it represents one of the few times that federal judges must act as an administrators of an agency as well as judges.

Sentencing Guideline Provisions Related to Departures and Appellate Review: A Selective Legislative History

When it passed the Sentencing Reform Act of 1984, Congress introduced important changes to the prior indefinite sentencing regime. The initial impetus for sentencing reform came as an offshoot of Sen. John McClellan's push during the 1970's for a comprehensive reform of the U.S. criminal code. Eventually, Congress gave up on attempts to reform and rationalize the U.S. criminal code along the lines of the American Law Institute's Model Criminal Code. At this point, Senator Edward Kennedy picked up the banner of reform by introducing Senate Bill S. 2966 in 1975 that

explicitly called for the creation of a sentencing commission and a guideline system of sentencing (Stith and Yoh 1993). Sentencing reform remained on the congressional agenda for the next nine years with Senators McClellan and Kennedy pushing for the elimination of the indefinite sentences and the institution of sentencing guidelines. Initially, the House reaction was cool to a radical overhaul of the federal criminal law and later did not support making the guidelines presumptive thus alleviating the need for departures and appeals (Stith and Yoh 1993, 244). For this reason, much of the subsequent provisions of the U.S. code that deals with sentencing guidelines and appeals comes from the Senate's position prevailing in conference over the more cautious position of the House about the utility of sentencing guidelines.

By 1983, the positions of the Senate and the House Judiciary Committee were closer, but the House preferred a more judge centered approach and worried less about judges being responsible for sentencing disparity. However, the full House did not consider the H.R. 6012 which incorporated a much paler version of the U.S. Sentencing Commission. As a result, the Senate bills S. 1762 and S. 668 were incorporated into a continuing appropriations bill by the House and signed into law on October 12, 1984.[28]

It is clear that the Senate viewed provisions of the Sentencing Reform Act on appellate review and departures quite differently from the House and these differences were restated when Congress revisited the issue of departures in the Sentencing Act of 1987. The major controversy between the House and the Senate was over how departures should be viewed. The House wanted to retain more sentencing discretion for judges while the Senate wanted departures to be rare and judges to strictly adhere to the guidelines. Thus, the Senate wanted a strong sentencing commission and strong appellate review while the House wished to preserve enough trial judge discretion to

[28] S. 1762 of the 98th Congress was titled the Comprehensive Crime Control Act of 1983 sponsored by Senators Strom Thurmond (R-SC) and Paul Laxalt (R-NV). Senator Kennedy's stand alone bill, addressed only Title II sentencing reform provisions. These bills were passed and sent to the House in February 1984 (U.S. Sentencing Commission, 2003, B-10).

permit individualizing sentences. A key flashpoint over departures was the new section 3553(b) of the Sentencing Reform Act which states:

> The court shall impose a sentence of the kind,. and within the range, referred to in subsection (a)(4) [the applicable sentencing guideline range] unless the court finds an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described (Pub. L. No. 98-473, 98 Stat. 1837, 1990 (1984)).

Where the Senate and House differed was over how readily and often a judge could "depart" and sentence offenders outside of the guidelines. The Senate valued uniformity in sentencing while the House sought to buttress its chief goal of maintaining judicial discretion. The House sought to ensure that judges retained the ability to address through sentencing the differences that judges saw in offenders. Nevertheless, the Senate's position has achieved pre-eminence over the House's when considering the actual operation of the sentencing guidelines.

The codification of appellate review provided another source of controversy between the Senate and the House. The absence of appellate review of sentencing, according to Richey (1978, 73), occurred because ". . .[t]he language granting jurisdiction to 'pronounce final sentence' was omitted from the 1891 Act creating the courts of appeal (Act of March 3, 1891, ch. 517 § 11, 26 Stat. 826). Apparently, Congress had originally granted this power of appellate review of sentencing to circuit courts in an 1879 act, but it unintentionally left the provision out in 1891 while clearly showing an intention in the legislative history that appellate courts were to review sentencing by district judges in the legislative history of the act (Richey, 1978, 73). But, any role was effectively blocked by several Supreme Court decisions including *Gore v. United States,* 357 U.S. 386, 393 (1958); *United States v. Tucker*, 404 U.S. 443, 446 (1972) "[t]he Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."; *Dorszynski v. United States*, 418 U.S. 424 (1974); and *Solem v. Helm*, 463 U.S. 277, 305 (1983) where the Court pronounced

> "Contrary to the dissent's suggestions, post, at 305, 315, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits."

In the common law, the lack of oversight of sentences appears anomalous especially when compared with Great Britain, Australia, New Zealand, and Canada which all have a history of appellate courts reviewing sentences, but appellate review in these countries was not coupled with sentencing guidelines[29] However, Congress rectified this oversight and vindicated Senator Roman Hruska of Nebraska who had long pursued this review by amending Title 18 of the U.S. Code § 3742. This section now states:

> 18 U.S.C. § 3742 (As amended in 1987) Review of a sentence
> (a) Appeal by a defendant—A defendant may file a notice of appeal in the district court fro review of an otherwise final sentence if the sentence—
> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under § 3563 (b)(6) or (b)(11) than the maximum established in the guideline range; or
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.
> (b) Appeal by the Government. —The Government, with the personal approval of the Attorney General or Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
> (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or

[29]Appeals of sentences was permitted in Great Britain after the Criminal Appeal Act in 1907 (Pattenden, 1996, 243). The origins of appellate review of sentencing in Canada, Australia, and New Zealand are uncertain to this author but apparently pre-date the U.S. experience (Lovegrove 1989; 1997).

supervised release under § 3563 (b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set for in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition. —If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guidelines and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and

remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Application to a sentence by a magistrate.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h)Guideline not expressed as a range. —For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

Key provisions of this section include the ability of both defendant and the government to appeal sentences outside of the guideline range and the fact that neither can appeal sentences within the guideline range. Another important provision is that for reviewing sentences outside of the guideline range, the appellate court must address whether the district court's sentence was "unreasonable". Finally, any error in the application of the guidelines by the district court judges is to be treated as an error of law.

Judge William W. Wilkins of the 4th Circuit and the first chair of the U.S. Sentencing Commission declared that,

> A close reading of the language demonstrates that the departure standard set forth in section §3553(b) envisions a two-prong test. First, the court must identify one or more aggravating or mitigating circumstances (or factors) of a kind or degree "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Second, having identified one or more factors not adequately accounted for in the guidelines, the court may depart from the guideline range only if it further determines that the factor(s) "should result in a sentence different from that described" by the applicable guidelines. (Wilkins, 1989, 438)

Thus, the first part of the analysis is whether a judge can depart using a particular factor which hinges on whether the judge has the statutory authority to depart. The second part is whether a departure should be granted. Later, this part of the analysis becomes intertwined with the concept of the "heartland" of typical cases where only departures should only be granted in cases exhibiting the factor to a kind and degree not adequately considered by the U.S. Sentencing Commission (i.e.

atypical cases). A third part of the review process not mentioned by Wilkins is that of the extent of the departure. At this point, whether the departure is "reasonable" is the standard for appellate review.

The U.S. Sentencing Commission's Commentary on the 1987 *Federal Sentencing Guidelines* notes in passing that the Commission has the statutory authority to forbid a court from using a particular factor to depart by indicating that it had adequately considered this factor. But, the Commission chose not do so in this initial set of guidelines (U.S.S.G. 1987, 1.6). The Commentary goes on to describe the cases where a departure might be warranted as when a court when applying a guideline provision finds that the atypical facts of the case take the case out of the "heartland" of typical cases involving that guideline provision. The Commission also comments that some factors can never be considered in sections §5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status); §5H1.4 (drug or alcohol dependence); and §5K2.12 (loss of business or personal economic difficulties) (U.S.S.G. 1987, 1.6). The Commission admits that other departure factors may be valid, whether mentioned in the guidelines or not, in an unusual case. For this reason, the Commission forswears the idea that the guidelines can be all-encompassing but it ". . .believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take into account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time" (U.S.S.G. 1987, 1.7).

Recent Appellate Case Law involving Departures from the Sentencing Guidelines

The U.S. Sentencing Commission has been the subject of two major Supreme Court cases—*Mistretta v. United States*, 488 U.S. 361 (1989) and *Koon v. United States*, 518 U.S. 81 (1996). Other Supreme Court cases that directly affect departures include *Braxton v. United States,* 500 U.S. 344

(1991), *Williams v. United States*, 503 U.S. 193 (1992), and *Stinson v. United States*, 508 U.S. 36 (1993).[30] In addition, cases decided by the circuit courts of appeal have also affected the scope of appellate review of departures under the Sentencing Guidelines. The first significant case, *Mistretta* dealt with several facial constitutional challenges to the very existence of the Sentencing Commission. The later case of *Koon* addressed more narrow questions: what are sufficient grounds for a federal district court judge to depart from sentencing guidelines and what standard of review should the appellate courts should use when addressing appeals of sentencing decisions.

Congress passed the Sentencing Reform Act of 1984 that created the United States Sentencing Commission (U.S.S.C.) as an independent agency within the judiciary to address serious disparities in federal criminal sentencing. This commission is charged with the responsibility to create binding guidelines for criminal sentencing that gives more determinate sentences for defendants. These sentences are to be determined according to the specific charges and details about the crime and defendant. Subsequently, a convicted defendant (Mistretta) sought to have his imposed sentence overturned because Congress violated the separation of powers principle by delegating the power of the judiciary to the USSC.

Justice Blackmun delivered the opinion of the Court that held the Sentencing Guidelines constitutional. The majority opinion did not find excessive delegation of legislative powers to the U.S.S.C., nor did it find that Congress could not delegate sentencing guidelines to such an expert body. The Court also rejected the claim that the U.S.S.C. violated the separation of power principle by how Commissioners were appointed and removed from the Sentencing Commission.

Justice Blackmun noted that Congress created the U.S.S.C. because of the existence of widespread variations in how federal criminals were sentenced. Congress felt that the Parole

[30]I discuss the possible impact of the Supreme Court's decisions in *Blakely* and *Apprendi* in the conclusion. These cases involve sentencing at the state level but given the facts in the *Blakely* case could signal future constitutional issues involving the federal Sentencing Guidelines.

Commission's guidelines and other means had failed to overcome these disparities. As a result, Congress investigated several alternatives such as determinate sentencing or advisory guidelines, but chose to accept mandatory guidelines with adequate flexibility to address different circumstances while reducing sentencing disparities.

The appellant, Mistretta, alleged that Congress violated the nondelegation doctrine by granting the U.S.S.C. excessive legislative discretion to a judicial branch agency. The Court disagreed and stated that broad delegations of Congressional law-making powers have been held constitutional repeatedly in a string of cases that include *Yakus v. U.S.*, 321 U.S. 414 so long as Congress gives an intelligible principle for the general policy (see *J.W. Hampton Jr. and Co. v. United States*, 276 U.S. 394). Justice Scalia dissented because he noted that the sentences have the force of law by prescribing the sentencing of offenders. Thus, he concluded that the agency effectively exercises law-making powers that the Constitution reserves for Congress. Nevertheless, the Court majority found that Congress adequately met the constitutional requirements to delegate its power to the U.S.S.C.

The Court also rejected the second claim by Mistretta that Congress unconstitutionally gave the Judiciary powers reserved for the Executive. Justice Blackmun noted that the principle of separation of powers is not violated because: (1) despite the placement of the U.S.S.C. in the judiciary, its powers are not united with the judiciary due to its independent nature (2) while the U.S.S.C. wields rulemaking power, the power is not given to individual judges that would increase their powers. As a result, the grant of this agency to the Judiciary by Congress did not effectively change the balance of power between the branches of government.

The third claim by the plaintiff was that the composition of the U.S.S.C. with judges and non-judges serving would undermine the independent nature of the judiciary. The Court rejected this idea by noting the historical additions of extra judicial duties on judges. Additionally, the Court

noted that judges are particularly well equipped to give expert technical advice to the U.S.S.C. about sentencing. Because the U.S.S.C. is not a court and exercises no judicial power, the Court held that the Act does not invest non-judges with judicial power nor require judges to share their powers with non-judges.

The final claim by the plaintiff proposed that the President's power to appoint or remove commissioners violates the separation of powers by allowing the executive to interfere in the operations of the judiciary. In response, the Court noted that removal is only for good cause that effectively limits executive interference. Furthermore, judges are still protected from their initial appointments as federal judges. Removal from the USSC does not remove the judge from the bench. The Court concludes that effectively the Commission does not risk excessive executive interference with Article III and thus is constitutional.

The subsequent case of *Braxton v. United States*, 500 U.S. 344 (1991) raised the status of the U.S. Sentencing Commission's guidelines from the status of ordinary statutory law to a position that is just below the U.S. Supreme Court. The unanimous decision authored by Justice Scalia gives the U.S. Sentencing Commission the role of eliminating conflicts among the circuit courts of how the Sentencing Guidelines should be interpreted. Congress in Scalia's opinion, "contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines [that] conflicting judicial decisions might suggest " (1991, 348). Because Congress itself could revise via amendment contrary statutory interpretations of law, the Court reasoned that by charging the Commission to review and revise the guidelines, the Supreme Court should allow the Commission to address these conflicts among the circuits. The Supreme Court should be "restrained and circumspect" in its certiorari decisions regarding conflicts among the circuits regarding the interpretation of the Sentencing Guidelines (1991, 348). As a result of this

decision, the amendment power of the Sentencing Commission gives it a role in statutory interpretation by the circuits akin to that of congressional statute.

The Supreme Court decisions in *Williams v. United States*, 503 U.S. 193 (1992) and *Stinson v. United States,* 508 U.S. 36 (1993) dealt directly with the appellate review of departures and the authority of the Sentencing Commission. In *Williams*, the Court dealt with an appeal seeking to overturn William's sentence due to the district court's application of both valid and invalid factors when sentencing. The Supreme Court affirmed the 7th Circuit's ruling that held Williams was not entitled to an automatic remand for resentencing because his criminal arrest record was improperly considered along with other valid factors for sentencing. The argument by Williams was this consideration of an invalid factor meant that 18 U.S.C. § 3742(f)(1) was triggered and his sentencing should be overturned because the district court incorrectly applied the guidelines to his sentence. However, since the authority cited by Williams was a Sentencing Commission policy statement, one of the legal questions was whether the policy statement itself carried the effective weight of the guidelines. Nevertheless, William's counsel argued that the judge's upward departure should be reversed and the case remanded for resentencing because the inclusion of the criminal arrest record was not permitted according the policy statement for §5K2.0.

> 18 U.S.C. § 3742 (f) If the court of appeals determines that the sentence –
>
> (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> (2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and -
>
> (A) if it determines that the sentence is too high and the appeal has been filed [by the defendant], it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed [by the Government], it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

The 7th Circuit disagreed with William's contentions and affirmed the sentence because it held that both paragraph 18 U.S.C. § 3742(f)(1) and (2) provide statutory authority for appellate review instead of just paragraph (1). Thus, the test for reviewing district court departures should be "legal error" instead of "reasonableness" alone. The Supreme Court disagreed ". . .[A] sentence thus can be "reasonable" even if some of the reasons given by the district court to justify the departure from the presumptive guideline range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure"(*Williams* 1992, 204). Justice O'Connor's majority opinion then vacated William's sentence and remanded the case to the appellate court to consider whether the district court might have imposed a different sentence given that one of the two departure factors was invalid. Justice Kennedy joined by Justice White dissented. The grounds for the dissent was that appellate review of departures should be governed by 18 U.S.C. § 3742 (f) (2) alone and that policy statements should not be accorded the same deference as the guidelines themselves. The *Williams* decision raised the status of the Sentencing Commission's commentary to the guidelines as binding on lower courts which effectively gave it the force of law absent any conflict with statutes or the guidelines themselves.

Stinson v. United States, 508 U.S. 36 (1993) effectively blocked another legal challenge to the authority of the Sentencing Commission and its guidelines. The unanimous decision, written by Justice Kennedy, held that "commentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution, federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline" (1993, 36). This decision overturned an 11th circuit ruling that the commentary was not binding and that an amendment to the commentary by the

Sentencing Commission did not have to be followed by district courts considering the interpretation of §4B1.2 of the guidelines.[31] Essentially, the court held that the U.S. Sentencing Commission's commentary should be treated as an agency's interpretation of its own legislative rules.

This decision combined with the Court's ruling in *Braxton v. United States*, 500 U.S. 344 (1991), which held the Commission responsible for resolving circuit conflicts over guideline provisions, effectively made the Commission the supreme arbiter of sentencing provisions. Due to *Braxton* and *Stinson,* U.S. Sentencing Commission amendments to guideline provisions, policy statements, or commentary are treated as binding and thus authoritative to the federal circuits and district courts. As a result, the Commission can resolve any conflicts between circuits by simply amending the Sentencing Guidelines, policy statements, or the commentary to the Guidelines.

The case of *Koon v. United States*, 518 U.S. 81 (1996), represented a narrow challenge to the efforts of the Sentencing Commission. Its outcome was perhaps foreshadowed by *dicta* in *Williams* that stated, " [t]he development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.' quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)". In this notorious case, Stacy Koon, a police officer, was charged with criminal violations of civil rights laws when he was involved in the infamous Rodney King beatings in Los Angeles. The district court departed from the Sentencing Guidelines and drastically reduced the sentence range for Stacey Koon from 70 to 87 months to that of 30 to 37 months. The judge subsequently gave the defendant a 30-month sentence at the bottom of the range. The district judge gave four reasons for departing from the guidelines: (1) possible

[31] The facts in the case was that § 4B1.2 applies to "crimes of violence" and the Sentencing Commission amended the Commentary of the Guidelines to specifically exclude "felon in possession" as a "crime of violence". The district court and the 11th circuit did not treat the commentary amendment as authoritative and thus the 11th circuit affirmed the district court's application of § 4B1.2 provisions to the sentencing of Stinson who was carrying a firearm.

abuse in prison, (2) job and occupational loss, (3) successive state and federal prosecutions, and (4) low risk of repeating offense.

The U.S. Justice Department appealed to the 9th Court of Appeals, which employed a *de novo* standard to overturn the district court's sentence as "unreasonable". This review was triggered by the fact that the district court used grounds for the departure that were unmentioned in the Sentencing Guidelines. Thus, what was at stake was whether the Courts of Appeals would be able to strictly scrutinize departure decisions using unmentioned grounds by district court judges. Koon's appeal to the U.S. Supreme Court questioned whether the Appeals Court erred by exceeding its role in overseeing district court judge's sentences.

The Court held in a 5-4 decision that the Courts of Appeals should not employ the *de novo* standard for reviewing judges' decisions to depart from the sentencing guidelines. Instead, the Courts of Appeals should employ a unified "abuse of discretion" standard that renders appellate review less likely. The Court also agreed that the 9th Circuit made a mistake in forbidding the district judge from considering possible prison abuse and the burden of consecutive state and federal prosecutions as factors to reduce the sentence range. The Court held that the Courts of Appeals do not possess the power to categorically deny the consideration of factors—this power is reserved for the Sentencing Commission and Congress. However, the Court also held that the district court judge abused his discretion to decrease the offense level using the reasons of occupational/job loss and low risk of repeat offenses because these factors were already considered and rejected as grounds for departure by the Sentencing Commission. Virtually all justices agreed that the 9th Circuit used an improper standard of review. Dissenters from the majority opinion differed about which specific reasons for a downward departure should be viewed as an abuse of discretion by the district court and which reasons should not. The effect of *Koon* has been continuing confusion on

what constitutes valid grounds for departure from the sentencing guidelines and not surprisingly an increase in the rate of downward departures from the guidelines by district court judges (Lee 1997).

In addition, *Koon* reemphasized the importance of the U.S. Sentencing Commission through its classification of departure reasons as (1) encouraged, (2) neutral, (3) discouraged, (4) forbidden, and (5) unmentioned. The U.S. Sentencing Commission could change the classification of factors by either including and classifying unmentioned factors or reclassifying and narrowing existing reasons. *Koon* combined with previous rulings effectively increased the power of the Sentencing Commission to define what are valid reasons to depart and thus highlighted the importance of the wording of Sentencing Commission policy statements and commentary to determine valid grounds for departures. The effects of these Supreme Court rulings has left the U.S. Sentencing Commission in an elevated position, downgraded the monitoring and lawmaking functions of the appellate courts, and widened the discretion of district court judges to depart from the sentencing guidelines.

Unfortunately, the Supreme Court's emphasis on the role of the Sentencing Commission and the reduced role of the appellate courts effectively diminished the creativity and zeal of appellate courts for developing a body of law regarding sentencing.[32] If the visionaries' idea of a common law regime of sentencing had existed from 1988 to 1996, we would have seen the Courts of Appeals

[32] Berman (2000, 88) notes that ". . .by confining the use of departure authority to atypical cases, *Koon* restricts the possibility for departures to foster judicial involvement through a common-law sentencing dialogue in all Guideline Cases. Departures are conceived and described by the Supreme Court in *Koon* merely as a means to achieve individualized sentences in "atypical" cases – which, the Court highlights, lest we forget, are expected to be 'highly infrequent'." In his view, a creative jurisprudence would seek to be deferential decisions to depart but use a sliding scale of deference when reviewing the reasonableness of the extent of the departure that depended on the extent of the departure (Berman, 2003, 99). Also see Berman (1999) for a similar argument. Stith and Cabranes (1998, 103) note that even with the *Koon* decision, the Supreme Court simply reiterated the "hegemony" of the U.S. Sentencing Guidelines because the appellate and district courts are still forbidden to re-examine factors that the U.S. Sentencing Commission has "adequately" considered. They quote a supporter of the guidelines, Frank O. Bowman (1996, 19) as noting, "The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by the courts of appeals." However, Bowman (1996, 19), when discussing the Koon decision, proved prescient when he said, "The less optimistic, and I fear more likely, prognosis (of the Koon decision) is that the combination of incidents of intemperance among the district courts and general confusion among courts of appeals will lead to amendments by the Commission the guidelines, and by Congress to the SRA, which will narrow the range of district court authority even more than was the case before Koon."

produce a sufficient number of precedents to become a rule of law about valid reasons to depart from the guidelines. Perhaps a consideration of a philosophical underpinning for sentencing other than disparity avoidance would also have occurred. However, all of the circuits quickly and unanimously rejected any appeals based on a district judge's failure to depart.[33] As a result, when an offender is sentenced within the guideline ranges, the appellate court will review only when a mistake is made in applying guideline provisions. While this result bodes well for avoiding disparity, this result meant that appellate scrutiny has been focused on departures rather than the overall purposes of the criminal code. Thus, this circumstance warped the discussion among the Courts of Appeals to consider only whether the judge was too lenient instead of whether the guidelines themselves were too strict.[34]

Instead, after the initial phase of deciding what standards of review were appropriate culminating in *U.S. v. Rivera*, 994 F. 2d 942 (1st Cir. 1993), the subsequent analysis of what cases are outside of the "heartland" of cases mentioned in *Rivera* seems stunted. Because the U.S. Sentencing Commission was given the authority to change provisions through amendments binding on the courts, appellate courts were effectively blocked from affecting existing provisions and also were discouraged from making new law by the U.S. Sentencing Commission's ability to trump any ruling by guideline amendment. For these reasons, the Courts of Appeal decisions should be characterized as heavy on the "error correction" and light on the "lawmaking" role with very limited participation in determining what the Sentencing Guidelines say.

After *Koon*, most circuits settled into monitoring district courts for legal errors in application of the Sentencing Guidelines, but relaxed their scrutiny of departures given the Supreme Court's

[33] See, U.S. v. Pozzy, 902 F. 2d 133, 137-140 (1st Cir. 1990), U.S. v. Russell, 917 F. 2d 512, 515 (11th Cir. 1990), U.S. v. Jackson, 921 F. 2d 985, 988 (10th Cir. 1990), U.S. v. Harrington, 947 F. 2d 956, 962-63 (D.C. Cir. 1991), U.S. v. Dickey, 927 F. 2d 836, 839 (9th Cir. 1991), U.S. v. Piche, 981 F. 2d 706 (4th Cir. 1992).

[34] Appellate review of upward departures is appropriately more strict but the rate of upward departures has remained at 1 percent or below for most circuits from FY 1990 to FY 2001 (Mercer 2003, 50-51).

ruling. This abdication led to both increasing disparity among district courts, but the appellate courts also left the initiative to the Sentencing Commission to address the proper grounds for departures. Thus, district court judges were creative by discovering new "unmentioned" factors for departures, but the appellate courts refrained from its envisioned role to codify the use of these "unmentioned" factors. Not surprisingly, the number of departures after *Koon* that cite the general departure provision of §5K2.0 soared from 431 cases in FY 1996 to 2458 cases in FY 2001. In the two years immediately after the *Koon* decision, the number of cases citing this provision went to 797 in FY 1997 and 1411 in FY 1998. At this point, the Courts of Appeal neither served as an effective monitor for disparity which at least was a stated goal of the Sentencing Reform Act, nor did they effectively develop a departure jurisprudence that would help prod the Sentencing Commission to adjust the guidelines. Instead, the Courts of Appeals engaged in ad hoc scrutiny for legal errors in application of the voluminous guidelines without much to say about defining a "heartland" of cases nor adequately establishing when a district judge could and *should* depart from the guidelines.

Table 3. Downward Departures citing Provisions §5K2.0 and §5H1.6

Year	§5K2.0	§5H1.6	Total Number of Guideline Cases
FY 1992	279	149	38,258
FY 1993	155	238	42,107
FY 1994	411	246	39,971
FY 1995	378	318	38,500
FY 1996	431	322	42,436
FY 1997	797	368	48,848
FY 1998	1,411	424	50,754
FY 1999	1,623	567	55,557

FY 2000	1,882	489	59,846,
FY 2001	2,458	465	59,897

Summary Data derived from ICPSR Studies 9317, 3105, 3496, 3497 Monitoring of Federal Criminal Sentences 1987-1998, 1999, 2000, and 2001 released by the U.S. Sentencing Commission. These datasets provide comprehensive data about district court sentencing behavior and include any cited reasons for departures.

Illustrative Review of Appellate Decisions Regarding §5K2.0 and §5H1.6 Provisions

At this point, a brief examination of how the appellate courts have treated two guideline provisions yields insight into the general trend of circuit legal policy from 1989 to 2003. The circuit's treatment of the general departure provision 5K2.0 is important because of their precedents interpreting this provision determines how much discretion an appellate court will yield to district courts when facing the general decision to depart or not. Second, this analysis examines the legal doctrine adopted by circuit courts when determining whether the family circumstances of an offender (5H1.6) is outside of the "heartland" of cases and thus atypical. Whether the standard is strict or lenient in a circuit for this factor might very well depend on the ideological makeup of that circuit. Because the family circumstance is treated as a discouraged factor, a circuit that permits broader range of departures based on this factor would exhibit lenient behavior.

A very recent U.S. Sentencing Commission survey of both circuit and district judges (United States Sentencing Commission 2003a) indicates that judges find the guideline's treatment of judicial discretion and family circumstances at the top of their lists of concerns. A majority of district judges indicated that out of seventeen defendant characteristics, guideline provisions should place more emphasis on only three: mental condition of the offender (61.7%), family ties or responsibilities (59.0%), and age (53.2%) (U.S.S.C., 2003a, II-30). Overall, these judges felt that the top three challenges to the sentencing guidelines were (1) drug policy (20%), (2) guideline philosophy (20%),

and (3) judicial discretion. (U.S.S.C. 2003a, II-34-5)[35] When asked the same questions, a majority of circuit judges thought the guideline provisions should place more emphasis only on two factors: family ties or responsibilities (62.9%) and the offender's mental condition (53.6%) (U.S.S.C. 2003a, III-20). Increasing the emphasis of the guideline provisions on the factors of age (46%) and employment record (48%) were supported by slightly less than a majority of circuit judges. Questions of judicial discretion (41%), guideline philosophy (14%), and drug policy (9%) also are emphasized in the circuit judges' responses as to what the greatest challenges to the guidelines are (U.S.S.C. 2003a, III-26.

This similarity in responses from judges at the district and circuit courts also can been seen in the case law reviewed subsequently by this author. The importance of an offender's family ties and circumstances (§5H1.6) to district and circuit judges comes from the fact that while the offender may be punished by incarceration, their presumably innocent family is also punished by the loss of financial and care-giving assistance for dependents. Thus, at what point does this "discouraged" factor become atypical of ordinary cases involving this guidelines? It appears that judges at the district and circuit level are struggling to find that balance with the current guidelines. Similarly, the struggle over how much discretion a sentencing judge should have still appears unresolved given district and circuit judges' responses to what are the greatest challenges to the guidelines. District judges are still unhappy with the loss of discretion and it appears that at least a significant number of circuit judges sympathize. The case law of the circuits over guideline provisions §5H1.6-Family ties and circumstances, and §5K2.0-General mitigating and aggravating factors, exhibit these concerns in a concrete form of published circuit opinions subsequently analyzed.

[35] The effects of drug sentence severity was noted repeatedly by district court judges. The guideline philosophy rubric addresses the difficulty in reconciling the different sentencing purposes expressed in the Sentencing Reform Act especially balancing uniformity and flexibility. Judicial discretion refers to a judge's ability to adjust the sentence to fit the individual offender's case. (Federal Judicial Center 2003a, II-34).

U.S.S.G. Provision §5K2.0 Regarding Standards of Review

The first task of appellate courts after the Sentencing Guidelines came into effect was deciding how strictly to scrutinize departures. The circuit courts had little problem with reviewing district court errors in applying the guidelines as the "legal error" standard allowed *de novo* review by the circuits. But reviewing departures from the guidelines was more troublesome. The statutory authority is included in 18 U.S.C. § 3742 (e) (3) which states that a sentence can be reviewed "[if it] is outside the applicable guideline range, and is unreasonable, having regard for—(A)the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and (B)the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." However, translating the "unreasonable" standard to traditional standards of review meant that the appellate courts would have to decide exactly how to review departures. Given that the circuits agreed unanimously not to allow appeals where district judges refused to depart after acknowledging the ability to do so, the task for review for circuit courts was simplified but different responses from the circuits resulted when deciding how to apply the law to review departures.

The 1st Circuit proved the leader in determining the standards of review in the cases of *U.S. v. Diaz-Villafane*, 874 F. 2d 43, 49 (1st Cir. 1989), and later revising this standard in *U.S. v. Rivera*, 994 F. 2d 942, 947-52 (1st Cir. 1993). Eventually, the U.S. Supreme Court in *Koon* adopted the reasoning of *Rivera* which was written by then 1st Circuit Judge and later Supreme Court Justice Stephen Breyer. The first step in analyzing cases is explained in *Diaz-Villafane,* "[f]irst, we assay the circumstances relied on by the district court in determining that the case is sufficiently "unusual" to warrant departure. That review is essentially plenary: whether or not circumstances are of a kind or degree that they may appropriately be relied upon to justify departure is, we think, a question of law" (p. 49). Next, the appellate panel proposes ". . .we determine whether the circumstances, if

conceptually proper, actually exist in the particular case. That assessment involves factfinding and the trier's determinations may be set aside only for clear error. (*Diaz-Villafane* p. 49)" The final step proposed in *Diaz-Villafane* was "once we have assured ourselves that the sentencing court considered circumstances appropriate to the departure equation and that those factors enjoyed adequate record support, the direction and degree of departure must, on appeal, be measured by a standard of reasonableness" (p. 49). *Rivera* revised this standard in 1993 by noting that plenary review of whether the circumstances are of a "kind or degree" should be employed sparingly and that in most situations, the district court's analysis should be treated with substantial deference.

This form of analysis proved widely persuasive and was adopted by 3rd, 6th, 7th, 8th, 10th, 11th, and D.C. circuits in the following decisions, *U.S. v. Kikumara,* 918 F. 2d 1084, 1098 (3rd Cir. 1990); *U.S. v Rodriguez* , 882 F. 2d 1059, 1067 (6th Cir. 1989); *U.S. v. Gaddy*, 909 F. 2d 196, 199 (7th Cir. 1990); *U.S. v. Lang,* 898 F. 2d 1379, 1379-80 (8th Cir., 1990); *U.S. v. White*, 893 F. 2d 276,277 (10th Cir. 1990); *U.S. v. Valle,* 929 F. 2d 629, 631 (11th Cir. 1991); U.S. v. Adonis, 891 F. 2d 3003, 303 (D.C. Cir. 1989). The 4th Circuit had a similar test but split the last step into two distinct steps but using the same reasonableness standard (*U.S. v. Palinkas,* 938 F. 2d 456, 461 (4th Cir. 1991). The 9th Circuit also was persuaded by the reasoning of *Diaz-Villafane* and adopted a variant of the 1st Circuit's analysis in *U.S. v. Lira-Barranza,* 941 F. 2d 745, 746-7 (9th Cir. 1991) *en banc.*

The 2nd, and 5th circuits employed different analyses to review sentencing departures (*U.S. v. Alba,* 933 F. 2d 1117, 1121 (2nd Cir. 1991) and *U.S. v. Mejia-Orosco*, 867 F. 2d 216, 219 (5th Cir. 1989) clarified on rehearing at 868 F. 2d 807, 808. The 2nd Circuit used a two-part analysis applying the *de novo* standard of review to the permissibility of using a factor for departure, and "clearly erroneous" standard for the factual findings about that factor justifying a departure. The 5th Circuit reviewed the district court's factual findings for error using a "clearly erroneous" standard. Subsequently, the 5th

Circuit examined whether the departure was based on acceptable reasons and then whether the departure itself was reasonable (Lee 1997, 26).

The Supreme Court's decision in *Koon* resolved the circuit conflicts about what standard of review to use and gave its stamp of approval to *Rivera's* approach to reviewing sentencing departures. The Supreme Court adopted a unified "abuse of discretion" standard for departures which lies between the "clear legal error" standard on one hand and the "*de novo*" standard of review on the other. Applying this standard to appellate departure review, any consideration of forbidden factors, discouraged factors, or other legal errors in applying the guidelines are examined under the "abuse of discretion" which encompasses any legal errors as by definition an "abuse of discretion". When considering unmentioned or encouraged factors, the district court is entitled to substantial deference to its departure decisions. However, by striking down two of the ground cited by the district court in departing downward in *Koon*, the situation of appellate review was still considered as confused by several commentators (Bowman 1996; Lee 1997; Berman 1997; 2000). Instead of clarity, *Koon* left the circuits with little guidance other than to increase their deference to district courts but the decision undercut this message by noting several impermissible grounds for departure by the district court. Thus, as noted by public law scholars, the absence of a clear precedent left the courts of appeal and the district courts to their own devices, which not surprisingly followed their prior inclinations.

U.S.S.G. Provisions Regarding §5H1.6 Family Circumstances

While in *Koon* the U.S. Supreme Court resolved the question of what standards of review to apply to departures, circuits struggled with how to review departures based on offender characteristics. Perhaps no area of circuit departure review is more controversial than that of what

family circumstances warrant downward departures.[36] Part of the controversy stems from the former ability of judges to take various offender characteristics into account before the guideline system was implemented. Given that judges were previously able to adjust sentences in a freewheeling way, they were used to taking family circumstances and ties into account before sentencing. Family circumstances gives pause to sentencing judges because of the "collateral damage" imprisonment may place on innocent family members and the family itself (Ellingstad 1992). As the district court judge C. Weston Houk noted in sentencing Susan Pozzy, "Any departure downward that I give this lady because of her pregnancy is not given because of her. It's given because of the child. It's not given because she has a physical disability, It's given because she has a child. And I think that [sic] child's rights should be given some consideration" (*U.S. v. Pozzy*, 902 F. 2d 133, (1st Cir. 1990), 136.)[37] Not surprisingly, as mentioned above, a recent survey indicates that a majority of district and circuit court judges identify the guideline's treatment of family circumstances as an area that needs to be changed (U.S.S.C. 2003a). For these reasons, circuit legal policy regarding family ties and responsibilities yield one of the better indicators of whether a circuit exhibits a more lenient or harsh attitude toward such departures by district court judges.[38] By also examining whether the circuit buttresses or erodes a district court's choices in sentencing autonomy, general impressions of how particular circuits view sentencing discretion under the guidelines can be formed.

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[36] Guideline provisions 5H1.1 to 5H1.6 refer to offender characteristics that can mitigate a sentence such as: §5H1.1 Age, §5H1.2 Education and Vocational Skills, §5H1.3 Mental and Emotional Conditions, §5H1.4 Physical Conditions including such as Alcohol or Drug Abuse, §5H1.5 Employment Record, and §5H1.6 Family Ties and Responsibilities, and Community Ties (U.S.S.G 2002, 386-88) . The Sentencing Commission adopted this stance from 28§U.S.C. 994(e) that requires the Commission guidelines and policy statements reflect the general inapplicability of an offender's education, vocational skills, employment record, family ties and responsibilities, and community ties to being imprisoned or the length of such imprisonment (U.S.S.G. 2002, 386). These circumstances have been classified as a "discouraged" basis for a downward departure by the U.S. Sentencing Commission and this classification was accepted by the U.S. Supreme Court in *Koon.*. A "discouraged" factor can be the basis for a departure given that the individual offender exhibits "exceptional" qualities that takes their case outside of the heartland of typical offenders.

[37] The Honorable C. Weston Houck of the District of South Carolina, sitting by designation.

[38] Community ties of offenders is also included in §5H1.6 but this exhibits considerably less controversy. I will not focus on this part of the guideline provision in this analysis except as it was included with family circumstances in a few appellate cases.

Key Decisions by Circuits that Indicate Leniency or Strict Application when Reviewing Departures

Early §5H1.6 cases under the guidelines throughout the circuits dealt with whether a judge could consider family circumstances at all. The 7th Circuit in *Thomas* I, 930 F.2d 526 (7th Cir., 1991), specifically forbid the consideration of family circumstances for downward departures. This decision chose to read the §5H1.6 section narrowly and deny district courts the general availability of family circumstances as a basis for departures. Departures on the basis of family circumstances was forbidden unless the sentence involved the sentence of parole or supervised release with family ties and responsibilities and the departure was then employed to adjust the length and terms of supervision of that sentence. The opinion by Judge Flaum notes that other circuits are split whether the phrase "not ordinarily relevant" in the policy statement for Section H allows downward sentencing departures based on *extraordinary* family circumstances (*Thomas,* p. 529-30). This opinion also cites a 9th Circuit case, *United States v. Brady,* 895 F. 2d 538 (9th Cir., 1990) as supporting its stance that "family circumstances" were not grounds for downward departures. However, this case dealt with a facial challenge to the Sentencing Guidelines due to the absence of individualized sentencing which the appellant claimed affected constitutionally guaranteed substantive and procedural due process rights (*Brady,* p. 539). The *Brady* court notes in passing that the Sentencing Reform Act changed the weight of individual factors, but did not eliminate them in sentencing individuals, thus no due process violation occurred (*Brady* , p. 543). While citing the "not ordinarily relevant language", *Brady* actually doesn't appear to bar district courts from considering factors such as family circumstances and responsibilities, but instead notes that they can affect sentencing within the guidelines and also for other sentencing aspects (*Brady* , p. 543).

After *Thomas* I was decided, the U.S. Sentencing Commission amended the §5H1.6 section to include the language that noted that, "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline

range." (U.S.S.G. Amendment to §5H1.6 effective November 1, 1991).[39] Other circuits unanimously disagreed with the 7th Circuit's *Thomas* I decision. The 2nd Circuit, in *United States v. Sharpsteen,* 913 F.2d 59, 63 (2d Cir. 1990), noted, "[t]he clear implication of section 5H1.6 is that if the court finds that the circumstances related to family ties and relationships are extraordinary, it is not precluded as a matter of law from taking them into account in making a downward departure." Other sister circuit courts agreed with the 2nd Circuit as well: *United States v. Gaskill,* 991 F.2d 82, 85 (3d Cir. 1993) ("section 5H1.6 does not prohibit departures, but restricts them to cases where the circumstances are extraordinary."); *United States v. Deigert,* 916 F.2d 916, 919 (4th Cir. 1990) ("the Guidelines permit departure when the circumstances are extraordinary."); *United States v. Burch,* 873 F.2d 765, 768 (5th Cir. 1989) ("Other factors are generally irrelevant, except in extraordinary cases--e.g., age, education, and family and community ties. Id. at §5H1.1; §5H1.2; §5H1.6."); *United States v. Brewer,* 899 F.2d 503, 508-09 (6th Cir.) (defendant's family and community ties held not unusual enough to justify departure on that basis); *United States v. Haversat,* 22 F.3d 790, 797 (8th Cir. 1994) ("policy statement that factor is *ordinarily* not relevant necessarily implies that the factor may be relevant in extraordinary cases" (emphasis in original)); *United States v. Mondello,* 927 F.2d 1463, 1470 (9th Cir. 1991) ("in extraordinary circumstances, a court may rely on one of the six factors listed in section §5H1.1-.6 to depart from the guideline range."); *United States v. Pena,* 930 F.2d 1486, 1494-95 (10th Cir. 1991) ("there may be extraordinary circumstances where family ties and responsibilities may be relevant to the sentencing decision."); *United States v. Mogel,* 956 F.2d 1555, 1562 (11th Cir. 1992), ("In sum, we interpret the policy statements of section §5H1.1-6 as prohibiting departures from the applicable sentence range in all but extraordinary cases."); see also *United States v. Lopez,* 291

[39] In *Thomas* II, 11 F.3d 732 (7th Cir.,1993), the 7th Circuit reheard *Thomas* I in light of the amendment to §5H1.6. Because the case involved a statutory minimum, even the change in the guideline did not apply. However, the *Thomas* II panel speculated that the second part of the analysis that forbid consideration of family circumstances might not longer apply.

U.S. App. D.C. 34, 938 F.2d 1293, 1296 (D.C. Cir. 1991) (although age not ordinarily relevant to a departure decision under U.S.S.G. § 5H1.1, age may be considered in an extraordinary case).

A rueful 7th Circuit panel in *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994), notes when setting aside the *Thomas* I precedent on consideration of family circumstances:

> In fact, apart from the decisions referenced by the panel in *Thomas* I (930 F.2d at 529), we have been unable to locate a single decision from another circuit that is consistent with *Thomas* I's alternative holding that even extraordinary family circumstances may never provide a basis for departure from an imprisonment range. Instead, the other circuits are unanimous in finding that section 5H1.6 permits departures from an imprisonment range to account for family circumstances in an extraordinary case (*Canoy,* p. 905-6).

In *Canoy,* the court chose to abandon the *Thomas I* precedent and follow the other circuits' case law by allowing district courts to consider departing on the basis of offender characteristics mentioned in guideline provisions § 5H1.1-5H1.6 in extraordinary cases.

Circuit legal policy that decided to let district courts to consider the offender circumstances in § 5H1.1-5H1.6 demonstrates quick agreement among circuits. However, the next step of defining what case facts exhibit 'extraordinary' family ties and circumstances has not been resolved by circuits even after the Supreme Court's *Koon* decision supposedly loosened the circuits' role in reviewing departures. The disagreement among circuits about what case facts justify downward departures for circuit courts continues in part because offender characteristics mentioned in § 5H1.1-5H1.6 are classified as "discouraged" factors. Thus, a greater level of scrutiny by circuits may be expected of factors treated as "encouraged" or even "neutral" factors, while not permitting the quick resolution that "forbidden" § 5H1.10 factors such as race and religion allow. Thus, substantial differences between circuits exist on how to review departures based on family circumstances. I contend these differences reflect the ideological values of the individual judges on the circuits and their disparate views on how much oversight should be accorded to district judge decisions.

Circuits that appear the most congenial to departure decisions based on family circumstances include the 2nd, 3rd, 8th, and 10th Circuits. The most inhospitable circuits for these departures include the 4th, 5th, 6th, 11th, D.C. , and the 7th Circuit prior to the 1994 *Canoy* decision. The philosophy guiding the 1st, 7th and 9th appears mixed with these circuits affirming some departures but reversing (vacating) and remanding others. Nevertheless, both the 7th and the 9th Circuits have become more lenient over time with regards to downward departures based on family circumstances. Table 4. illustrates some of the key circuit decisions on family circumstance departures and how the circuits have ruled over time. It also includes a measure of whether the decision can be considered pro-defendant (resulting in a lesser sentence), and pro-discretion (allowing a district judge more discretion).

Table 4. Key §5H1.6 Decisions by Circuit, by Year

Circuit	Defendant Name	Citation	Year	Pro Defendant	Pro Dist. Court Discretion	Case Outcome
1st	U.S. v. Pozzy	902 F. 2d 133 (1st Cir.)	1990	0	0	v,r
1st	U.S. v. Deane	914 F. 2d 11 (1st Cir.)	1990	0	0	v,r
1st	U.S. v. Rushby	936 F. 2d 41 (1st Cir.)	1991	0	1	a
1st	U.S. v. Chestna	962 F. 2d 103 (1st Cir.)	1992	0	0	a
1st	U.S. v. Carr	932 F. 2d 67 (1st Cir.)	1991	0	0	v,r
1st	U.S. v. Sclamo	997 F. 2d 970 (1st Cir.)	1993	1	1	a
1st	U.S. v. Rivera	994 F. 2d 942 (1st Cir.)	1993	1	1	v, r
1st	U.S. v. DeMasi	40 F. 3d 1306 (1st Cir.)	1994	0	0	v,r
1st	U.S. v. Periera	272 F. 3d 76 (1st Cir.)	2001	0	0	r, r
2nd	U.S. v. Sharpsteen	913 F. 2d 59 (2nd Cir.)	1990	1	1	v, r
2nd	U.S. v. Alba	933 F. 2d 1117 (2nd Cir.)	1991	1	1	v, r
2nd	U.S. v. Ritchey	949 F. 2d 61 (2nd Cir.)	1991	1	1	v,r
2nd	U.S. v. Johnson	964 F. 2d 124 (2nd Cir.)	1992	1	1	a
2nd	U.S. v. Rioux	97 F.3d 648 (2nd Cir.)	1996	1	1	a
2nd	U.S. v. Londono	76 F. 3d 33 (2nd Cir.)	1996	0	0	v,r
2nd	U.S. v. Galante	111 F. 3d 1029 (2nd Cir.)	1997	1	1	a
2nd	U.S. v. Faria	161 F. 3d 761 (2nd Cir.)	1998	0	0	v,r
2nd	U.S. v. Spei	145 F. 3d 528 (2nd Cir.)	1998	0	0	v,r
3rd	U.S. v. Shoupe	929 F. 2d 116 (3rd Cir.)	1991	0	0	v,r
3rd	U.S. v. Headley	923 F. 2d 1079 (3rd Cir.)	1991	0	1	r
3rd	U.S. v. Higgins	967 F.2d 841 (3rd Cir.)	1992	1	1	v,r
3rd	U.S. v. Gaskill	991 F.2d 82 (3rd Cir.)	1993	1	1	v, r
3rd	U.S. v. Monaco	23 F.3d 793 (3rd Cir.)	1994	1	1	v,r
3rd	U.S. v. Sweeting	213 F.3d 95; 2000 (3rd Cir.)	2000	0	0	v,r
3rd	U.S. v. Serafini	233 F.3d 758 (3rd Cir.)	2000	1	1	a
3rd	U.S. v. Dominguez	296 F.3d 192 (3rd Cir.)	2002	1	1	v,r
4th	U.S. v. Daly	883 F. 2d 313 (4th Cir.)	1989	0	1	a
4th	U.S. v. Goff	907 F. 2d 1441 (4th Cir.)	1990	0	0	v,r
4th	U.S. v. McHan	920 F.2d 244 (4th Cir.)	1990	0	0	v,r
4th	U.S. v. Brand	907 F. 2d 31 (4th Cir.)	1990	0	0	v,r
4th	U.S. v. Deigert	916 F. 2d 916 (4th Cir.)	1990	1	1	v,r
4th	U.S. v. Bell	974 F. 2d 537 (4th Cir.)	1992	0	0	v,r
4th	U.S. v. Weddle	30 F.3d 532 (4th Cir.)	1994	0	0	a
4th	U.S. v. Maddox	48 F. 3d 791 (4th Cir.)	1995	0	0	v,r
4th	U.S. v. Rybicki	96 F.3d 754 (4th Cir.)	1996	0	0	v,r
4th	U.S. v. Wilson	114 F. 3d 429 (4th Cir.)	1997	0	0	v,r
5th	U.S. v. Burch	873 F. 2d 765 (5th Cir.)	1990	1	0	v,r
5th	U.S. v. O'Brien	950 F.2d 969 (5th Cir.)	1991	0	0	v,r
5th	U.S. v. Brown	29 F.3d 953 (5th Cir.)	1994	0	0	v,r
6th	U.S. v. Sailes	872 F. 2d 735 (6th Cir.)	1989	0	1	a
6th	U.S. v. Brewer	899 F.2d 503 (6th Cir.)	1990	0	0	v,r
6th	U.S. v. Kohlbach, Crouse	145 F.3d 786 (6th Cir.)	1994	0	0	v,r
6th	U.S. v. Tocco	200 F.3d 401 (6th Cir.)	2000	0	0	v,r
7th	U.S. v. Thomas	930 F.2d 526 (7th Cir.)	1991	0	0	v,r
7th	U.S. v. Canoy	38 F.3d 893 (7th Cir.)	1994	1	1	v,r
7th	U.S. v. Owens	145 F.3d 923 (7th Cir.)	1998	1	1	a
7th	U.S. v. Wright	218 F.3d 812 (7th Cir.)	2000	0	0	v,r

8th	U.S. v. Sutherland	890 F.2d 1042 (8th Cir.)	1989	0	1	a
8th	U.S. v. Shortt	919 F, 2d 1325 (8th Cir.)	1990	0	0	v,r
8th	U.S. v. Johnson	908 F.2d 396 (8th Cir.)	1990	0	1	a
8th	U.S. v. Neil	903 F.2d 564 (8th Cir.)	1990	0	0	v,r
8th	U.S. v. Big Crow	898 F.2d 1326 (8th Cir.)	1990	1	1	a
8th	U.S. v. Prestemon	929 F.2d 1275 (8th Cir.)	1991	0	0	v,r
8th	U.S. v. Harrison	970 F.2d 444 (8th Cir.)	1992	0	0	a
8th	U.S. v. One Star	9 F.3d 60 (8th Cir.)	1993	1	1	a
8th	U.S. v. White Buffalo	10 F.3d 575 (8th Cir.)	1993	1	0	a
8th	U.S. v. Goff	20 F. 3d 918 (8th Cir.)	1994	0	0	v,r
8th	U.S. v. Haverstat	22 F.3d 790 (8th Cir.)	1994	1	0	v,r
8th	U.S. v. Woods	159 F.3d 1132 (8th Cir.)	1998	1	1	a
8th	U.S. v. King	280 F.3d 886 (8th Cir.)	2002	0	0	v,r
9th	U.S. v. Brady	895 F. 2d 538 (9th Cir.)	1990	0	1	a
9th	U.S. v. Mondello	927 F. 2d 1463 (9th Cir)	1991	0	1	a
9th	U.S. v. Miller	991 F. 2d 552 (9th Cir.)	1993	0	0	v,r
9th	U.S. v. Berlier	948 F.2d 1093 (9th Cir.)	1991	0	0	r,r
9th	U.S. v. Lipman	133 F.3d 726 (9th Cir.)	1998	0	1	a
9th	U.S. v. Klimavicius-Viloria	144 F. 3d 1249 (9th Cir.)	1998	0	1	a
9th	U.S. v. Aguirre	214 F.3d 1122 (9th Cir.)	2000	1	1	a,v,r
10th	U.S. v. Pena	930 F.2d 1486 (10th Cir.)	1991	1	1	a
10th	U.S. v. Gauvin	173 F.3d 798 (10th Cir.)	1994	1	1	a
10th	U.S. v. Webb	49 F. 3d 636 (10th Cir.)	1995	1	1	r, r
10th	U.S. v. Rodriguez-Velarde	127 F.3d 966 (10th Cir.)	1997	0	0	v,r
10th	U.S. v. Archuleta	128 F.3d 1446 (10th Cir.)	1997	0	0	v,r
10th	U.S. v. Jones	158 F.3d 492 (10th Cir.)	1998	1	1	a
11th	U.S. v. Cacho	951 F.2d 308 (11th Cir.)	1992	0	1	a
11th	U.S. v. Mogel	956 F.2d 1555 (11th Cir.)	1992	0	0	v,r
11th	U.S. v. Allen	87 F.3d 1224 (11th Cir.)	1996	0	0	v,r
DC	U.S. v. Dyce	91 F.3d 1462 (DC Cir.)	1996	0	0	v,r
DC	U.S. v. Leandre	132 F.3d 796 (DC Cir.)	1998	0	0	a
				1-pro-Defendant 0-pro-gov't	1-pro-dct Discretion 0-reduces Dct. Discretion	v-vacated r-reversed r-remanded a-affirmed

A second way to analyze the circuits' legal policy would be to look for circuit decisions that are legally creative in giving district court judges guidance in what can be considered valid grounds for family circumstance departures. This creative role involves a circuit's lawmaking abilities. For example, the 8th Circuit in the case *United States v. Big Crow,* 898 F.2d 1326 (8th Cir., 1990), extended the consideration of family circumstances to the problems of family life on Native American reservations. By reaffirming this decision through subsequent appellate cases including *United States v. One Star,* 9 F.3d 60 (8th Cir., 1990), and *United States v. White Buffalo*, 10 F.3d 575 (8th Cir., 1990),

the 8th Circuit effectively broadened §5H1.6 provisions to include the environment where the family and the offender must live. Other examples of legal creativity include the 1st Circuit's decision in *United States v. Sclamo*, 997 F. 2d 970 (1st Cir., 1993). In *Sclamo*, the court permitted district courts leeway to consider reports by psychologists of potential harm to the child by removing a stabilizing influence. The case facts of *Sclamo* had a psychologist testifying that a special bond existed between an offender living with the child's mother and a child abused by the natural father and that the child would be damaged by the offender being sent to prison. Thus, the 1st Circuit broadened the acceptable grounds for family departures in that circuit to include psychological damage to a minor that would come from imprisoning a surrogate parent with whom a mentally fragile child had a significant meaningful relationship.

The 2nd Circuit has crafted the broadest legal grounds for departures for family circumstances. In *United States v. Alba,* 933 F. 2d 1117 (2nd Cir., 1991), the 2nd Circuit gave its approval for a district court judge to depart based on the potential for the family unit to destruct because of its dependence on the offender. In this case, the defendant possessed a twelve year stable marriage, two minor children, and a disabled father and grandmother as well as a strong employment record. The district court felt that a downward departure should be given because the defendant's financial and emotional support held the family together but felt it lacked the authority to depart. The appellate panel gave the judge authority to depart when it reversed and remanded the case for resentencing because it relied upon two invalid factors along with two valid factors when it gave sentence.

The 2nd Circuit gave even broader discretion to depart based on family circumstances in the case of *United States v. Johnson* , 964 F. 2d 124 (2nd Cir., 1992). This case noted that the mother had the responsibility for four small children from different fathers, and that the single mother was the sole link between the children. The appellate court explained that it was ". . .reluctant to wreak

extraordinary destruction on dependents who rely solely on the defendant for their upbringing (*Johnson*, p. 129)". Thus, the doctrine espoused in *Alba* became somewhat broader in that district court judges should have the discretion to grant downward departures to avoid the destruction of families. This reasoning was continued in a 2nd Circuit case resolved after *Koon* in *United States v. Galante,* 111 F. 3d 1029 (2nd Cir. 1997), where the court affirmed an extensive downward departure for a defendant because it felt that the trial judge did not exceed the boundaries of 2nd Circuit precedents of *Alba* and *Johnson.* The court couched its language in that it was deferring to the district court's finding that sentencing the defendant father to prison ". . .would have a disastrous effect on the children in terms of possibilities of their education and upbringing." (As cited in *Galante,* p. 1035). But the court did include a warning to district court judges.

> The fact that we will ordinarily defer to the sentencing court's discretion does not mean that this will always be so. The Sentencing Reform Act, the Guidelines, and decisional law make clear that a trial judge's discretion when granting a downward departure is to be exercised prudently in light of the Guideline's aim of reducing sentencing disparity -- while at the same time considering the history and characteristics of an individual defendant -- and to be applied in line with precedents of the Supreme Court and of this Court. As a consequence, although a trial court's discretion is not straitjacketed, it is to be reined in. There remains some open field for the trial court's exercise of discretion, but the recited constraints have put boundary line fences on that field. The test of discretion asks whether the circumstances relied upon to justify a downward departure are so far removed from those found exceptional in existing case law that the sentencing court may be said to be acting outside permissible limits; then, and only then, should we rule it has misused its discretion (*Galante,* p. 1036).

The 2nd Circuit's apparent boundaries were breached in the case of *United States v. Londono,* 76 F. 3d 33 (2nd Cir., 1996) that reversed a district court's decision to depart based on the defendant's and wife's wish to conceive a child during the wife's remaining childbearing years. The cases of *United States v. Faria,* 161 F. 3d 761 (2nd Cir., 1998) and *United States v. Spei,* 145 F. 3d 528 (2nd Cir., 1998) also rejected district court downward departures based on child support given by a non-custodial father and a father being unable to properly arrange suitable marriages for his children if he was imprisoned. Thus, the thrust of the 2nd Circuit's nuanced legal policy is that functioning families

should not be torn apart by imprisonment if a district court thinks that by departing downward a reasonable amount to avoid imprisoning the offender might preserve the family unit. However, departing simply to have the offender avoid some family suffering due to imprisonment will still be suspect.

The 7th and 9th Circuits provide evidence that a court can change significantly from prior precedents over time to become more lenient in reviewing departures. In *Thomas I,* 930 F.2d 526 (7th Cir., 1991), the 7Th Circuit, as mentioned above, barred the consideration of §5H1.6 departures altogether. In the cases of *United States v. Brady,* 895 F. 2d 538 (9th Cir. 1990) and *United States v. Berlier*, 948 F.2d 1093 (9th Cir., 1991), the 9th Circuit interpreted the Sentencing Guidelines strictly. In Brady, the 9th Circuit noted, "Psychological condition (to the extent it is not a defense to the crime charged) and family and community standing are far less indicative of culpability than factors such as the offense itself, the defendant's criminal history, or the manner in which the offense is committed" (*Brady*, p. 542). In Berlier, the panel opinion restates this narrow view when it declares, "[t]he Commission considered family ties, was aware that those ties could be affected by prison sentences, and declared that family ties ordinarily should not be a factor in departing from Guideline Sentences" (*Berlier*, P. 1096). However, both circuits increased the discretion of district court judges to depart for family circumstances in subsequent cases.

In *United States v. Canoy,* 38 F.3d 893 (7th Cir. 1994), the 7th Circuit explicitly overruled the portion of *Thomas I* that dealt with family circumstances departures. In this case, the district court judge declared ". . .that Canoy is a good father, that he has three exemplary children, and that his family would suffer "substantially" and perhaps "irreparably" were he incarcerated for a full 27 months" (*Canoy*, P. 903). The 7th Circuit panel in *Canoy*, after consulting with the other judges of the 7th Circuit, declared,

> Because our sister circuits have uniformly rejected Thomas I's interpretation of section 5H1.6 both before and after the November 1, 1991 amendment, and because

> that amendment omits the language on which Thomas I specifically relied, we hold today that a district court may depart from an applicable guidelines range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary. (*Canoy,* p. 906)

Thus, the 7th Circuit chose to no longer be an outlier among circuits and adjusted its legal policy in light of other circuits' decisions and the Sentencing Commission's amendment to §5H1.6 of November 1, 1991. In a subsequent decision, *United States v. Owens,* 145 F.3d 923 (7th Cir., 1998), the 7th Circuit affirmed a departure due to similar circumstances as *Canoy*. This circuit has subsequently cited *Canoy* as the ruling precedent in §5H1.6 downward departures, but in *United States v. Wright,* 218 F.3d 812 (7th Cir. 2000), a panel of the 7th Circuit explained, "[a]lthough appellate review is deferential, we think it impossible to say that the clinical psychologist's report details anything "extraordinary" about Deniese Watts's family ties and responsibilities" (*Wright,* p. 815). Unlike the 2nd Circuit, the 7th Circuit was unwilling to include potential psychological damage to children caused by a parent's incarceration as a grounds for departure in this case.

The 9th Circuit, while strict in the early cases of *Brady* and *Berlier*, loosened a bit in *United States v. Mondello*, 927 F. 2d 1463 (9th Cir, 1991) by noting ". . . in extraordinary circumstances, a court may rely on one of the six factors listed in section 5H1.1-.6 to depart from the guideline range" (*Mondello,* p. 1470). The 9th Circuit expanded this doctrine more explicitly in *United States v. Aguirre*, 214 F.3d 1122 (9th Cir. 2000) *remanded on other grounds*, where it affirmed a departure by a district court judge by saying, "[b]ecause district courts are 'particularly suited' to determine whether a given factor makes a case unusual, we will not second guess the district court's determination that this case involved an unusual family situation. We conclude that the extraordinary family circumstances departure was not an abuse of discretion, and affirm the four level departure on this basis" (*Aguirre,* p. 1127). The 9th Circuit also affirmed a refusal of the district court judge to depart in the cases of *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998). Nevertheless, in *Lipman,* the panel opinion recognized "cultural assimilation" as a new valid basis for downward departures for those

aliens who had been living in this country for a number of years but concluded that the district court judge recognized this factor and chose not to depart which cannot be reviewed. In another 1998 case, *United States v. Klimavicius-Viloria*, 144 F. 3d 1249 (9th Cir. 1998), the circuit panel upheld a refusal of the district judge to give a downward departure based on family circumstances. This panel said in its opinion, "[w]e have held that § 5H1.6 "discourages" a departure based on family ties, and that when a factor is discouraged, "the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present" (*Klimavicius-Viloria,* p. 1267). The opinion noted, "[a]lthough the court did not specifically discuss this factor, it did state concerning all of Lerma-Lerma (a co-defendant) requests: "I've considered them, and I've exercised the Court's discretion, and the Court declines to depart." This was sufficient. (*Klimavicius-Viloria* , P. 1267). In summing up the 9th Circuit's approach, we can note that this circuit generally supports considerable latitude in the sentencing behavior of judges in its circuit. Within this constraint, the 9th Circuit, through affirmances of district judges decisions on departures, has been able to widen the grounds of departures to include a significant new extension, cultural assimilation as a valid basis for departures.

This basis has a particular importance due to the increasing number of immigrants in the United States and legal requirements to deport these non-citizens after conviction of committing certain criminal offenses. Often, this may remove a defendant living in the United States since childhood whose whole family may now be in the United States. Thus, a conviction may result in a greater punishment to non-citizens than citizens. The 9th Circuit recognized this problem and adjusted its early legal policy expressed in *Brady* and *Berlier* that was designed to minimize departures. Subsequently, the 9th Circuit gave district judges greater discretion to help keep families together. By achieving its legal policy shift through affirmances, the 9th Circuit signaled its desire for a looser departure policy by accentuating the individual district court judge's discretion to sentence.

The legal philosophy of heightened review of district judges and an emphasis on the "exceptional" nature of departure decisions is exemplified by the decisions reached by the 4th circuit. This circuit has been the touchstone of judges wishing to cite relevant precedent that narrows the grounds of family circumstance departures. Its influence on sentencing policy extends to the other circuits of the South, the 5th and the 11th , as well as the DC Circuit. The 4th Circuit may be viewed as especially authoritative on sentencing matters because the first chairman of the U.S. Sentencing Commission, Judge Wilkinson, serves as a 4th Circuit judge.[40] In a considerable line of cases from 1989 to 1997, the 4th Circuit hewed to a strict narrow interpretation of any departures based on family circumstances by affirming refusals to depart and reversing those district judges who did depart (see *United States v. Daly*, 883 F. 2d 313 (4th Cir. 1990); *United States v. Goff*, 907 F. 2d 1441 (4th Cir. 1990); *United States v. McHan* , 920 F.2d 244 (4th Cir. 1990); *United States v. Brand*, 907 F. 2d 31 (4th Cir. 1990); *United States v. Bell,* 974 F. 2d 537 (4th Cir. 1992); *United States v. Weddle*, 30 F.3d 532 (4th Cir. 1994); *United States v. Maddox*, 48 F. 3d 791 (4th Cir. 1995); *United States v. Rybicki*, 96 F.3d 754 (4th Cir. 1996); and *United States v. Wilson* , 114 F. 3d 429 (4th Cir. 1997); also see c.f. *United States v. Deigert,*, 916 F. 2d 916 (4th Cir. 1990)). A panel's comment in *Bell* provides a typical response in these 4th Circuit cases, "This court has repeatedly rejected downward departures based on a defendant's family responsibilities, and Bell has failed to distinguish his situation from those cases" (*Bell,* p. 537). *Deigert* provides one of the few counterpoints where a 4th circuit panel vacated and remanded a case where the district judge felt it had no authority to depart downward due to family ties and responsibilities. Nevertheless, the 4th Circuit precedents support the strictest sense of what is or is not extraordinary and the 4th Circuit still engages in a high level of scrutiny over district court sentencing departures.

[40] The 1st Circuit may have also been viewed this way prior to the ascension of Stephen Breyer to the Supreme Court. Breyer while serving as a member of the Sentencing Commission reportedly wrote the language of much of the initial Sentencing Guidelines noting that the final draft of the Guidelines was known as "Breyer's draft". (Stith and Cabranes 1998, 58)

While the case law on §5H1.6 is not extensive in the 5th, 6th, 11th, or D.C. circuits, what precedents exist reiterate the narrow view of the 4th Circuit when reviewing downward departures based on family ties and responsibilities (e.g., 5th Circuit in *United States v. Brown,* 29 F.3d 953, 961 (5th Cir. 1994), "Unless there are unique or extraordinary circumstances, a downward departure from the guideline range based on the defendant's parental responsibilities is improper."; the 6th circuit, *United States v. Tocco,* 200 F.3d 401, 436 (6th Cir. 2000), "The district court has broad discretion in dealing with requests for departure . . . but the Sentencing Commission and the courts expect that they will not often occur. . . ."; the 11th Circuit, in *United States v. Mogel* , 956 F.2d 1555, 1562 (11th Cir. 1992) "In sum, we interpret the policy statements of section 5H1.1-6 as prohibiting departures from the applicable sentence range in all but extraordinary cases."; and the DC circuit, in *United States v. Dyce*, 91 F.3d 1462, 1466 (DC Cir. 1996), "We underscore what is implicit in the word 'extraordinary' and explicit in the Guidelines themselves: departures on [the basis of family ties and responsibilities] should be rare.") By emphasizing the rare nature of these departures, these circuits are implicitly telling the district courts to expect strict scrutiny of these types of departures. As a result, district court judges in these circuits are discouraged from considering these departures at all, let alone creative attempts to develop a broader reading of §5H1.6.

Examining the development of legal doctrine regarding guideline provision §5H1.6 family ties and responsibilities emphasizes that circuit policy matters. While a defendant in the 2nd or 3rd Circuits might be able to persuade a district judge to depart from the guidelines in order to not break up a family unit through imprisonment, the success of such an appeal in the 4th Circuit appears doubtful. Thus, the emphasis after *Koon* seems to be the mechanical task of reviewing decisions for legal error rather than engaging in the creative task of law-making by creating a common law of sentencing (Berman 1999). In essence, the circuits still retain a significant role after *Koon* in determining how thorough a review to conduct of district court decisions but a reduced role in

being able to extend (or restrict) the behavior of district court judges through developing legal doctrine by circuit precedent.

The next chapter (Chapter 4) begins my empirical examination of whether circuit courts influence district court sentencing decisions and if so what factors matter. This chapter explains the hypotheses, data, methods, and operationalization of variables for the subsequent empirical chapters. The actual empirical chapters 5, and 6 employ different variants of regression analyses to test for influence at the aggregate level over time (Chapter 5) and a one year case level analysis of circuit panels decisions on appeals of district court sentencing decisions (Chapter 6). These chapters seek to determine whether the circuits did influence sentencing behavior through the testing of hypotheses with empirical data.

Chapter 4

Data, Measures, Hypotheses, and Operationalization

I chose to conduct a two-part analysis for investigating how circuit courts influence the sentencing behavior of district courts. The first part examines what circuit characteristics might influence district court departure rates and employs an aggregate level analysis reported in Chapter 5. The second part of the analysis examines what factors lead a panel of circuit judges to reverse a departure decision by a district court judge when it negatively impacts the defendant. This analysis uses a case level analysis of a panel's decision to reverse and is reported in Chapter 6. The aggregate model in Chapter 5 employs departure rates by district courts and appeals of downward departure decisions to offer insight into how hierarchy may influence district court sentencing decisions. This analysis examines how circuit court rulings affect the rate of downward departures by district courts by employing a sample of 88 federal district courts that are nested within 11 circuit courts as the units of analysis. The dependent variable for this analysis is the number of sentencing departures divided by the number of cases where departures could have been granted for each district-year (1991-2001). Table 5 below gives a brief overview of the data.

The case level analysis in Chapter 6 investigates what factors influence a circuit panel's decision to reverse a pro-defendant sentencing departure decision by a district judge. Because the downward departure decision of a district judge deals with whether the defendant receives a lighter sentence, the decision at the circuit level to reverse an anti-defendant decision by the district judge will benefit the defendant. As detailed below, these panel decisions might be influenced by a mix of panel members' ideology, legal experiences, conception of their appellate role, institutional factors, and other variables. This analysis takes place in the fiscal year (1997) immediately after the 1996 *Koon* decision when the district courts and appellate courts were uncertain about the new sentencing era and what circuit precedents still applied to departures (Lee 1997). For these reasons, examining

the role of appellate courts in monitoring district courts should provide indications of what happens when the Supreme Court acts to widen the discretion of lower court judges at the expense of circuit courts.

The Aggregate Model

The hierarchical nature of the federal court system has appellate courts acting as principals when they supervise their agents—the district courts beneath them (Songer, Segal, and Cameron 1994; Cameron, Segal, and Songer 2000; and Haire, Lindquist, and Songer 2003). However, given the lack of direct sanctioning power, appellate courts must influence district court behavior primarily through the development of persuasive legal doctrine; but they sometimes must act directly through reversing lower court decisions. These techniques of control permit circuit courts to limit unwanted district court behavior and encourage desired outcomes.

The aggregate analysis employs independent variables that attempt to measure circuit level effects on subsequent district level behavior. For example, circuit legal precedents established in past decisions provide a signal to district courts of the preferences of that reviewing circuit. For that reason, a lagged measure of circuit legal policy is used that measures the percentage of pro-defendant decisions that were published and were appealed based solely on the sentence. Affirming or reversing district court decisions and then publishing written opinions allow appellate courts to send signals to the district courts. These signals can increase compliance within the circuit without undertaking the onerous task of attempting to reverse every erroneous decision by district courts. These two methods, direct reversals of lower court decisions and the development of circuit case law, serve as two means by which appellate courts can either directly control misbehaving agents and/or discourage other potential miscreants by providing clear signals about the policy preferences of that particular circuit court. How well these control mechanisms work in practice by constraining (or not) district court behavior should provide interesting lessons in how our court system adapts to

statutory and regulatory changes in judicial discretion, especially given the relatively recent advent of the sentencing guidelines.

Table 5: Aggregate Federal Sentencing Information FY95 to FY01

Year	Total number of criminal cases	Total number of appeals involving sentencing	Departures		Appeals based on Judge's Departure Decisions	Successful Appeals	Percent of Successful Appeals	Dates
			Downward	Upward				
FY 1995	38,500	4,314	3,110	335	709	81	11.42%	10/94-9/95
FY 1996	42,436	4,039	4,201	388	823	82	9.96%	10/95-9/96
FY 1997	48,848	3,691	5,574	387	638	74	11.60%	10/96-9/97
FY 1998	50,754	3,633	6,509	391	607	67	11.04%	10/97-9/98
FY 1999	55,557	4,024	8,304	313	793	80	10.09%	10/98-9/99
FY 2000	59,846	3,762	9,286	358	697	57	8.18%	10/99-9/00
FY 2001	59,847	4,226	10,026	307	604	45	7.45%	10/00-9/01
Totals	355,788	27,689	47,010	2,479	4,871	486	9.96%	

The shaded columns and row represent data where the identity of judges at the appellate and district level can be obtained. I chose FY 1997 for the individual analysis because the Appellate Court judges codes were included in the U.S.S.C. appellate data for those years. Data for this table was obtained from statistical tables of the Administrative Office of the United States Courts and the United States Sentencing Commission for the years 1995 to 2001.

Aggregate Model: Hypotheses, Data, and Operationalization

The purpose of the aggregate model is to investigate whether the Courts of Appeals and Supreme Court send effective signals to the district courts that affect their subsequent downward departure rates. If district courts attempt to be "faithful" agents, then judges in these courts should try to discern and predict what policy outcomes that the principals desire. At the same time, the appellate courts should attempt to ensure the agent's faithfulness by monitoring and sanctioning unwanted actions thorough reversals. They should also provide useful signals to the district courts through published appellate decisions reflecting the policy preferences of the supervising court. Signaling preferences through appellate opinions allow the appellate court to affect district court behavior without relying solely on "error correction" to maintain the "faithfulness" of district court agents. However, if district courts perceive a lack of monitoring of their decisions or do not receive clear signals about the policy preferences from the supervising appellate courts, then the temptation to "shirk" becomes greater. In addition, even an agent trying to be "faithful" cannot follow incoherent instructions from above. Using departure rates as a specific policy area, this analysis

strives to discern the effects of attitudinal, legal, and structural factors that influence the rates of departure activity by district courts within a hierarchical system.

Policy preference divergence between the appellate and district courts increases the motivation to "shirk" by the district court and may also weaken the coherency of that supervising court's legal policy because of the natural tendency to compromise to maintain collegiality. This decreases the ability of an appellate court to act as a unified principal thus increasing "noise" in the signal and the increased chance for "shirking" (hypotheses 1 and 2). To test the hypotheses of the aggregate model, a measure is needed of the policy preferences of the district court and appellate court judges themselves. For this measure, I use the percent of judges on the circuit and district courts that were appointed by a Democrat president as a crude measure of preferences (Carp and Rowland 1996).[41] Given that the starting point of the analysis begins with the courts dominated by Republican appointees, the changes in the composition of the circuit and district courts through Clinton's nominees should influence the departure rate through two ways—decreased coherence of circuit legal outcomes due to attitudinal diversity on circuit panels and through the greater liberalism of the Democratic nominees who generally favor less draconian punishment of criminal defendants but may also be concerned about maintaining equitable sentences.

Legal considerations, apart from attitudinal influences, stress that district courts should respect the guidance of appellate courts above them in the judicial hierarchy. However, this requires appellate courts to provide clear signals through the development of precedents and monitoring activities to guide district courts (hypothesis 3). Since the effect of circuit precedent may be conditioned by the overall ideological coherence of circuits, the model includes measures that capture the rate of dissent within the circuit (Haire, Lindquist, and Songer 2003). The circuit dissent rate variable measures how often circuit judges dissent on panels which provides an

[41] A possibility of collinearity between these two variables might exist but the overall correlation between the two is .2328 using Pierson's *r* so the risk of collinearity does not appear severe.

indication to district court judges of how cohesive a circuit might be on reviewing district court decisions (hypothesis 4).

To measure the hypothesized effect of circuit legal policy, I employ cases from the Administrative Office of the U.S. Courts Terminations of Courts of Appeals case dataset to identify all published sentencing decisions by circuit. These cases were obtained from the datasets, *Federal Court Cases: Integrated Data Base, 1970-2000*, ICPSR Study # 8429.[42] Then, the percent of "pro" defendant sentencing decisions was calculated to permit testing whether these appeals court decisions affect the subsequent departure rate of the district courts. [43] I subsequently lagged these decisions by one year to allow for time for the opinion to disseminate to attorneys and district court judges. This provides a means to measure circuit sentencing policy and determine whether it affects subsequent departures rates. In addition, I also employ a measure of circuit monitoring and sanctioning activity by using a circuit's prior reversal rates of criminal sentencing cases from district courts within that circuit (hypothesis 5). These data were obtained from the datasets, *Monitoring of Federal Criminal Convictions and Sentences: Appeals Data, 1993-2001*, ICPSR Study #6559, 3105, 3493, and 3494. Monitoring and subsequent sanctioning of unwanted outcomes allows circuits to be able to discourage or encourage district court judges' exercise of their departure powers (Klein and Hume 2003). A final measure attempts to capture the effect of the Supreme Court's ruling in *Koon* that discouraged circuit courts from too much scrutiny of departure decisions and encouraged district court judges to exercise their discretion to depart (Songer, Segal, and Cameron 1994;

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[42] I originally considered using the database developed by Donald Songer and associates, the *United States Courts of Appeals Database*, ICPSR study # 2086, but instead chose to use data of the Administrative Office of the U.S. Courts available via the ICPSR and selecting for sentencing decisions only.

[43] An alternative measure the independent variable of interest in the aggregate model might employ some measure of circuit legal policy. A possible measure of a circuit's legal policy, would come from content analysis of specific circuit precedents with a focus on decisions that indicate a circuit preference for tightening or relaxing departures in district courts. Decisions by the appellate circuit will be coded as either increasing or decreasing the sentencing discretion of district court judges. This variable will have to be lagged given that circuit actions can only affect subsequent district court behavior. By examining the district court departure rates after the decisions, the degree of appellate influence on district courts can be tested.

Cameron, Segal , and Songer 2001) (hypothesis 6). Whether *Koon* increased or decreased departure rates has been contested by legal scholars (Bowman 1996; but see Stith and Cabranes 1998). By including proper controls, perhaps the marginal effect (if any) of the *Koon* decision on departure activity by lower courts may be examined.

Structural control variables are included in order to control for the contextual factors that also influence departure rates. I employ control variables that are consistent with using district courts as the level of analysis. The first control variable employed is the overall crime rates per state. Presumably, high crime rates would lead to public outcry over a greater issuance of lenient sentences (Cook 1977; but also see Kritzer 1979). This variable comes from calculations made by the Bureau of Justice Statistic of the overall crime rate by state per year. Judicial behavioral researchers have also investigated the possible impact of public opinion. While the empirical evidence is mixed, several recent studies provide persuasive evidence that the Supreme Court does respond directly to public opinion (Stimson et al. 1995; Mishler and Sheehan 1996; Flemming and Wood 1997; Yates, Whitford, and Gillespie 2004). Given the relative insulation of the Supreme Court, circuit and district judges may be even more responsive to public opinion when making decisions (Giles and Walker 1975; Cook 1977; Kuklinski and Stanga 1979; but c.f. Kritzer 1979). To provide an indirect measure of public opinion, I employ the ideological measure of a state's citizenry developed by Berry, Ringquist, Fording, and Hanson (1998), ICPSR Study #1208 (updated in 2004).[44] This measure provides an estimate of the economic and social liberalism of a state's citizenry by year. The liberalism of a state's citizenry should be positively related with the incidence of departures. These contextual influences address the fact that district court behavior may be influenced by other factors than legal or attitudinal considerations.

[44] While this state liberalism measure of Berry et. al (1998) is inferior to a pure public opinion measure, these are not available on a yearly basis for all states that ask the pertinent questions about the punishment of offenders.

Other structural influences on district courts are also incorporated into the model as controls. The proportion of drug trafficking or immigration cases in a district could affect how district courts view departures (Giles and Walker 1975; Carp and Stidham 1998). While the guidelines expressly forbid departing on the basis of a defendant's drug or alcohol abuse, many of those accused of drug trafficking may be relatively minor participants that were unable to offer sufficient evidence to prosecutors to get a substantial assistance departure. This is especially true in immigration cases as well. This variable indicates whether on an aggregate level, judges attempt to equalize sentences for offenders with little assistance to offer prosecutors with sentences for those who were granted substantial assistance departures by prosecutors. Also, district courts that have more immigration cases may approach departures differently because illegal re-entry after deportation requires a sixteen level upward adjustment under guideline provision §2L1.2. Because a prison sentence is usually required for offense levels over twelve, illegal re-entry coupled with other offenses usually requires prison time when sentenced within the guidelines. Because departures require providing an adequate record and this takes time, districts with heavy workloads per judge should demonstrate a lower departure rate because of the increased pressure to move cases along (Packer 1968). These contextual variables address how the composition of a court's docket and overall workload might affect the departure rate within a district.

Summary of Aggregate Level Hypotheses for Investigation of Circuit Effects on District Departure Rates:

H1: As the proportion of district court judges appointed by Democrats increases in a district, the rate of downward departures should increase in that district.

H2: As the proportion of circuit judges appointed by Democrats increases in a circuit, the rate of downward departures should increase in that circuit's district courts.

H3: As the proportion of a circuit's previous published decisions (lagged by one year) favoring criminal defendants in sentencing cases increases, the rate of downward departures in district courts within that circuit should increase.

H4: As the dissent rate in a Circuit increases, district court downward departure rates should increase because district courts would have a harder time predicting how a circuit panel would decide.

H5: As the monitoring activity by the circuit increases measured by the prior year's reversal rates of district courts, the rate of departures should decrease due to fear of reversal.

H6: The overall downward departure rate by district courts should increase after the Supreme Court signaled circuit courts in Koon v. U.S., 518 U.S. 81 (1996) *to engage in less scrutiny of district court downward departure decisions*

Table 6: Predicted Effects of Independent Variables on Dependent Variables-Aggregate Level Analysis

Independent Variables D.V. = Rate of District Ct. Departures[45]	Variable type Hypothesis linked or Control Variable	Effect on Departure Rates of District Courts
Percent of Circuit Judges appt. by Dem.	Hypothesis 1	As the circuit's makeup becomes more Democratic, the district court should be encouraged increase departure rates.
Percent of District Judges appt. by Dem	Hypothesis 2	As the district 's makeup becomes more Democratic, the district's departure rate should increase.
Circuit Legal Policy (1 year lag)	Hypothesis 3	If a circuit is easing restrictions, then the rate of departures in that circuit should increase.
Dissent rate in circuit	Hypothesis 4	As dissent rate increases, the departure rate should increase.
Prior Circuit's Reversal Rate of district court	Hypothesis 5	As the reversal rate rises then the departure rate should decrease.
Decided before or after *Koon* (0=no, 1=yes)	Hypothesis 6	Departure rates should increase after *Koon.*
Crime rate-state	Control	As the state's crime rate goes up, departure rates should decrease
Ideology of State Citizenry	Control	As public citizenry becomes more conservative, increased emphasis on punishing offenders, then departure rates should decrease.
Proportion of Immigration Cases	Control	As the proportion of immigration cases increase then departures should increase.
Proportion of drug trafficking cases	Control	As the proportion of drug cases increase then departures should increase.
Total Cases per judge	Control	An increase in the total number of cases heard per judge should decrease the rate of departures.

The Aggregate Model Methodology

To examine the effects of the independent variables on the departure rates of district courts, I employ a generalized estimating equation model that was population averaged using the cross-sectional time series variant (GEE-PA). Somewhat similar results were obtained by using regular time-series regression models, time series tobit models, or even OLS regression models thereby lending credence to the robustness of the relationships found. However, the problematic nature of the dependent variable and the time-series nature of the data matrix eventually led me to employ a

[45] The dependent variable for the district court analysis (H1-H6) is the ratio of the number of downward departures divided by the total number of all criminal cases where a departure could be granted.

GEE-PA model (Hardin and Hilbe 2003). First, the dependent variable exhibits a leftward skew; and second, the dependent variable cannot be a negative number given that it is a percentage ranging from 0 to 100 percent. Instead of a Gaussian distribution, the distribution of the dependent variable best fits the Gamma distribution (Mendenhall, Wackerly, and Scheaffer 1990). Thus, I chose to employ to employ a time-series GEE-PA model due to its superior handling of the time series nature of the data and the problematic nature of the dependent variable mentioned above.

The equation of the population averaged GEE model is:

$$g(E(y)) = b_0 + b_1X_1 + b_2X_2 + b_3X_3 + b_4X_4 + b_5X_5 + b_6X_6 + b_7X_7 + b_8X_8 + b_9X_9 + b_{10}X_{10} + b_{11}X_{11}$$

y -> {gamma} where:

y = *Dependent variable:* downward departure rates as a percentage of a district court's sentences
X_1 = Percent of Court of Appeals Judges appointed by Democrat President
X_2 = Percent of District Court Judges appointed by Democrat President
X_3 = Circuit Legal Policy
X_4 = Reversal Rate of District Court during previous Fiscal year (lagged)
X_5 = Dissent rate in Circuit.
X_6 = Decided Before or After Koon (dummy)
X_7 = Overall Crime Rate by State
X_8 = Citizen Ideology by State
X_9 = Percent of Drug Cases in District
X_{10} = Percent of Immigration Cases in District
X_{11} = Total case workload per district court judge

The Case Level Analysis

The major disadvantage of an aggregate analysis comes from the inability to investigate judicial attributes affecting a particular case because of its institutional focus. One judge in a district may be driving all of the departure decisions emanating from that district whereas the aggregate approach would lump this judge with others that do not depart as often. Also, considerations of the particular legal facts in a case context cannot be examined. In addition, an analysis using aggregate level data cannot effectively test connections between individual decisions to depart and appellate review of these decisions. Thus, employing the attitudinal or legal models of judicial behavior become suspect in the aggregate due to their individualistic nature. However, by focusing on the

panel behavior of judges at the circuit level, a case-level analysis enables an investigation of what factors trigger reversals of district court sentencing decisions.[46]

These case-level hypotheses require an examination of factors influencing a circuit court to reverse or affirm district court decisions in individual downward departure cases. The vast literature on individual judicial behavior indicates that several key variables play a part in judicial decision-making. First, and perhaps foremost, circuit judges do make decisions at least partially on the basis of their own policy preferences (Segal and Spaeth 1993). These policy preferences are shaped in part by what experiences that these judges may have had such as prior prosecutorial or criminal defense practice, trial judge experience, and perhaps the experiences of gender and race (Gruhl, Spohn, and Welch 1981; Gotschall 1983; Welch, Combs, Gruhl 1988; Davis 1989; Rowland and Carp 1996; Steffensmeier and Hebert 1999; and Steffensmeier and Britt 2001).[47] These past experiences influence judicial decision-making through shaping the policy preferences of the individual circuit judges.[48]

Rowland and Carp (1983) and Songer, Sheehan, and Haire (2000) note that partisan differences in the treatment of criminal defendants exist at the district and circuit courts. Judges appointed by Democrats are somewhat more likely to render favorable decisions for criminal defendants when compared with judges appointed by Republicans. Consequently, in the context of sentencing appeals, judges appointed by Democrats are expected be more likely to vote for reversing

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[46] I define reversal as any disturbance of the district court's decision by the circuit panel. See Howard (1981).
[47] I was unable to find clear references in the political science literature for the effects of serving as a prosecutor prior to appointment to the bench apart from criminal science matters. However, at least anecdotally, prosecutors are generally selected for being "tough on crime" and in Colorado, Governor Owens claims at his official website, http://www.state.co.us/issues/Crime1.html, that he "Fulfilled his promise to appoint tough prosecutors to the bench with the expectation that victims of a crime, when before the court, will receive consideration on par to that of the offenders." The expectation would be that these prosecutors would not be lenient when they sit on the bench.
[48] Cross and Tiller (1998) propose that "whistleblowers", judges of a different partisan affiliation than other panel members, increase the likelihood that the panel decision will reflect the median preferences of that circuit. The presence of a "whistleblower" will reduce the risk of a panel decision that does not reflect the overall preferences of that circuit. Legal accuracy rather than ideological preferences may predominate the panel decision in these cases. Thus, I propose that panels that have diverse membership attributes mentioned above may behave differently than panels that demonstrate no such diversity

"conservative" district court downward departure decisions and be more likely to vote for affirming "liberal" departure decisions by the district court (Hypotheses 7). Thus, when these judges appointed by Democrats are members of a circuit panel, these panels should demonstrate an increased likelihood of reversing district court downward departure decisions that do not agree with their "liberal" policy preferences in the criminal justice area (Songer, Sheehan, and Haire 2000, 116).[49]

On the other hand, those judges with previous prosecutorial experience may cast a more jaundiced eye on sentencing appeals by those convicted of crimes (Hypothesis 8). Judges with previous service as a prosecutor might be expected to favor the prosecution when deciding cases, ceterus paribus (Gibson 1978b; Myers 1988; Steffensmeier and Hebert 1999;. c.f. Welch Combs and Gruhl 1988). The research literature presents a mixed picture of the effects of a judge's gender or minority status on criminal sentencing (Hypotheses 9 and 10). One study of criminal sentencing in "Metro City" indicates that female trial court judges are more likely to incarcerate than male judges (Gruhl, Spohn, and Welch 1981) Steffensmeier and Hebert (1999) support this finding by their study of sentencing of Pennsylvania state judges. Female judges in Pennsylvania are more likely to incarcerate offenders and also sentence them to longer sentences than do male judges. These empirical results conflict with the idea that women as judges would display a different voice when acting as decision maker (Gilligan 1982). Instead, female judges appear less likely to overturn "conservative" district court decisions on departures perhaps due to crime control concerns. Minority judges on the other hand know first hand about the devastating incarceration rates that

[49] This is not to suggest that all Democrats are liberals and thus seek lesser sentences for crimes. The harshness of the federal guidelines for some crimes has made some judges appointed by Republicans (i.e. see the discussion of Pickering in an earlier chapter) furious as well. Liberals that helped create the Sentencing Reform Act are concerned with the equity of sentences handed down as well. Given that the Sentencing Guidelines at least purportedly reduces sentencing disparities of the classic type (race, gender, SES, etc.), the concern of liberals on the bench may be the draconian sentences (especially mandatory minimums) that may need to be leavened by departures. Under the original intent of the Sentencing Reform Act, increasing number of departures for a specific crime would indicate that the U.S.S.C. needed to revisit and lessen the sentences for the offense.

affect minority communities. With regards to sentencing behavior, Welch, Comb and Gruhl (1988) find that black judges incarcerate white or black defendants at approximately the same rate, but black judges favored defendants of their own race when setting the length of sentence. For this reason, I expect that minorities serving on circuit courts tend to favor defendants over the government when reviewing "conservative" district court downward departure decisions.

District court judges sitting by designation on appellate panels, also may exhibit a reluctance to overturn decisions by other district judges especially on sentencing (Carp 1998, 245-249; Brudney and Ditslear 2001) (hypothesis 11). In a similar fashion, circuit judges with previous service as a district court judge may also exhibit this same reluctance to reverse decisions of district court judges especially as many of these circuit judges prior service coincided with the unfettered sentencing regime before the sentencing guidelines (hypothesis 12). However, circuit panels may be more likely to reverse newly appointed district federal judges (hypothesis 13). These judges may make more legal errors than more senior judges due to a lack of socialization and experience (Haire, Lindquist, and Songer 2003).

Second, at least some circuit judges care about legal accuracy, and district courts below them should prefer positive recognition by the appellate court for legal accuracy to a negative perception (Miceli and Cosgel 1994; Posner 1996; and Klein and Hume 2003). Thus, signal exchanges by the appellate courts and district courts beneath them help appellate courts inform lower courts of their preferences. At the same time, federal courts labor under a heavy workload that would lead appellate courts to prefer signaling to direct action through reversals. Thus, prior reversal rates of a district court's criminal decisions, the level of dissent at the circuit level, and whether the district judge made a sentencing decision contrary to their presumed policy preferences, serve as circuit level factors that would influence a reviewing panel's behavior when examining sentencing decisions by the lower court.

First, the prior reversal rate of a district court provides a signal to busy circuit courts that that a "rogue" district court exists whose policy preferences are too far to the right or left of the circuit's median policy preferences (hypothesis 14). The indication that certain rogue district courts ignore the dictates of sentencing guidelines comes from the Arizona's district court sentencing more cases outside of the sentencing guidelines than within and recent activity by the Utah district court to not provide the U.S. Sentencing Commission with information on sentencing departures (U.S. Sentencing Commission 2003b). Thus, circuit courts would be expected to "rein in" errant district courts by subjecting decisions from these courts to extra scrutiny and subsequent reversals of decisions outside of the circuit court's policy preference range.

Second, the cohesiveness of the circuit might also affect the decision-making of three judge panels given that predicting *en banc* reversal of panel decisions would become difficult (hypothesis 15). High dissent rates among the three judge panels in a circuit indicate a high degree of conflictual rather than consensual decision-making in that circuit. At the same time, district court judges would be less likely to be able to predict three judge panel preferences and might choose to ignore uncertain guidance from above and follow their own preferences thus increasing the need for circuit scrutiny of district court decisions (Haire, Lindquist, and Songer 2003). Thus, strategic activity by district court judges could be encouraged under such circumstances, and these circuits might be forced into increased monitoring of district courts. I would expect that a higher circuit dissent rate would result in a greater number of reversals.

A third signal that would aid the monitoring court would be when a district court judge appointed by Republicans grants a downward departure or when a judge appointed by a Democrat refuses to grant a downward departure (hypothesis 16). In these cases, the circuit panel would subject decisions contrary to the expected preferences of a district court judge to a lower level of scrutiny and thus reverse these decisions at a lower rate. Thus, conservative decisions by judges

appointed by Democrats and liberal decisions by judges appointed by Republicans serve to signal the circuit that the lower court's decision is not ideologically based and thus less deserving of scrutiny (Haire, Lindquist, and Songer 2003). Thus, the expectation is that when the district judge is appointed by a Democrat and makes a "conservative" decision on downward departures that the circuit will be less likely to reverse.

Control variables examine the role that case facts play in circuit judicial decision-making. The decision to publish a case comes after the decision to reverse; however, published cases normally exhibit a higher reversal rate especially in criminal cases as most unpublished decisions affirm the lower court's decision in these types of cases.[50] Also, case characteristics, such as the defendant's race, gender, citizenship status, severity of crime committed, and past criminal history, might affect whether appellate judges choose to overturn a lower court's decision as well (Diamond and Zeisel 1975; Myers and Talarico 1987; Lovegrove 1989; Dixon 1995; Baum 1997; Mustard 2001).

The circuit court's panel decision to reverse lower court departure decisions in order to benefit defendants provides a useful dependent measure of how circuit courts choose to audit sentencing behavior in district courts within the circuit. I chose to limit this analysis to a sample of downward departure cases that were appealed (the gray columns in Table 5 above) because many of the specific judges involved can be identified without access to every district court's records.[51] In this analysis, I use the outcome of the appellate review of anti-defendant departure decisions by district court judges as the key dependent variable.

Whether signals such as reversals constrain the actions of other district court judges is another matter. One of the primary weaknesses of the principal-agent model stems in part from its

[50] For example, in fiscal year 1997, 26.2 percent (558/2130) of published criminal cases were reversed while only 9.0 percent (393/4366) of non-published cases were using the U.S.S.C. data on criminal appeals. This year appears typical..
[51] Defendants are assumed to appeal departure decisions that would not reduce sentences by as much as the defendant would prefer. This assumption includes the appeal of downward departure decisions because the departure given was insufficient in the defendant's eyes.

borrowing from economic literature. The original principal-agent model as developed by Kenneth Arrow (1985) depends on proper incentive structures to overcome delegation problems. However, in the court system, appellate judges cannot remove or discipline district court judges nor can they change the pay, etc. This, in reality, leaves reputation, legal training, and perhaps progressive ambition of individual district court judges as the elements that would cause a district court judge to willingly follow appellate court rulings (see discussion above). The direct means of control by appellate courts over unwilling district judges is the threat to reverse that district court judge's decision (Klein and Hume 2003).

Whether this threat is regarded as credible depends in part on circuit characteristics. One characteristic is whether the circuit is cohesive and thus able to give clear signals to underlying district courts. If the ideological disparity between three judge panels within a circuit is large, then a district court judge may not be able to accurately predict what a particular decision says about the preferences of the circuit court as a whole (Haire, Lindquist, and Songer 2003). Under this condition, district court judges will simply ignore a muddled signal. Other problems with the signal come from whether the appellate court is overturning an outlier district court judge. If the other district court judges know that a particular judge is an outlier, a judge who is either much more conservative or liberal in decision than the supervising circuit, then the average district court judge may ignore an outlier judge's decisions being overturned by the appellate panel. Thus, signaling by the appellate court works best when the appellate court makes rulings that follow a uniform pattern and when the district court judge that is being overruled is not an outlier. A written opinion rather than a summary reversal also gives lower court judges more information about the preferences of the appellate court and should give a better signal as well.

Summary of Hypotheses: Examining Auditing Behavior of Judges in the Courts of Appeal

H7 As the number of those appointed by a Democrat serving on a Circuit panel increase, the probability of the reversal of an "anti" defendant sentencing decision of the district court judge should increase.

H8 A circuit panel with at least one member with previous prosecutorial experience will be less likely to reverse an "anti" defendant departure decision.

H9 A circuit panel with at least one female judge is more likely to reverse an "anti" defendant departure decision of a district court judge.

H10 A circuit panel with at least one minority judge is more likely to reverse an "anti" defendant departure decision of a district court judge.

H11 A circuit panel is less likely to reverse an "anti" defendant departure decision when the panel includes a district court judge sitting by designation.

H12 A circuit panel with at least one member with previous district court experience prior to circuit service will be less likely to reverse an "anti" defendant departure decision.

H13 A panel is more likely to reverse the departure decision of less experienced district court judges.

H14 The a high reversal history of a district court will increase the probability of a panel reversing an "anti" defendant sentencing departure decision.

H15 A greater dissent rate of a circuit should increase the probability that the circuit panel reviewing the appeal will reverse a district court judge's "anti" defendant departure decision.

H16 A circuit panel is less likely to reverse the "anti" defendant departure decision of district court judges appointed by a Democrat.

Table 7: Predicted Effects of Independent Variables on Dependent Variable-Case Level Analysis

Independent Variables D.V. = Probability of Circuit Reversal on District judge's "anti" defendant downward departure decision[52]	Variable type Hypothesis linked or Control Variable	Effect on Reversals (Case-Level Dependent Variable)
Number of Circuit Judge on panel appt. by Dem. (0, 1, 2, or 3)	Hypothesis 7	As the number of judges appointed by Democrats on a panel increases, the chances of reversal increases.
At least one Circuit Judge on panel with previous prosecutorial experience- (0=no, 1=yes)	Hypothesis 8	Should decrease the rate of reversal.
At least one Circuit Judge on panel is Female (0= male, 1= female)	Hypothesis 9	Should decrease the chance of reversal.
At least one Circuit Judge on panel is a minority (0=white (non-Hispanic), 1= other)	Hypothesis 10	Should increase the chance of reversal.
At least one District Court judge sitting by designation on Circuit Panel (0=no, 1=yes)	Hypothesis 11	Should increase the chance of reversal.
At least one Circuit Judge on panel with prior federal district court service (0=no, 1=yes)	Hypothesis 12	Should decrease the chance of reversal.
Number of years on bench by district judge	Hypothesis 13	As the experience of the district court judge increases the chance of reversal decreases.

[52] The dependent variable for the downward departure case level analysis (H7-H16) would be the probability that a circuit court panel will reverse a lower court's downward departure decision that is "anti" defendant. Essentially, a vote to reverse supports the liberal "pro-defendant" decision.

Prior Reversal Rate of District Court	Hypothesis 14	Will increase the chances of reversal.
Dissent rate in circuit	Hypothesis 15	Should increase the chance of reversal.
District Judge appt. by Dem (0= Rep, 1=Dem.)	Hypothesis 16	Should decrease the chance of reversal.
Case published (0=no, 1=yes)	Control	Should increase the chance of reversal.
Defendant Race (0=white (non-Hispanic), 1= other)	Control	Should increase the chance of reversal.
Defendant Sex (0= male, 1= female)	Control	Should decrease the chance of reversal.
Defendant is U.S. Citizen (1=yes, 0=no)	Control	Should increase the chance of reversal.
Adjusted Level of Crime Seriousness (as measured by U.S.S.C.)	Control	As dissent rates increase, the chance of reversal should increase.
Defendant past criminal history points (As measured by U.S.S.C.)	Control	Should increase the chance of reversal.
Number of charges	Control	Should increase the chance of reversal.
Statutory minimum sentence involved (0=no, 1=yes,)	Control	Should increase the chance of reversal.
Appeal involves immigration case (0=no, 1=yes)	Control	Should increase the chance of reversal.
Defendant adjustment for accepting responsibility (U.S.S.C. 0 = no acceptance, 1, 2, 3 represent increasing levels of acceptance adjustment for defendant)	Control	Should decrease the chance of reversal.
Departure type (0=5H1.6, 1=5K2.0)	Control	Should decrease the chance of reversal.

The theoretical framework comes from principal-agent theory that would have appellate courts exercise their control over district courts by monitoring appeals and overturning decisions that are outside of the preference range of the panel. However, appellate courts cannot effectively monitor every decision due to excessive transaction costs so these courts rely on signaling district courts in the circuit by reversing decisions and thereby acquiescing in some degree of agency loss (Bendor, Glazer, and Hammond 2001). By reversing some sentencing behavior contrary to the circuit's preferences, the Court of Appeals sends a notice to district courts about the preferences of that appellate court (Songer, Segal, and Cameron 1994). To empirically test the individual case level analysis, I use a binary dependent variable in a logistic regression model of whether the circuit affirmed or reversed the lower court's downward departure decision to the benefit of the criminal defendant.[53] The logistic regression equation is represented by this equation:

[53] Originally, the review of a downward departure grant by the district judge was to be the dependent variable. However, when examining the detailed reasons for the reversals, only 19 cases of downward departures were reviewed with 7 out of 19 of these cases reversed. Instead, these decisions and the decisions where the district court denied a departure were included in the dataset. The downward departures were recoded to make sure that the district court's decision was cast as pro-defendant or anti-defendant. I only selected cases where all of the judges could be identified, excluding the D.C.

$$y=b_0 + b_1X_1 + b_2X_2 + b_3X_3 + b_4X_4 + b_5X_5 + b_6X_6 + b_7X_7 + b_8X_8 + b_9X_9 + b_{10}X_{10} + b_{11}X_{11}\ b_{12}X_{12} + b_{13}X_{13} + b_{14}X_{14} + b_{15}X_{15} + b_{16}X_{16} + b_{17}X_{17} + b_{18}X_{18} + b_{19}X_{19} + b_{20}X_{20} + b_{21}X_{21}$$

Y=The probability of a panel's decision to reverse a lower court's "pro" defendant departure decision
X_1=District Court Judge appointed by Democrat President
X_2=Number of years bench experience of district court judge
X_3=Previous reversal rate of district court
X_4=Number of Circuit Court judge appointed by Democrats on panel
X_5= Presence of at least one Circuit Court judge with previous prosecutorial service
X_6=Presence of at least one Circuit Court judge with previous district court service
X_7=Presence of at least one female Circuit Court judge on panel
X_8= Presence of at least one minority Circuit Court judge on panel
X_9= Presence of at least one district court judge sitting by designation on panel
X_{10} = Whether circuit decision was published or unpublished
X_{11} = Dissent rate of circuit
X_{12}= Race of defendant
X_{13}= Sex of defendant
X_{14} = Citizenship status of defendant
X_{15}= Defendant's adjusted highest offense level
X_{16}= Total criminal history points of defendant
X_{17}= Number of criminal counts
X_{18}= Whether statutory minimum sentence involved
X_{19}= Appeal involves an immigration case
X_{20}= Acceptance of responsibility by defendant
X_{21}= Departure type

Data Collection for Aggregate and Individual Level Models

The data for analysis of the dependent variables and some of the independent variables were obtained from Administrative Office of the U.S. Courts databases combined with the U.S. Sentencing Commission data. These data are readily available from the ICPSR and fortunately Fiscal Year (FY) 1997 data from the U.S. Sentencing Commission left the three panel member judge codes in the dataset.[54] This yields a rare opportunity to directly identify all appellate court judges via these codes. These data also allow an examination of the crucial period after *Koon,* described by Lee (2004) as a policy window where circuit and district behavior would be in flux. I used multiple sources for identifying these decisions including published and unpublished decisions derived from

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Circuit, where the appellate panel directly addressed the departure decision itself as an issue to be reversed (or not). Thus, I was left with a dataset including 267 cases with 46 reversals.

[54] The formal titles of the datasets that will be used are: Monitoring of Federal Criminal Sentences Series, ICPSR Studies: 9317 for the years 1987 to 1998, 3106 for the year of 1999, 3496 for the year 2000, and 3497 for the year 2000, Source: U.S. Sentencing Commission. Appellate review data of sentencing cases will come from Monitoring of Federal Criminal Convictions and Sentences: Appeals Data, ICPSR Studies: 6559 for the years 1990 to 1998, 3105 for the year 1999, 3493 for the year 2000, and 3494 for the year 2001. Additional sources of data of appellate and district court actions are included in the Federal Court Cases: Integrated Data Base, 1970-2000, ICPSR Study 8429, Source: Federal Judicial Center.

Westlaw, or *Lexis Academic Universe,* and opinions and orders posted on various websites dedicated to particular circuits' opinions. These opinions and orders were matched with cases in the sentencing dataset to resolve judges' identities.

These decisions were gathered in several ways. The first method was through examining all published and unpublished decisions available through computer databases such as *Lexis/Nexis* and *Westlaw* for case and judicial identifiers. The second method used was to examine opinions through the various circuits' websites because these often identify the judges in the header of the opinions. In addition, the district court judge is usually identified in these opinions. A brief survey of the circuit websites indicates that most now have a significant proportion of both published and unpublished appellate opinions starting about 1996 with some websites containing opinions back to the 1980's, and this data was used when the other databases failed to identify a case. By using multiple approaches to crack the judge identifier codes, a sufficient number of judges were identified to make an individual case level analysis possible.[55] This matching procedure eventually will permit the examination of the primary pool of non-appealed cases as well as the characteristics of those cases that were appealed. In addition, the U.S.S.C. data contains a wealth of information about specific case circumstances such as charges, statutory minimums, and defendant characteristics that is employed in the case-level analysis. This dataset is available for the time period from 1991 to 2001 for district court data and from 1991 to 2001 for appellate court data. Much of the information can be employed "as is" for the individual case level analysis.

In aggregate form, such information as the percentage of violent crimes in the circuit was calculated for the district level analysis from the FBI's Uniform Crime Reports aggregated by state

[55] Docket numbers can be obtained by combining the U.S. Sentencing Commission's (U.S.S.C.) files with the criminal case files from the U.S. Administrative Office of the U.S. Courts (AOUSC) as archived by the ICPSR. Using the case docket number, date, crime, and district court as linkage variables, the U.S.S.C. data can be linked to appellate decisions in the U.S. AOUSC database. To link these variables, I used Microsoft's Access Database program to match the files as Access can handle large datasets up to 2 gigabytes in size and relational queries can combine the data into new datasets for analysis. Currently, I have files from the ICPSR Sentencing Commission data and AOUSC data in such a database that was employed to create tables 2a, 2b, 3, and 4.

available from http://www.fbi.gov/ucr/ucr.htm and from reports from the United States Department of Justice, Bureau of Justice Statistics such as *The Sourcebook of Criminal Justice Statistics,* (serial publication). Unpublished data from the Bureau of Justice Statistics (BJS) provided to the ICPSR through the National Archive of Criminal Justice Data (NACJD) accessible through http://www.icpsr.umich.edu/NACJD/ is also employed. I focus on the time period of FY 1991 to FY 2001 for the aggregate analysis because this period permits using data from these years for investigation. For this reason, I can examine whether changes occurred in the monitoring relationship between circuit and district courts before and after the *Koon* decision.

Most background data on judges comes from the Federal Judicial Center's database on presidential appointments to the courts. Ideological information about judges on the circuit level and calculations of dissent rates were made available by the authors of a recent article on the U.S. Courts of Appeals (Haire, Lindquist, and Songer, 2003).[56] Past career experiences of individual judges were garnered primarily through the Federal Judicial Center's Judicial Biography Database available at http://www.fjc.gov/newweb/jnetweb.nsf/hisj and complemented with the Barrow, Zuk, and Gryski's (1996) extension of Songer's Multi User Database that is available from ICPSR study number 6796.[57] Past career experiences such as past service as a district judge or prosecutor may color how these judges would make their decisions on whether to reverse. For the aggregate district level analysis, reversal rates by district and dissent rates by circuit were derived from AOUSC annual reports and the *MultiUser Database on the U.S. Courts of Appeals*, ICPSR Study # 2086 respectively. Ideology or policy preferences of the district and appellate courts are handled by using

[56] Data on the most recent judges was gathered from the Federal Judicial Center's Judicial Biographical Database available online at http://www.fjc.gov/newweb/jnetweb.nsf/hisj.
[57] Multi-User Database on the Attributes of United States Appeals Courts Judges, 1801-1994, Principal Investigators, Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski, available as ICPSR study 6796, financed through NSF Grant SBR-93-11999.

aggregate measures such as the percentage of judges appointed by a Democratic president as a crude index of liberalism (Carp and Rowland, 1996).

There are several problems with the individual case level analysis. One is that not all departure cases can be used because some cases in the USSC dataset do not match any judicial opinions and orders for obtaining judge identifiers. Also, some district judge identifiers were not available from some cases in the D.C. and Fifth Courts of Appeals. A conservative bias is to be expected because cases where the judge departs downward from the guidelines to the extent desired by defendants should not be appealed by those defendants. Of course, the opposite is true of upward departures. Instead, defendants base most of their appeals on the denial of a downward departure or the application of an upward departure to their sentence. The government is somewhat more sparing when deciding to appeal departure decisions than are defendants and thus the government only appeals a few downward departures such as the case of Stacey Koon.[58] For that reason, I eliminated appeals by the government from the analysis except when those cases were also cross-appealed by the defendant. Seven cases were cross-appealed by the defendant and the government and these were included in the analysis.

Chapters 5 and 6 present the empirical results for the aggregate and case level models respectively. Both chapters follow a similar format that begins with a general description of the data and model employed, the presentation of empirical results, and subsequently a discussion of what those results might mean.

[58] I have not been able to find a case where the government has ever appealed an upward departure by a judge.

Chapter 5

Aggregate Model Analysis and Discussion

In this chapter, I present the results of the aggregate model analysis that examines patterns in decision making by district court agents. The first model uses the individual judicial district's downward departure rates as the dependent variable. In an exploratory analysis, I develop a second model that examines upward departure rates reported in Appendix A. Given that my unit of analysis is the district-year (88 districts, 1991-2001), (1991-2001), cross-sectional time-series analysis is employed for both models.[59]

Initially, I present descriptive statistics for the variables employed in the aggregate analysis. My dependent variable, the downward departure rate, varies from 0 to 63 percent and exhibits a leftward skew. A histogram of this variable indicates the left half of the sample squeezed between 0 and the mean value of 8.236 percent whereas the other half of the sample to the right side ranges between the mean and 63.50 percent. Thus, the distribution of the dependent variable in the downward departure rate analysis exhibits non-normal (non-Gaussian) behavior and most closely

[59] The district courts of Washington, D.C. and the state of Arizona are excluded from the downward departure analysis as well as district courts in Puerto Rico, the Northern Marshall Islands, the Virgin Islands, and Guam. All but Arizona are also excluded from the upward departure analysis as well. Washington, D.C. courts are excluded due to missing citizen ideology scores as well as the unique dual federal court system in D.C. This also means that the D.C. Circuit is excluded from the analysis. Arizona was excluded from the downward departure analysis due to its departure rate ranging from 32.0 percent to 63.50 percent with a mean departure rate of 47.2 percent. This large departure rate is most probably due to the particularly heavy concentration of immigration cases in this district's workload. Because §2L1.2 of the Sentencing Guidelines requires a sixteen level upward adjustment for those charged with re-entering the country after being deported, this almost ensures mandatory prison time for many immigration defendants. As a result, judges in Arizona apparently are reluctant to sentence these offenders to prison due to the non-violent nature of the offense and perhaps the added burden on the federal prison system. Leaving Arizona in the model results in a vastly increased immigration significance and coefficient size but decreasing the overall fit of the model. Immigration cases in Arizona as a percent of district court workload increased from 7 percent to over 58 percent during 1991-2001 with a mean of 28.9 percent.

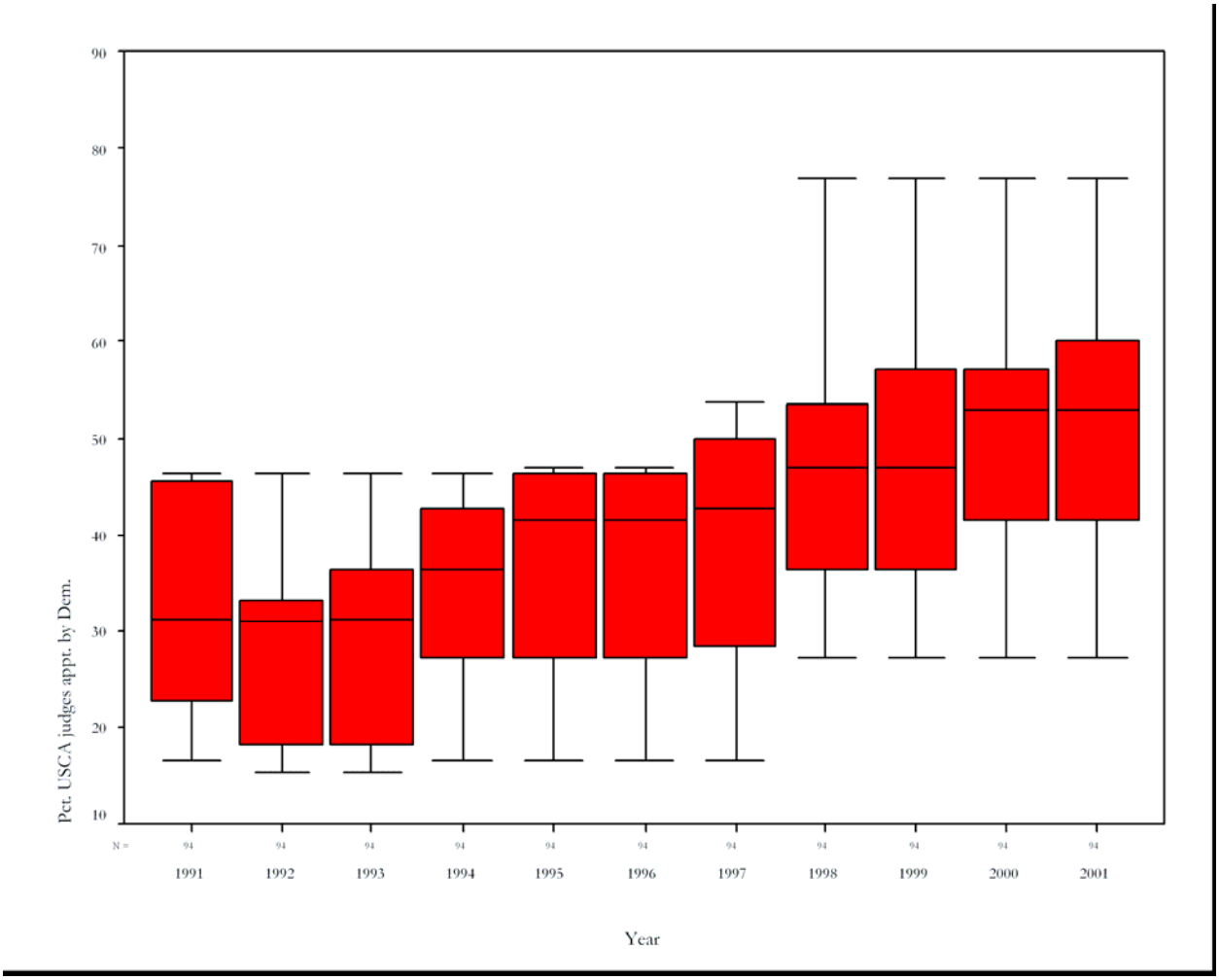
resembles that of the continuous Gamma distribution.[60] Gaussian distributions best fit variables when the variable does not exhibit skewness and is not limited to positive values only[61].

The descriptive statistics for the independent variables suggest the overall makeup of the courts leaned toward those appointed by Republican presidents. Not surprisingly, circuit legal policy in sentencing also tended to be oriented toward the prosecution. Fortunately, considerable cross-sectional and temporal differences exist especially with key independent variables such as the percent of district or circuit court judges who were appointed by a President who was a Democrat. The period from 1992 to 2001 starts with most circuit and district courts composed of majorities of judges nominated by Republican Presidents and finishes with these courts reflecting the considerable number of President Clinton's appointments to the bench.

The boxplot in Figure 1 displays the percent of judges serving on the Courts of Appeals who were appointed by Democrat presidents. As we can see, the percentage of Democrat appointees to the U.S. Courts of Appeals reaches its nadir in 1992 at the end of twelve years of Republican presidents. Subsequently, during the eight years of President Clinton's administration, the percentage of judges who were appointed by a Democrat rose steadily and reached a maximum just before Clinton left office. The boxplot also reveals that most circuits were dominated percentage-wise by Republican appointees until about 1997 when replacement of retiring Republican judges by Democratic nominees left the circuits roughly balanced in the percentage of appointees.

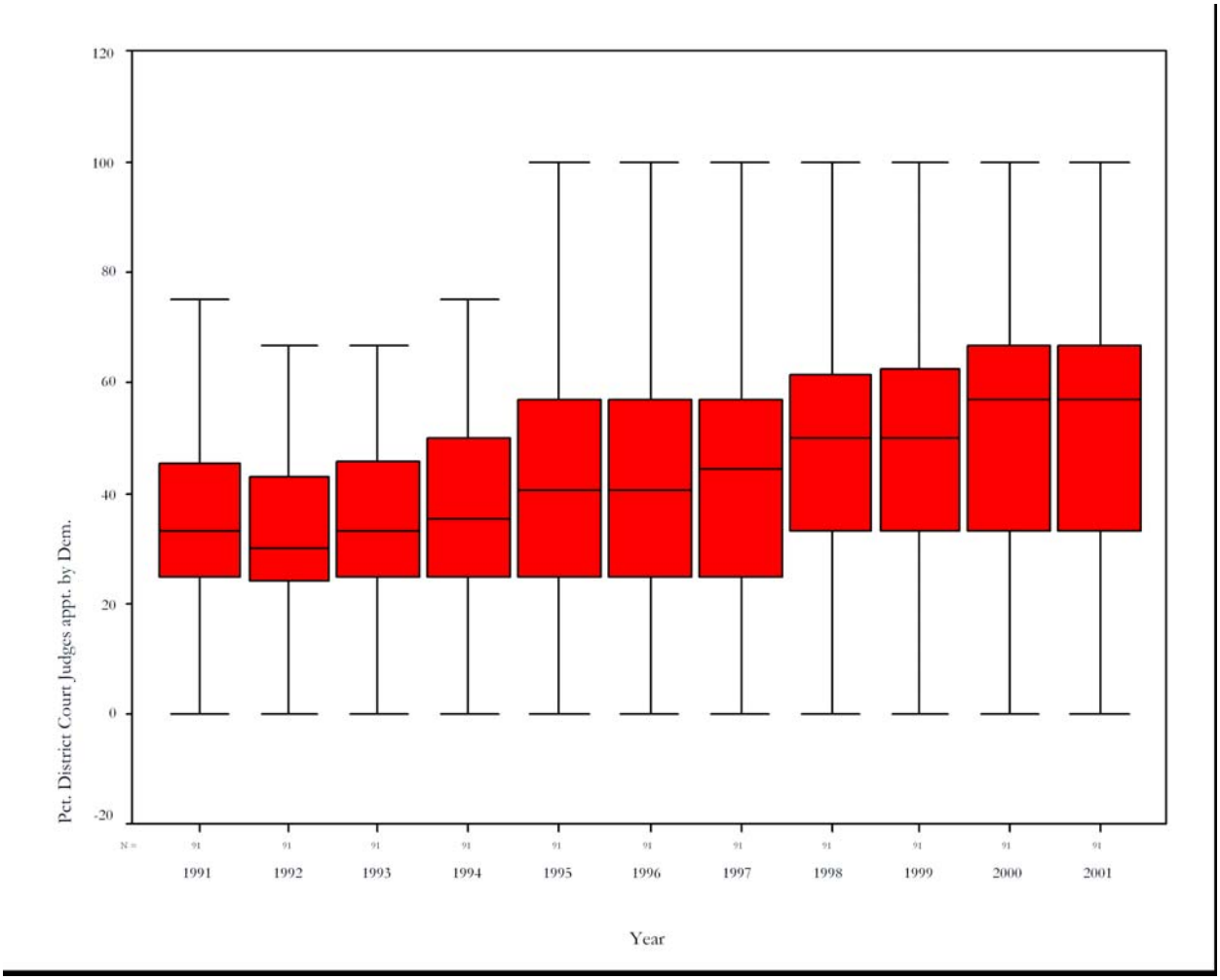
[60] Another reason that the Gamma distribution fit the dependent variable distribution better than the Gaussian distribution is because the dependent variable is limited to positive values between 0 and 100 percent.
[61] The upward departure dependent variable also exhibits a similar skew however the range from 0 to 11.10 percent results in a more normal shaped distribution with a skew value of 2.747. There are very few incidents of upward departure rates greater than 4 percent with 95.4 percent of all upward departure rates less than or equal to 3.00 percent. As a result, the Gaussian distribution provides a better fit than the Gamma distribution for the upward departure dependent variable.

Figure 1. Percent of judges appointed by a Democrat President serving on the Court of Appeals 1991-2001



The boxplot in Figure 2 demonstrates that similar trends were occurring at the district court level as well. However, the districts varied widely in the percentage of those nominated by Democrats. The percentage of Democratic appointees serving on district courts reaches its lowest point in 1992 and steadily increased until 2001 when the average district had partisan parity in appointees. In 1997, the year sampled for the case-level analysis, the bulk of the districts ranged from 25 to 55 percent Democratic appointees with a few districts at both extremes.

Figure 2. Percent of judges appointed by a Democrat President serving on the District Courts 1991-2001



Boxplots in Figure 3 and Figure 4 below display the downward and upward departure rates respectively by district over time. These departure rates display trends in the opposite direction over time. The overall upward departure rate trends downward over the time period observed while the downward departure rate trends upward. In addition, the differences between districts' downward departure rates increase over time while rates of upward departures decrease. Despite the increased rates, the majority of downward departure rates in the district courts remained well under twenty percent and those of upward departures declined to under two percent by 2001.

Figure 3. Downward Departure Rates of the District Courts from 1991-2001

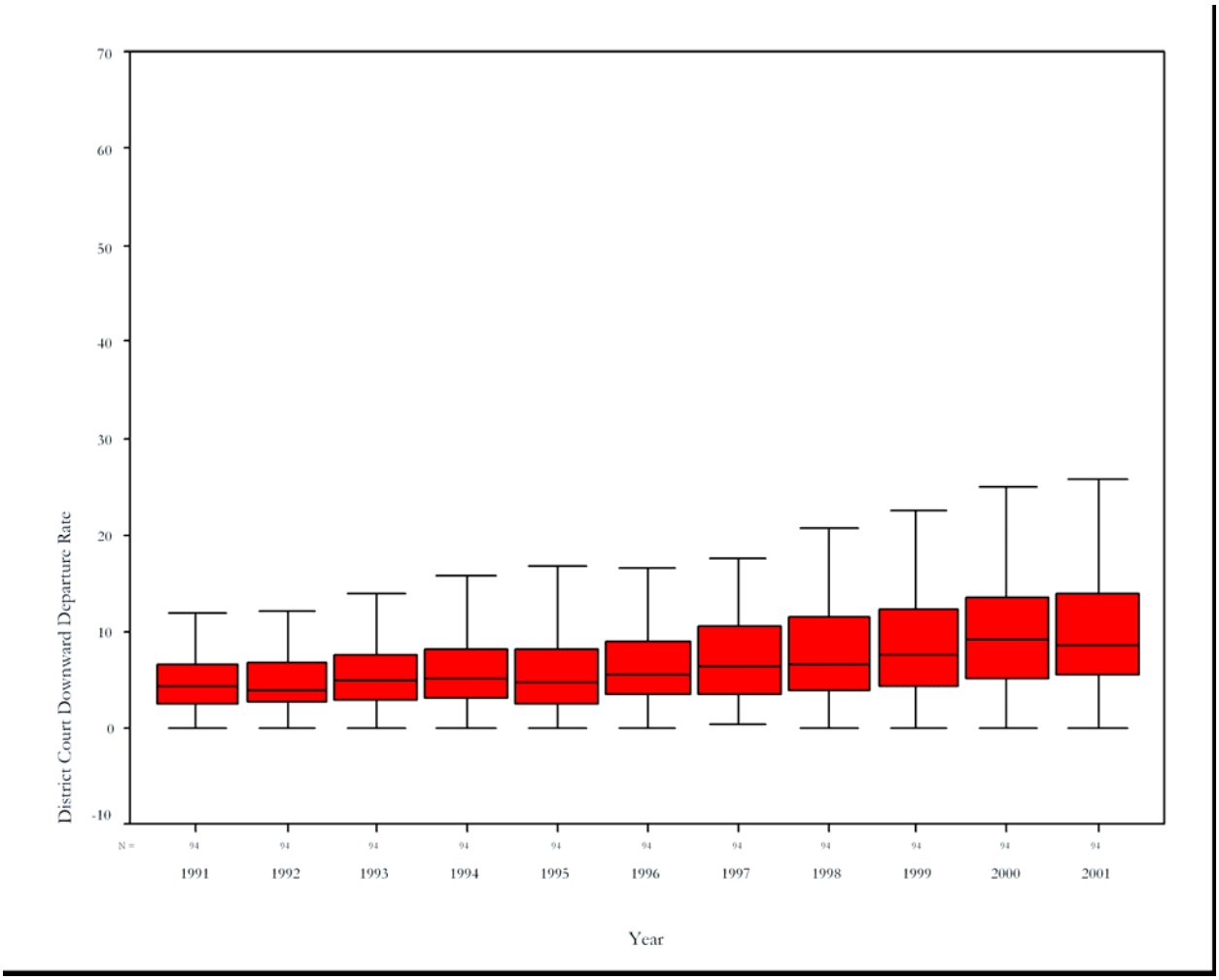
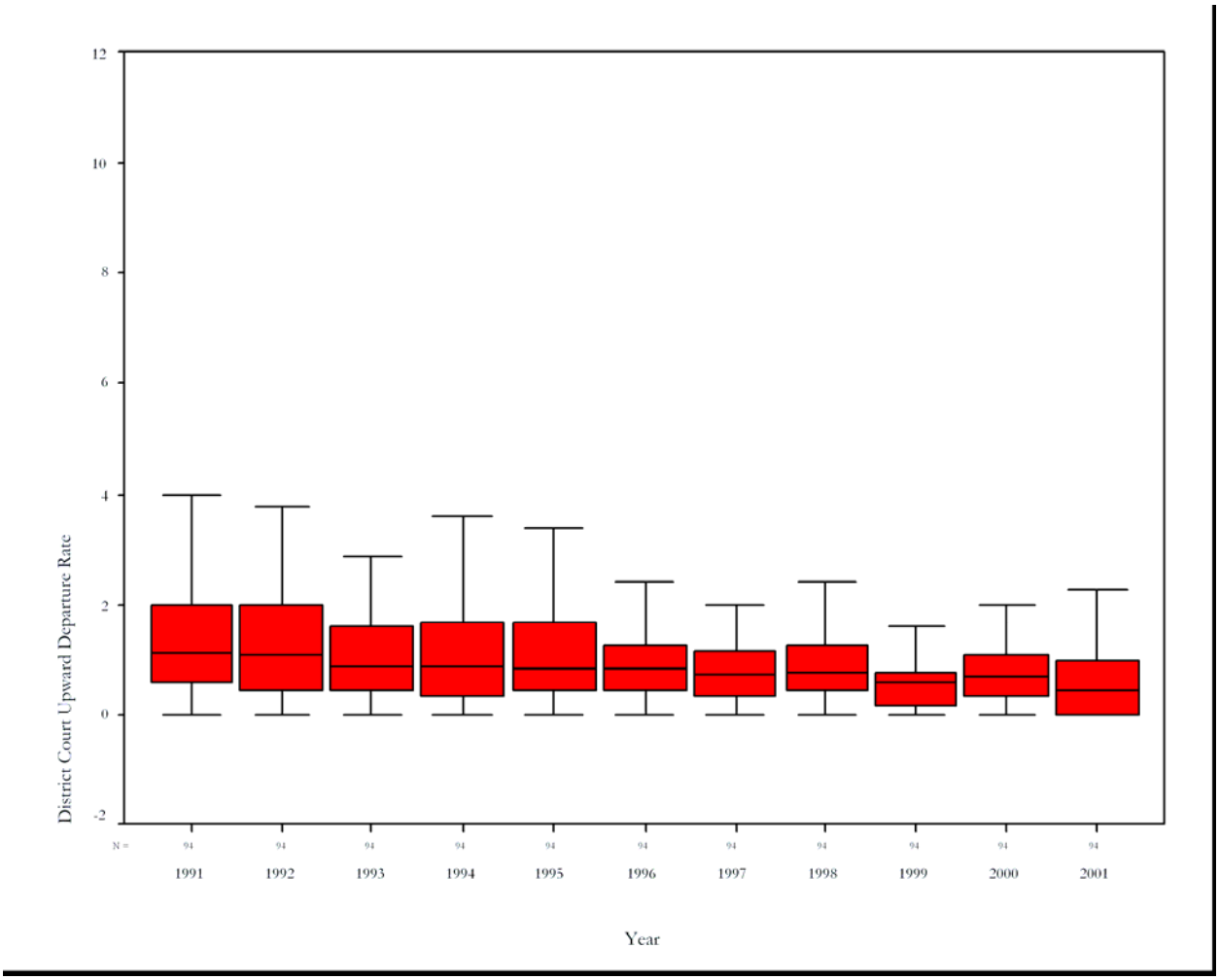


Figure 4. Upward Departure Rates of the District Courts from 1991-2001



Given the nature of the dependent variables, I chose to employ General Estimating Equations (GEE) model that was population averaged (PA) because this form of analysis permitted specification of the underlying distribution of the dependent variable (Hardin and Hilbe 2003). The population averaging GEE model was employed instead of the subject specific GEE model because the hypotheses tested involved the marginal outcome on the departure rates caused by the independent variables that are averaged over the population of district courts. A subject specific model would be concerned with the effect of the covariates on a specific district court's departure rate and thus unable to test my general hypotheses.

While several downward departure rate models that rely on Gaussian distributions were fitted for diagnostic purposes, these models exhibited negative heteroscedasticity for several key independent variables. The necessity of employing time series methods was indicated by a Durbin-Watson statistic of 1.63 that indicates mild autocorrelation of the dependent variable in the downward analysis.[62] However, the regular time series model in Stata, the xtreg process, reported within group correlations ranging from ϱ=0.68 to ϱ=0.72.[63] Thus, Stata's option for reporting robust standard errors, using the sandwich estimator developed by Huber (1967) and White (1980), was employed with standard error clustering on individual district court.[64] Fortunately, correlations between co-variates did not indicate much potential for collinearity with a maximum correlation of r=0.233 between the percent of Court of Appeals judges appointed by a Democrat and the lagged general reversal rate of district courts.[65] To check for whether the dependent variables and the key independent variables are stationary, I used a Stata module *nharvey.ado* which permits variables in a cross-sectional time series panel study to be tested (see Nybloom and Harvey 2000 for a discussion of this test). These tests did not indicate the stationarity of the dependent variables was problematic for the time period of the study.

The downward departure GEE-PA model estimated employs the canonical link, the Gamma distribution for μ, and a correlation matrix adjusted for AR2 type autocorrelation. The unit of analysis was eighty-eight district courts with ten years of district court departure rates on a yearly basis. The matrix was balanced with no missing values.[66] The model did not display overdispersion.

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[62] Further tests indicated the form of the autocorrelation to be primarily type AR2 instead of type AR1.
[63] This indicates that substantial correlation within the grouping variable of district courts occurs. We would expect to see such correlations as the judges composing the circuits and districts courts do not change much from year to year.
[64] For GEE models, Stata terms these errors as semi-robust given the quasi-likelihood nature of GEE models instead of employing maximum-likelihood algorithms requiring full information of the covariate correlation matrix.
[65] Other tests were also employed for collinearity such as the variance inflation factor (VIF), and these also indicated low levels of collinearity between the independent variables.
[66] The upward departure GEE-PA model estimated employed the canonical link function, the Gaussian distribution pattern for μ, and an exchangeable correlation matrix. The unit of analysis was the same as for the downward departure model and the matrix was balanced with no missing values.

Table 8. Descriptive Statistics-Aggregate Analyses-Downward and Upward Departure Rate Models

Variable	*Observations*	*Mean*	*Std. Dev.*	*Min.*	*Max*
DV=District Court Downward Departure Rate	880	8.300	7.053	0.000	51.800
Pct of District Ct. Judges appointed by Democrat	880	43.611	24.995	0.000	100.000
Pct. of Circuit Ct. Judges appointed by Democrat	880	40.532	13.628	15.385	76.923
Circuit Legal Policy (pct. of pro-defendant decisions) (lagged)	880	30.430	14.190	0.000	62.500
Circuit Rate of Dissent	880	0.119	0.056	0.026	0.267
Rate of District Court Reversals (lagged)	880	15.145	6.826	4.300	48.800
Crime Rate per 100,000 by state	880	4710.586	1180.046	2282.000	8358.000
Citizen Ideology Measure	880	47.704	23.695	0.000	97.917
Total Cases per Dist. Court Judge	880	484.238	238.703	145.667	3805.111
Pct. of Drug Trafficking cases in District	880	0.387	0.215	0.026	2.081
Pct. of Immigration cases in District	880	0.060	0.084	0.000	0.544

Table 9. XTGEE-Population Averaged Model of District Downward Departures Rates 1992-2001

Variables	Coefficient	Semi-Robust Std. Errors	P>|z| Two-Tailed
Percent of District Court Judges Appt. by Democrat	0.0365 ***	0.0108	0.001
Percent of Circuit Court Judges Appt. by Democrat	0.0382 **	0.0161	0.018
Circuit Rate of Dissent	11.2062 **	4.1595	0.007
Circuit Legal Policy	-0.0080	0.0063	0.206
Reversal Rate of District (1 yr. lag)	-0.0006	0.0123	0.804
State Crime Rate per 100,000 population	-0.0006 ***	0.0002	0.002
Citizen Ideology by State	0.0060	0.0071	0.396
Total Cases per District Court Judge	-0.0002	0.0006	0.750
Percent of district court cases dealing with drug trafficking	-1.3375 *	0.6218	0.031
Percent of district court cases dealing with immigration	10.0004 **	4.2616	0.019
After *Koon v. U.S.*	1.2047 ***	0.3284	0.001
Constant	6.3616 ***	1.6291	0.001
Number of districts =88, 10 observations per district (1992-2001)	Scale Parameter =0.5992	Wald Chi^2 (11 d.f.) = 108.94 Prob > Chi^2 =0.0001	

* Significant at p<.05 (one-tailed)
** p<.01
***p<.001

District Courts excluded AZ, DC, PR, NMI, GU.

Downward Departure Model Results

The model results support several hypotheses and are reported above in Table 9. As expected, the policy preferences of the principal affect decision making by agents. As the percent of circuit judges appointed by a Democrat increases, the district downward departure rate also increases. This finding suggests that federal trial court judges are responding to the ideological makeup of their circuit court superiors. However, a measure of circuit sentencing policy did not appear to shape district court departure decisions in this model. The ideological makeup of the district also was hypothesized to shape sentencing patterns. As expected, the model results support this hypothesis as well. As the percent of judges appointed by Democrat increased within a district, the downward departure rate increased as well.

The principal-agent framework also suggested that the ideological coherence within a circuit would affect the ability of district courts to determine the preferences of the upper court. Consensual circuits would provide clear signals for lower trial courts whereas circuits characterized by dissensus would present mixed cues to district courts. The results of this model clearly support this hypothesis. I also had hypothesized that the tendency to reverse (or affirm) district courts would affect the exercise of discretion at the trial level. However, the results in Table 9 indicated that circuit reversal rates were not related to departure rates.

Finally the model also tested the hypothesis that the Supreme Court's decision in *Koon* would encourage district courts to exercise sentencing discretion and increase the departure rate. The results from this model strongly support that expectation. The departure rate increased in the years following this landmark case.

The model fit overall was highly significant as indicated by the Wald chi ^{2} statistic score of 115.90 (d.f. 11). Briefly, the results for the other control variables generally supported expectations. The percentage of immigration cases making up a district court's workload increased the average

district's departure rate. Also as predicted, the crime rate in a state is significantly and negatively related to the downward departure rates in districts within that state while the percent of drug trafficking cases was negatively and significantly related to the downward departure rates of a district court. The other control variable measuring workload effects of a district court was not significant.

Fortunately, providing estimated effects for these relationships is usually straight forward for GEE-PA models. Roughly, a three percent increase in the percentage of judges appointed by a Democrat President at either the circuit or district court level results in a one percent increase in the downward departure rate in the average district court. An eleven percent increase in the circuit dissent rate results in a one percent increase in the average district's departure rate while the *Koon* decision increased the downward departure rate of the average district court by 1.20 percent for subsequent years. Interpreting the other control variables, as the crime rate in a state increases by .06 percent, the departure rate drops on average by one percent; and each 1.33 percent increase in the proportion of drug trafficking cases in the average district results in a 1 percent decrease in the downward departure rate. Each 10 percent increase in the proportion of immigration cases results in a one percent increase in the average district's departure rate.

Discussion of Results

In interpreting these results, one must be careful not to attribute these aggregate level variables to changes in individual judicial behavior at the district court level. For example the aggregate level changes in the percent of judges appointed by a Democrat president cannot be directly attributed to the behavior of these judges on the bench. The increased presence of such judges at the circuit level may instead result in changes in behavior by judges appointed by Republican presidents by acting a whistleblower (Cross and Tiller 1998) or by serving as an advocate for judicial autonomy for district court judges instead of letting criminals off lightly. Thus, an ecological fallacy can easily be committed when discussing these results. Nevertheless, these results

indicate that the President's power to appoint judges can have a significant impact in a relatively short period of time on how district judges sentence offenders. Thus, as hypothesized, partisan appointment of judges affect the overall rate of departures (hypotheses 1 and 2).

Second, these results indicate that circuit legal policy represented as "pro-defendant" decisions by a circuit court do not effectively signal district court judges about the preferences of the circuit court in the departure context (hypothesis 3). A better measure might be to use the proportion of all "pro-defendant" decisions--published and non-published. When compiling this variable, a considerable disparity was noted by this researcher in the outcomes of published versus non-published criminal cases. Often "conservative" circuits such as the Fourth Circuit had a much higher rate of "pro-defendant" decisions than the "liberal" Ninth Circuit. This could indicate that better measures of circuit legal policy should include unpublished cases as well as the published cases especially since publishing norms are different from circuit to circuit. It could also suggest that given the 4th Circuit's prior reputation, i.e. conservative, that trial court decisions are less likely to be reversed or even brought to the circuit in the first place. A consistent strong signal from a circuit about its preferences may discourage appeals because all parties know what the outcome will be. An indirect measure of circuit legal policy as operationalized as the propensity for a circuit to reverse a particular district court's decisions did achieve modest support in the upward departure model.

The positive influence of the Circuit's rate of dissent on downward departure rates provides a clearer indication of how circuits influence district court sentencing behavior. In the absence of a clear signal, district judges may follow their heart rather than seek uncertain guidance from above. Faithful agents (district court judges) are confounded by the lack of guidance from the Courts of Appeals and wily district court judges see an opportunity for acting strategically to further their own preferences. Thus, as expected, increasing dissent rates mean increased departure activity (hypothesis 4). These contrasting results suggest that a more refined measure of legal policy might

provide different answers. However, the effects of circuit legal policy on departures must still be regarded as an open question while the dissent rate appears to encourage departure activity.

Contrary to expectations, a district's past reversal rates do not appear to affect departure rates (hypothesis 5). The reason may be that circuits scrutinize certain district court judges instead of the district as a whole. Thus, monitoring costs may be minimized by focusing on a few "troublemaking" judges instead of increased scrutiny of the district court as a whole.

But the effect of the Supreme Court's formulation of legal policy to district court departure rates does seem clear. According to prior expectations, *Koon* clearly encouraged district court judges to grant downward departures more often (hypothesis 6). Despite those that feel that *Koon* gave a mixed message to district courts on how often to depart (Stith 1996; Hofer 1996; Lee 1997; and Stith and Cabranes 1998), it appears that district court judges heard what they wanted to hear and acted as though the Supreme Court did grant wider leeway (Bowman 1996). As discussed in Chapter 3, the circuits got the message and did little to undercut this decision. Thus, when the Supreme Court rules in such a way to increase judicial discretion, lower court judges adapt their behavior accordingly.

The importance of context can also been seen in these results. The rate of downward departures for the "average" district court is influenced by the overall crime rate in a state while the citizen ideology in the state appears to have little effect. Perhaps one reason for this finding is suggested by Herbert Packer's (1968) thesis about "crime control" versus "due process" systemic responses by the judicial system to crime. Because the downward departure rate is negatively related to the crime rate in a state, this finding would lend support to the notion that the judicial system responds to increased crime by emphasizing the "crime control" method of operation. It appears that the system responds by decreasing the chance of individualized treatment which indicates an emphasis of the "crime control" criterion of efficiency over the legal criterion of due process.

The finding that an increasing docket of immigration cases is positively related to the downward departure rate also provides an indication that the federal judicial system does attempt to adjust sentencing when penalties are deemed too harsh for the crime. An argument for efficiency can also be made in that the immigration cases often represent individuals who are non-violent and are primarily concerned with obtaining employment in the United States. Imprisoning these individuals in a "victimless" crime may not seem an efficient use of the criminal justice system's prison and judicial resources especially as many of these offenders cannot provide useful information to prosecutors and thus are unable to obtain substantial assistance departures. A similar argument can be made using drug trafficking cases. Judges who are prevented from departing downward due to mandatory minimums may be very reluctant to give upward departures to sentences they already regard as strict. Thus, the proportion of drug trafficking cases should exhibit a non-significant relationship to downward departure rates. This contention is supported by the aggregate analysis.

The need for a more interactive model for the aggregate level is indicated. Trends in crime rates, workloads, etc are related and perhaps the incidence of judicial attributes dispersed through the districts and circuits may also be related in a non-linear or non-additive fashion to departure rates. For example, the number of Democrats at the district level and circuit level may interact to affect departure rates. Another welcome addition to the model would be a more sophisticated treatment of circuit effects, especially the isolation of southern circuits, because these circuit's departure rates increased at a slower rate than in other circuits. Thus, in future research, the role of circuit level effects needs to be explained.

While the aggregate model can lend itself to speculation about how individual judges will act, a case level analysis is necessary to tie these macro-level trends to the behavior of the individual judge or the behavior of circuit panel members. While the attitudinal model of judicial behavior

receives support from this analysis at the aggregate level, the attitudinal model primarily addresses the individual judge. Using the partisanship of the appointing president is a crude measure especially when applied to an aggregate level analysis, but this measure will subsequently be applied to specific judges or panels. The legal model receives mixed support by the aggregate analysis. However, it should be considered that employing individual case and defendant characteristics may lead to different results in the case level analysis. In sum, the results from the aggregate models indicate that a relationship exists at the macro level between some of the key independent variables with the rate of downward and upward departures, but whether the relationship is due to individual judicial behavior cannot be discerned by this type of analysis.

The next chapter (6) is the last empirical chapter. This chapter seeks to link individual panel decisions to reverse at the circuit level with the specific facts of the case, relevant institutional variables, and the attributes of judges on that panel. While the aggregate analysis suggest that the partisan makeup of district and circuit courts matter, these findings are subject to questions without the case-level analysis that follows in the next chapter.

Chapter 6

Case Level Model Analysis and Discussion

The case-level analysis is intended to complement the aggregate analysis by examining the individual case facts that cannot be suitably investigated in an aggregate fashion. These analyses are linked by their focus on downward departures and what factors influence district court's departure rates and appellate influence on departures. This chapter relies on appellate cases that deal with downward departures to indicate the potential influences on circuit decisions' to reverse the sentencing decisions of district court judges. If circuit judges are behaving in an unpredictable fashion when reversing these decisions, then the findings in the aggregate analysis that circuits can influence district court's sentencing decisions are weakened.

The sample of cases drawn for the case level analysis involves appellate cases that the Sentencing Commission designated as dealing with departure provisions §5K2.0 and §5H1.6. Out of the possible 324 cases, the identities of the judges and case data were ascertained in 276 of these cases (85.19%).[67] The cases were drawn from fiscal year 1997 data which means that the sample is immediately after *Koon v. United States.* This fortunate occurrence allows the examination of case level effects after *Koon* broadened the grounds for downward departures. Of course, this sample is also limited to data collected by the Sentencing Commission which means that some cases undoubtedly have been excluded. Cases from the District of Columbia circuit were excluded due to the unique nature of this circuit (Cohen 2002) and district court leaving 267 cases from the remaining twelve circuits and 72 out of 94 district courts. I chose not to weight the sample by district or circuit for this analysis because of the exploratory nature of this initial analysis.

The dependent and most of the independent variables represent dichotomous measures. At first, the intention was to use the individual circuit judge's vote as reflected in the dataset. However,

[67] Nine cases were eliminated from these cases due to being from the D.C. Circuit leaving 267 cases for analysis.

this method was thwarted because only four dissents were recorded in the dataset out of 828 votes. Likewise, only four concurrences or other opinions were recorded in the sample. Thus, I made the decision to use the panel's decision to reverse or affirm as the dependent variable given that this sample exhibited much consensus rather than extensive conflict for these particular cases. This decision also means that the panel district court judge relationship is emphasized in this analysis.

Briefly summarizing the variables statistically in Tables 9a and 9b below, the skewed nature of the dependent variable is obvious. Also obvious is that a majority of independent variables are measured dichotomously which somewhat increases measurement error. Enough variance from this model was obtained to be able to successfully run the model, but the substantial number of dummy variables leads to considerable caution when interpreting the results of the logistic regression. Fortunately, logistic regression is rather robust due to its maximum likelihood nature. Thus, data problems such as heteroskedasticity and the non-normal distribution of the dependent variable have a reduced impact on the results due to the maximum likelihood method.

Table 10: Descriptive Statistics of Dichotomous Variables in the Case Level Analysis

Dichotomous Variables	*Yes*	*No*
Dependent Variable:		
Lower Court decision reversed	46	221
Independent Variables		
Dist. Judge appointed by Dem	74	193
At least one panel member was a prosecutor	145	122
At least one panel member is female	118	149
At least one panel member is a minority	60	207
At least one panel member is a district court judge	32	235
Circuit decision published	73	194
Departure granted by dist court	25	242
Statutory minimum involved	136	140
Defendant is minority	165	102
Defendant is female	26	241
Defendant is citizen	210	57
Immigration Case	19	248
N = 267		

Table 11: Descriptive Statistics of Case Level Analysis

Other independent variables, n=267	*Mean*	*Std. Deviation*	*Minimum*	*Maximum*
District Judge's years on the bench	10.93	6.74	1	30
District Court's prior reversal rate	12.33	6.41	0	33.30
Number of issues raised on appeal	1.95	1.10	1	7
Circuit Panel members appt. by Democrats	1.14	.86	0	3
Number of counts	2.16	2.15	1	16
Adjusted Offense Level	27.21	8.26	4	44
Total Criminal History Points	4.71	5.82	0	27
Acceptance of Responsibility	1.93	1.31	0	3

Interpretation and Discussion of Case Level Logistic Regression

Interpreting the results of the logistic regression seen in Table 12 below demands caution. However, a statistically significant positive relationship exists between the outcome of appellate review and the number of judges appointed by a Democrat serving on that panel. Thus, it appears that panels with Democrats as members are more likely to reverse the district court decision on a downward departure that is "anti" defendant. Also notable, the presence of a female panel member reduces the likelihood of a departure reversal that would favor a defendant. The presence on the panel of a judge with district court experience or prosecutorial experience, a district court judge sitting by designation, or a judge who is a minority do not significantly affect a circuit panel's decision to reverse or confirm the trial court.[68] Neither the party of appointment of the district

[68] Under a relaxed 90% confidence interval the presence of at least one judge on the circuit panel with district court experience actually leads to a greater likelihood for a panel reversal that benefits the defendant ($p<0.09$).

court judge nor the years of district court bench experience seem to play a significant role in a panel's decision to reverse.

Another contextual variable, the circuit's dissent rate, also does not seem to affect the panel's decision to reverse. The circuit's prior reversal rate of sentencing cases coming from a district court does not appear to affect subsequent review of decisions. Thus, circuit panels do not appear to scrutinize sentencing decisions coming from some districts more closely than others. Perhaps the most surprising finding is the strong negative relationship that exists between the decision to publish and a panel's decision to reverse. However, in the aftermath of the *Koon* decision by the Supreme Court, this may simply reflect circuits carrying out the wishes of the Supreme Court by adjusting circuit precedent to affirm a greater number of departure decisions. The use of published cases to affirm district court decisions may reflect a signal by circuit courts to district courts that circuits will scrutinize these departure decisions less in the future.

Only one case fact appears important in panel decisions to reverse. However, this case fact is the most troubling. If a defendant is white, then that defendant has an increased chance to get a pro-defendant reversal from the circuit court of appeals when compared with a non-white defendant. This variable may reflect differences in the quality of legal representation or minority defendants may be viewed as a greater threat than white defendants. However, the possibility of institutional factors that systematically treat minority defendants harsher than whites may be at work. Given that the sentencing guidelines attempt to eliminate the consideration of many defendant characteristics such as race from judicial decision making, this result is alarming. Factors that did not seem to affect the probability of getting a pro-defendant reversal include the citizenship status of a defendant, the decision to grant a departure, and the district court judge granting an adjustment for acceptance of responsibility by a defendant. Also, other case facts such as the number of counts, the type of departure, the existence of a statutory minimum, previous criminal history, and the

adjusted offense level are not significant but this result may be affected somewhat by collinearity with other defendant characteristics.[69]

Overall, the fit of the model is adequate with a proportional reduction of error of approximately 21.8 percent over the naïve prediction of the modal category.[70] Of course more cases would provide a better basis to analyze reversals on departure cases that are "pro-defendant", but the importance of circuit judges appointed by Democrats and whether a female serves on the appellate panel appear important. Likewise the case facts that were significant did not appear surprising other than the defendant's race affecting the success of getting a pro-defendant reversal from a circuit panel.

[69] Collinearity is especially present between the citizenship variable and immigration charges with nearly a perfectly negative relationship (a few U.S. Citizens are charged with smuggling immigrants). This leads to considerable instability in the coefficients for these variables.

[70] Of the original dataset, two influential outliers were discerned using a variant of Cook's distance method., case 65 and case 310. Eliminating these two cases in an auxiliary model resulted in an improved fit and some variables becoming significant that were on the cusp of significance in the other model (-2 log likelihood = -86.1941). The district's prior reversal rate, the presence of a prosecutor or prior service as a district judge were significantly and positively related to whether the panel granted a pro-defendant departure at the 95 percent confidence interval (one-tailed test). At the 90 percent confidence interval (one-tailed test), the years of experience on the bench of the district judge, whether a case was a immigration case, and whether the defendant accepted responsibility for the crime also were positively related to whether a pro-defendant departure decision was granted by an appellate panel. The number of Democrats appointed to the panel bench displayed a stronger positive relationship using a 99 percent confidence interval (1 tailed) and other variables that were significant in the original model remained statistically significant in the auxiliary model. Coefficients did not change much and no significant variable changed sign from the original logistic regression model.

Table 12. Logistic Regression and Logit Estimates-Appeals Involving Downward Departures FY 1997

Variables	Coefficient	Robust Std. Errors	Odds-Ratio
District Level Variables			
Dist Judge Appt by Democrat	0.0589	0.4525	1.0607
Number of Years on Dist. Bench	0.0457	0.0318	1.0467
District Prior Reversal Rate	0.0410	0.0341	1.0419
Circuit Level Variables			
Number of COA Panel Judges appt. by Democrat	0.9342 *	0.2475	1.5616
At Least one COA Panel Judges former Prosecutor	0.6462	0.4406	1.9084
At Least one COA Panel Judges former Dist. Ct. Judge	1.6784	0.9915	5.3572
At Least one of COA Panel Judges is Female	-0.9010 *	0.4427	0.4061
At Least one of COA Panel Judges is a minority	0.2830	0.4742	1.3271
At Least One District Court judge sitting on panel by designation	0.2400	0.5859	1.2712
Dissent Rate by Circuit	3.0933	2.5471	22.0491
Panel Decision Published	-1.7957 ***	0.4423	0.1660
Case Characteristics			
Defendant is Minority	-1.0824 **	0.4516	0.3388
Defendant is Female	0.6282	0.7072	1.8742
Defendant is Citizen	0.1359	0.6534	1.1456
Case involves Immigration	1.4905	1.0128	4.4392
Number of counts	0.0920	0.0883	1.0092
Statutory Minimum involved	0.3866	0.5651	1.4720
Def. accepted responsibility	0.2588	0.1717	1.2954
Departure type	0.3946	0.5579	1.4838
Adjusted Highest Offense Level	0.0220	0.0339	1.0222
Criminal History Points	-0.0396	0.0366	0.9612
Constant	-2.3551	2.1539	
Number of cases n=267 Lambda-p (PRE) =21.77 Null=82.77	Pseudo R^2 =0.2467 -2 Log Likelihood =-92.4171 Wald chi^2 (21) = 61.44		p>chi^2=.0001

* Significant at p<.05 (one-tailed)
** p<.01
***p<.001

Discussion of Results

Confirming prior expectations, the number of judges appointed by Democrats did affect the outcome of appellate review. Thus, hypothesis 7 receives support.. Increasing the number of judges nominated by a Democrat who serve on a circuit panel increases the likelihood of reversing an "anti-defendant" departure decision by the district court judge. Holding the other independent variables at their mean, a panel with 0 Democrats has a 6.23 percent predicted probability of reversing an anti-defendant departure decision. With one Democrat serving on the panel, the probability of reversal rises to 9.41 percent. With two and three Democrats on the panel, the probability of reversal climbs to 13.95 percent and 20.20 percent respectively. Thus, increases in the number of Democrats serving on a panel dramatically changes the probability that an anti-defendant departure decision by a district judge is reversed. This outcome reflects that circuit judge ideology matters when considering criminal justice appeals (Segal and Spaeth 1993).

Another panel judge attribute does not yield sufficient evidence for any conclusions. As a result, the question of whether the outcome of appellate review is affected the presence of at least one judge with prosecutorial experience is still open (hypothesis 8). Insufficient support exists that judges with previous prosecutor service give prosecutors the advantage during appellate review. In fact, the results indicate that the presence of a judge who has previous service as a prosecutor may increase the likelihood of reversing an "anti" defendant outcome. However, this result fails to achieve statistical significance at conventional levels. In sum, a judge with previous prosecutorial experience cannot be said to influence a circuit panel to make decisions negatively affecting defendants.

On the other hand, confirming the hypothesized effect of females serving as panel judges, a panel with at least one female judge has a predicted probability to reverse of 6.26 percent. but, a panel with no female judges has the predicted probability of reversal of 14.12 percent.. Thus, a

panel with a female "whistleblower" is half as likely to disturb the district court's departure decision(Cross and Tiller 1998) and this finding confirms hypothesis 9. This finding is indirectly supported by a recent study of Pennsylvania trial judges' sentences (Steffensmeier and Hebert 1999). Steffensmeier and Hebert find that female judges were more likely to incarcerate than their male counterparts. Furthermore, they found that sentences for males (black and white) and black females were significantly longer when given by female judges than sentences from male judges. Thus, female judges at the circuit level also may be less inclined to give support to criminal defendants seeking a lighter sentence through a departure.

In criminal sentencing appeals of downward departures, the presence of at least one African-American, Hispanic, or Asian-American judge does not significantly influence the outcome of appellate review (hypothesis 10). Given that minority status seems not to matter in these cases, these results may be disappointing to those who call for minority judges to use their status to champion minorities. For sentencing cases, socialization and norms of collegiality may trump race. Judge Bruce Wright, an African-American judge from New York notes, "As soon as these Black judges put on Black robes, they become emotionally white. But it's not surprising. We have Eurocentric educations. We learn white values." (Washington 1993, 251). Another possible reason is that the judges at the appellate level have little if no personal contact with the defendant and thus the decision to reject an appeal may not have the same emotional impact as directly sentencing someone to prison. Prior research focuses on how a trial judge's minority or gender status affects sentencing. What my findings may indicate is that these assumptions may not be applicable to circuit behavior.

Neither district judges sitting by designation nor the presence of a circuit judge with prior district court experience seemed to matter (hypotheses 11 and 12). Neither result approaches statistical significance; however, the presence of a circuit judge with district court experience falls

just short of conventional statistical significance in the opposite direction . Thus, the results hint that panels with prior district court judges serving may be less inclined to give deference to district court judge's decisions. Perhaps, panels with these attributes are less likely to defer to the district judge's "superior" knowledge of the sentencing facts because of their experience with the vagaries of the criminal justice system. But, since neither variable is statistically significant, the presence of these judges on a panel cannot be said to affect the outcome of appellate review in appeals of downward departure decisions.

Other variables do not reach statistical significance either. Contrary to expectations, the number of years of experience as a district court judge does not affect the likelihood of having a "conservative" departure decision reversed by an appellate panel (hypothesis 13). This result might stem from several reasons. First, the results give mild support (not at conventional levels) for an alternative hypothesis. District judges with more experience may be more likely to have their sentencing decisions reversed. One possible explanation would be that these judges feel more comfortable in employing their sentencing discretion despite the risk of reversal. Another explanation might be that judges appointed before the institution of the sentencing guidelines may still be more resistant to following its dictates. The "first year" socializing experience may also lead these district court judges unsure of their authority and thus more likely to sentence within the guidelines which prevents any appellate challenge to the sentence.

Likewise, insufficient evidence exists that the prior reversal rate of a district court or the circuit's dissent rate influence a circuit panel's decision to reverse an anti-defendant downward departure decision. As a result, neither hypothesis 14 or hypothesis 15 is supported by these results. However, the coefficient sign of both of these variables have the correct direction and this result may reflect the small sample. The circuit dissent rate in particular has a large robust standard error and might prove significant using a multi-year sample which would increase the amount of variance

for this variable. The significance of the district court reversal rate variable might also benefit from including more years in the sample as well. Also contrary to expectations, the party of the appointing president for district court judges have no impact on the outcomes of appellate review of sentencing departures (hypothesis 16) . This result lends some credence to the idea that conservative and liberal district court judges may exhibit similar departure behavior as seen by circuit panels—except the beneficiaries may be different. Because none of the measures included to measure signaling behavior were significant, some of these measures may need to be refined or replaced. For example, the circuit panels may actually use the individual district judge's prior track record of appellate review instead of the district as a whole. The circuit dissent rate as mentioned above might be significant using a multi-year sample. The partisanship of the district court judge may not serve as a useful indicator to the circuit court as such. Instead, judges at the circuit level may be reacting to previous experiences with that judge's ideological preferences expressed in district court decisions over time.

Only two control variables are significant and suitable for further discussion. As expected, a published opinion exhibits a much more likely chance of being reversed than an unpublished opinion. Holding other variables at their mean, the predicted probability of reversal of a published opinion is 28.94 percent while the unpublished opinion is only 6.33 percent. In terms of signaling, it appears that circuit panels prefer to signal district courts through reversals rather than affirmances. In terms of monitoring and signaling, this result makes sense. Given that most cases are not reversed, circuit panels prefer not to expend the effort to re-affirm a district court's decision by publishing an opinion. However, by publishing reversals, the circuit panel provides a guide to district judges of undesired outcomes without excessive monitoring costs. Thus, in sentencing at least, circuits prefer to tell district judges what not to do in published opinions instead of what to do.

As mentioned above, the most worrisome result comes from the increased probability that the appellate process gives a greater chance of reversal to white defendants than defendants of color. The predicted probability of a white defendant (non-Hispanic) obtaining a pro-defendant reversal is 17.74 percent while a minority defendant has a probability of only 6.81 percent. While some of the difference may occur because of better legal representation obtained by white criminal defendants (Haire, Lindquist, and Hartley 1999), systemic bias in the criminal justice system cannot be ruled out. Those who are "have nots" may not fare as well as those who are "haves" (Wheeler, et. al 1987). Racial disparity may also be increased by the huge numbers of drug trafficking prosecutions and increasingly with immigration cases (Spohn 2000). Also, offenders may fare better in departure decisions if they commit some exotic non-violent fraud offense instead of a drug charge because the district judge and circuit see too few cases to establish a "heartland". Too many drug cases involving minorities may simply dull the sensibilities of what is "extraordinary" when the circuit and district court judges make sentencing decisions.

Potential improvements for the case level model include using a greater sample size from different years, employing multi-level modeling techniques, and the need to isolate circuit effects. Interactive terms might also be profitably employed especially as some of the judge characteristics are dummy variables thus permitting dummy interactives for such combinations as the presences of female Republican circuit judges or when the district judge and all panel judges are Democrats. First, given these findings, an extension to the case level analysis by extending the sample to cover a greater number of years should lend greater explanatory power to the model. Second, extending the sample of the case level model would also permit the use of multi-level modeling techniques which would also aid in separating circuit effects in this model. However, these extensions are beyond the scope of this dissertation.

These findings indicate that the power to appoint circuit court judges does have an impact on how the accused are treated when appealing a sentence. Panels with more appointees from a Democrat president make the reversal of "anti-defendant" departure decisions by district judges more likely. Contrary to expectations, the presence of a female judge results in a lower probability of a "pro-defendant" reversal by the panel. Thus, female judges may urge a circuit panel not to reverse the district court's sentencing decision which results in keeping the defendant incarcerated longer. While other attributes did not show the expected significant influence on the circuit's reversal decision, further investigation is needed.

Chapter 7

Conclusions

Implications for Sentencing Policy

Appellate review of sentences under the Sentencing Guidelines demonstrates that several factors are important. First, the results of the aggregate and individual level analyses agree that the party of the nominating president influences how departures policy is implemented in district and circuit courts. Second, the ideological agreement within a circuit court and the *Koon* decision by the Supreme Court influence how district courts view departures. Those circuits demonstrating greater dissent have district courts departing at a higher rate. After controlling for other causes, the Supreme Court's decision in *Koon* resulted in district judges departing at a higher rate. Third, contextual variables such as the crime rate in a district's state and the specific type of offenses committed affect the rate of district court downward departures at the aggregate level. Thus, judges are not immune to outside environmental influences when making discretionary decisions. The individual level analysis indicates that circuit judges' attributes influence the decision to reverse "anti-defendant" departure decisions and that white defendants fare better than minorities at the circuit level on appealing downward departure decision.

Several implications for sentencing policy can be found from these results. First, appointment politics matter. A judiciary stacked with partisans from one party or the other is likely to reflect those partisan preferences when considering how to properly sentence criminal defendants. Judges at the circuit level appointed by Democrats appear to increase the overall departure rate and appear more likely to overturn "anti-departure" decisions made by district court judges. Also, district courts with a greater number of judges appointed by a Democrat display increased departure rates as well. On the other hand, the reverse is true of the effects of judges appointed by Republicans. Because Congress does not appear likely to scrap the Sentencing

Guidelines any time soon, how and whether those guidelines apply to an offender's circumstances will for the most part be determined by the district and circuit judges. That determination, in turn, will be influenced by who appoints those judges.

Support for a more encompassing definition of a diverse judiciary also receives some support from the result in this dissertation. Gender matters and some of the other attributes may also affect how sentencing appeals are handled at the circuit level. A sufficient diversity of judges serving on the Courts of Appeals regarding gender and minority representation should be coupled with openness to diverse prior legal experiences of nominees. Thus, in an ideal world, those who sentence and review those sentences would more closely reflect the citizenry of the United States.

A second implication is that institutional variables matter apart from partisanship. Circuits that display greater disagreement will not be accorded the same deference by district judges when those judges contemplate departing from the guidelines. This result should be expected. When the principal (the circuit) gives an incoherent message about what is to be permitted and what is not, district judges who are "faithful" agents fail to get direction and district judges who chose to "shirk" can do so. What appears still unanswered is what additional criteria that circuit judges employ to decide whether to reverse a district court decision. Contextual variables at the circuit level apart from dissent rates should be examined further for their effects on circuit sentencing policy.

District judges, on the other hand, appear to be sensitive to the actions of the courts above such as the circuit's dissent rate or the Supreme Court's ruling in *Koon*. Using principal agent vernacular, Congress can minimize agency loss to faithless district court judges by delegating oversight responsibility to the Courts of Appeals. Adherence to the Sentencing Guidelines themselves, apart from departures, apparently has been adequately policed by the Courts of Appeals given that the rate of sentencing appeals overall has stabilized in recent years. Thus, under the right circumstances, a circuit court with little internal dissension, adequate appetite for oversight, and

buttressed by U.S. Sentencing Commission amendments can significantly impact departure rates in that circuit. For example, the 4th Circuit's departure rate remains far below that of the 2nd Circuit even after the *Koon* decision. Thus, fire alarm oversight can work in such circumstances.

Both the circuit's dissent rate and whether the opinion is published also have principal-agent implications. The effect of a circuit's dissent rate is explained above and is supported by recent research (Haire, Lindquist, and Songer 2003). The influence of unpublished circuit opinions on district court behavior should also be examined because of their increased availability to lawyers and judges. This problem may be especially acute when considering criminal appeals because of the sheer volume of unpublished decisions when compared to those published. If signals about circuit preferences are given primarily through unpublished decisions and these decisions are not (or cannot) be brought to the attention of district court judges then these "agents" cannot be effectively guided by such means. The dissent rate and the use of unpublished opinions to resolve cases complicates a principal agent analysis because agents cannot be held responsible for an agency loss caused by the absence or incoherence of instructions from the principal.

District and case level variables such as the crime rate and the types of cases that compose a trial court's criminal docket also imply that district judges are sensitive to their environments (Giles and Walker 1975; and Kuklinski and Stanga 1979). Communities that are under siege by crime may influence judges in those areas to act to control crime while lessening procedural barriers. Judges in other communities may extend greater procedural protections at the expense of efficiency because the demands on the judicial system to control crime are reduced (Packer 1968). Of course, the broader legal community of prosecutors, defense attorneys, and the accused themselves also would serve to reinforce prevailing community influences on these judges.

These results also indicate that Congress should be aware, that a co-equal branch, the Supreme Court, has a great effect on district court behavior on sentencing. Since the Sentencing

Guidelines have been instituted, the Supreme Court has acted to encourage discretion for departures by district judges through consistent opinions and through public statements. At the same time, the Supreme Court has been deferential to Congress and the U.S. Sentencing Commission despite doubts about the wisdom of their actions. Recent statements by Justice Rehnquist (2003) and Justice Kennedy (2003) bemoan recent actions by Congress to increase scrutiny and decrease discretion of the judicial branch in sentencing policy. These rumblings of discontent could result in a full-blown constitutional challenge if Congress continues its actions that further reduce judicial sentencing discretion. What Congress should note is that Courts of Appeals have generally refused to consider most appeals to the departure decision itself. If the appellate courts so wished, they could turn on the spigot and drown the criminal justice system in sentencing appeals. Second, even the U.S. Sentencing Commission agrees that mandatory minimum sentences for most crimes are a bad idea. Instead, Congress should roll back these provisions and let the U.S. Sentencing Commission and the federal court systems have a part in deciding how much punishment is enough.

The Protect Act and Its Consequences

After the *Koon* decision, conservatives in Congress noted the increasing departure rates along with the Clinton administration failing to fill vacancies on the U.S. Sentencing Commission. In October 2000, an oversight hearing of the Sentencing Commission chaired by Senator Strom Thurmond (R-SC) was conducted by his Senate Judiciary Subcommittee on Criminal Justice Oversight. Senator Thurmond was one of the authors of the Sentencing Reform Act and he noted the accelerating rate of sentencing departures made by judges would soon mean that more cases would be sentenced outside of the guidelines than within (U.S.S.C 2003b, B-22). Senator Leahy (D-VT), the ranking minority member on the subcommittee rejected the idea that an increased downward departures rate meant the end of the guidelines (U.S.S.C 2003b, B-23). However, many in Congress were not happy about the increased downward departure rates.

At least one of the reasons for the increasing downward departure rate was addressed by the U.S. Sentencing Commission itself. During 2001, the Commission amended §2L1.2 that addressed illegal immigrant re-entry into the United States after deportation. These departures became particularly numerous in the southwestern border states. Whatever the felony offense committed, whether murder or simple drug possession, warranted a sixteen level increase in punishment for the illegal re-entry. The Commission chose instead to amend this provision to give judges a sliding scale of enhancement from eight to sixteen levels depending on the severity of the offense and how dangerous the defendant appeared to the sentencing judge (U.S.S.C. 2003b, B-24-5). This amendment demonstrates that the Sentencing Commission can use departure activity by judges to adjust the sentencing guidelines when they are too strict through amending the guidelines. Of course, in order for the Commission to do this for other offenses, Congress should eliminate statutory minimums.

Congress was in no mood to do this. In fact, the genesis of the Protect Act of 2003 came from the Supreme Court 2002 decision in *Ashcroft v. Free Speech Coalition* which struck down some provisions of a federal statute defining child pornography. During congressional hearings, the U.S. Department of Justice provided evidence that district judges gave discretionary downward departures in 20 percent of all sexual abuse cases sentenced (U.S.S.C. 2003b, B-26).

Given the inflammatory subject of child pornography, the Protect Act primary focus was to clarify child pornography definitions and to add new statutory minimum sentences for these cases. However, attached to these popular measures was an amendment sponsored by Representative Feeney (R-FL) that sought to curb the increasing rate of downward departures in general. The proposed amendment was in response to urging by the Attorney General John Ashcroft to treat offenders more harshly (Taylor 2004). This amendment restores the standard of appellate review of downward departures to *de novo* thus overturning the Supreme Court's *Koon* decision. In addition,

when a sentencing case is sent back to the district judge on remand, the reason for the departure must have been given in the original statement of reasons for the departure and the appellate court must approve of the grounds cited for the departure. Furthermore, the provisions also require judges to provide specific written reasons for departures and then require the Chief Judges of each district court to submit the district judge's written statement of these reasons for each departure case within thirty days to the U.S. Sentencing Commission (U.S.S.C. 2003b, ii). Despite the opposition of the American Bar Association (ABA, 2003), the National Association of Criminal Defense Attorneys (NACDL), and many individuals in Congress, the courts, and the press, the Feeney amendment passed and was attached to the Protect Act. This act subsequently passed overwhelmingly and was signed by the President on April 30, 2003

Empirical evidence of the effects of the Feeney amendment to the Protect Act of 2003 cannot yet be discerned. However, the degree of dislike by the judiciary for this *diktat* led one federal district judge, John S. Martin, Jr., to retire. This judge wrote in an opinion article appearing in the *New York Times,* " For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice. . . . I no longer want to be part of our unjust criminal justice system" (Martin 2003, A31). Chief Justice Rehnquist also criticized the act and noted in a letter to Senator Leahy that the Feeney amendment does ". . .serious harm to the basic structure of the sentencing guidelines and would seriously impair the ability of the courts to impose just and reasonable sentences." (As quoted in Cambanis 2003, A1) Associate Justice Stephen G. Breyer also criticized the amendment (Cambanis, 2003, A1). Subsequently, on July 28, 2003, Attorney General John Ashcroft escalated the controversy by sending a memo to all federal prosecutors requiring them to

> . . .oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law. This obligation extends to all such improper

> adjustments, whether requested by the defendant or made *sua sponte* by the court. In particular, downward departures or other adjustments that would violate the specific restrictions of the Protect Act should be vigorously opposed. (Ashcroft 2003, 3)

Prosecutors also must take all steps to enable the Government to appeal sentencing adjustments and are required to report to the appropriate division of the U.S. Department of Justice in Washington of any adverse sentencing decisions.

Congress and the Attorney General clearly intend that the Courts of Appeals should reduce departure rates through strict oversight. Whether the Courts of Appeals has much appetite for this type of oversight without a commensurate role in sentencing policymaking is unclear. Thus, the effect of sentencing departures has yet to be determined; however, Congress and the U.S. Department of Justice may be risking a future fight with a disgruntled federal judiciary over how much discretion a judge should have within the Sentencing Guidelines.

The whole sentencing regime of the U.S. Sentencing Guidelines has now been called into question in the summer of 2004. First, Chief District Judge William G. Young wrote a 174 page opinion blistering prosecutors manipulation of facts in a drug case to give a murdering drug dealer a lighter sentence but abandoning a minor participant who fingered the drug dealer in the first place to prosecutors (Sentencing Memoranda: *United States v. Green*, No. 02-10054 (D. Mass. June 18, 2004). He attacked the Department of Justice's practices that punish criminal defendants who go to trial with threat of mandatory minimums and stiff guideline sentences. In a prescient way, he claimed that plea and fact bargaining has resulted in a virtual denial of the 6th Amendment Trial by Jury.

Shortly thereafter, in the case of *Blakely v. Washington,* slip opinion 02-1632, handed down June 24, 2004, the U.S. Supreme Court extended its previous decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and threatened the foundation of sentencing guidelines.[71] The opinion of the five

[71] In between these two decisions, the U.S. Supreme Court in *Ring v. Arizona,* 536 U.S. 584 (2002) declared Arizona's death penalty statute unconstitutional because it did not permit a jury to decide the aggravating facts necessary to trigger the death sentence.

justice majority written by Justice Scalia claims at the very beginning not to involve the constitutionality of determinate sentencing but instead Scalia claims the decision will merely extend the Sixth Amendment's guarantee of a jury trial. to facts used to enhance punishment[72] The main thrust of the majority's opinion emphasizes that when an enhancement to a sentence is made based on a fact determination—the determination of that fact must be made by a jury not a judge. Under such a situation, judges making upward departures under the federal guidelines are clearly unconstitutional and the significant number of sentencing enhancements of the guidelines are also at risk given the facts in *Blakely*. Justices O'Conner's and Breyer's dissents indicate that given the Court's rulings in *Apprendi* and *Blakely* that the sentencing guidelines of the federal government and the states are at grave risk as currently constituted.[73]

Justice Breyer's dissent takes particular care to denote the possible policy consequences of *Blakely*. He proposes four possible outcomes and because this is a dissent, none of the outcomes are good. The first outcome cited is a "pure charge" system of real conduct. Thus, every defendant would be treated equally by being sentenced to the same time with very few if any facts beyond those charged at indictment affecting the sentence. Second, a return to the indeterminate sentencing regime that existed prior to the guidelines. The third approach, the choice Breyer predicts that the majority wishes legislatures to take, would permit judges to issue the presumptive sentence and depart downwards without constitutional infringement. However, any enhanced punishment above the presumptive sentence would require two juries or a complex charge system to remain constitutional.[74] What Breyer suspects is that under the current scheme, most defendants plead

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[72] Scalia was the sole objector to the court's decision in *Mistretta* to uphold the constitutionality of the federal sentencing guidelines.

[73] Perhaps, Kansas, is the sole sentencing guideline state that might not need changing. After *Apprendi*, the Kansas legislature provide a bifurcated jury trial that includes sentencing factors to a sentencing jury if the resulting sentence is greater than the statutory or guideline maximum sentence, K.S.A. §21-4718 as amended May 29, 2002. The majority opinion in *Blakely* approvingly notes the changes made by the Kansas legislature in response to *Apprendi*.

[74] A complex charge system would divide a crime like robbery into each element such as carrying a firearm, discharging the firearm, fleeing in a reckless manner, causing psychological trauma to the victim, and so forth. Breyer contends that

guilty and thus states hold jury trials less than one out of ten times. If the defendants choose to contest the facts despite wanting the plead guilty, that would mean that the other 90 percent of criminal defendants who now plead without a jury would certainly want one for sentencing, or at least use the issue as a bargaining chip. Breyer argues that the increased complexity might well result in greater plea bargaining that before. The final option for legislatures is to enact astronomically stiff sentences for crimes with a broad laundry list of mitigating factors that judges could employ to reduce the sentence. Out of all of the options presented, Breyer believes that any resulting system might result in augmented prosecutor power, lack of uniformity due to judicial discretion, or the complexity and expense of a two jury system. Regardless of the options adopted, the outcomes would be inferior to the status quo in his eyes. Also, Breyer notes the large number of criminal defendants currently being engaged in the criminal justice system and given the new questions about the constitutionality of sentencing guidelines the majority risks chaos in the federal and state judicial systems.

To punctuate the *Blakely* decision, Paul G. Cassell, a Utah federal district court judge, ruled the federal guidelines as whole unconstitutional due to the Supreme Court's ruling in *Blakely* that occurred one week earlier. Cassell's opinion held that only statutory minimums and maximums would subsequently bind judges decisions instead of the guidelines after *Blakely*. However, Cassell predicts that Congress and state legislatures will react by reverting to tough determinate sentences with virtually no judicial discretion to avoid submitting sentencing facts to juries. Thus, Cassell claims that the rationale of 6th Amendment right to a jury trial cited by the majority in *Blakely* will in fact result in abrogation of that right by emphasizing the trial hammer of a very long sentence.

In sum, the recent decisions by federal judges and perhaps subsequent decisions by state judges will certainly result in substantial revisions to criminal codes. Legislatures will certainly react

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states would probably require defendants to plead guilty to all elements of the crime and waive their *Apprendi* rights or a defendant could risk a trial with multiple elements.

and in a fast fashion to avoid potential chaos in the criminal justice system. Unfortunately, the crisis mentality that this ruling might cause legislatures is not generally conducive to good policymaking and thus the situation in sentencing may go from bad to worse. What this means for the structure of the sentencing guidelines and the relationship between appellate and sentencing courts remains to be seen.[75]

Future Avenues of Research

This research should be extended through several means. First, an extension of the case level analysis to years before and after the *Koon* decision should be undertaken. Second, not much doctrinal analysis of departures at the Courts of Appeals has been undertaken. A doctrinal analysis of how the various factor categories cited by the Supreme Court in *Koon* : forbidden, discouraged, neutral, and encouraged have been treated by the Courts of Appeals might indicate whether a "common law" of sentencing is still possible. Third, scanty research exists on states with sentencing appeals. Whether these states have a comparable problem with the increase of departures over time and what they do to address this problem might provide useful evidence to guide sentencing policymakers into making wiser choices.

Other possible avenues of research include the role of a defendant's race in the appellate system. Are minorities getting the short shrift on representation or are the offenses that are committed by minorities disparately affected when appealing the case? Further investigation into the role of prior judicial legal experiences when considering sentencing appeals also might provide a fruitful inquiry. The use of discretion by Assistant U.S. Attorneys also impacts the types of

[75] On July 21, 2004, the U.S. Department of Justice requested that the Supreme Court hear two cases to judge the validity of the federal sentencing guidelines after *Blakely*. In the first case, the Department of Justice asked the Court to bypass the appellate court and hear the case directly instead of waiting for the 1st Circuit to rule. The federal government is also requesting an appeal in another guideline case that the 7th Circuit had reversed post-*Blakely* . The government would prefer that briefs be expedited and an oral argument be conducted on September 13, 2004 which is before the traditional beginning of the Supreme Court session (Liptak, 2004, A19).. The 4th and 5th circuits supported a narrow reading of the *Blakely* decision, but the 6th circuit has reduced the status of the guidelines to advisory in light of *Blakely*. The 2nd Circuit sent three questions directly to the U.S. Supreme Court before proceeding further (Lithwick, 2004)

sentencing cases involved in appeals. U.S. Attorneys in some districts may be overcharging defendants, using substantial assistance departures in an unequal fashion, while in other districts, U.S. Attorneys may be cooperative with defense attorneys and judges. A substantial number of sentencing appeals stem from claims that the U.S. Attorney's office promised a reduction but then determined the assistance provided was not sufficient to warrant a departure request from the prosecution. A final measure, the creation of larger datasets of criminal justice appeals on sentences may also permit more sweeping findings and illuminate how sentencing appeals are treated using the Sentencing Guidelines.

In conclusion, the history of the U.S. Sentencing Guidelines can be divided into several epochs. First, the implementation stage led to widespread judicial discomfort and ended with the Supreme Court approving the experiment in *Mistretta*. The second phase of the guidelines, from 1988 to 1996, emphasized the role of the Courts of Appeals and the Sentencing Commission in attempting to create a coherent sentencing policy by a mix of codification and common law. There is some evidence that this mix was beginning to bear fruit but two events effectively ended this collaboration. The first was that Congress rejected legislation proposed by the Sentencing Commission to eliminate most statutory minimums and permit the Sentencing Commission and the courts to adjust these sentences through departures. The second was *Koon*. The third phase of the guidelines began with the Supreme Court's 1996 decision in *Koon* that effectively shunted the Courts of Appeals to the sidelines. At virtually the same time, a disheartened Sentencing Commission, after its rebuff from Congress became moribund with several vacancies. Under these circumstances, many district judges began to exercise their departure powers and gradually increased these rates to such an extent that Congress felt compelled to act. As Frank Bowman (1996) so presciently predicted after *Koon*, district court judges increased departures to the extent that when the response came from Congress, the discretion of sentencing judges has been reduced to an all-time low under

the Sentencing Guidelines. This fourth phase, under the Protect Act, begins with a judiciary upset at the loss of its discretion for sentencing and with the sentencing guidelines post-*Blakely* possibly constitutionally infirm. This same judiciary must enforce these Sentencing Guidelines from Congress while facing constant challenges to sentencing adjustments from government prosecutors. Whether the judiciary chooses confrontation with Congress by ruling the guidelines unconstitutional or whether it retreats in the near future should make a fascinating story for judicial scholars.

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Appendix A: Data and Analysis Notes

Table 13. Exploratory Analysis XTGEE-Population Averaged Model of District Upward Departures Rates 1992-2001

Variables	Coefficient	Semi-Robust Std. Errors	P>|z| Two-Tailed
Percent of District Court Judges Appt. by Democrat	0.0002	0.0028	0.946
Percent of Circuit Court Judges Appt. by Democrat	-0.0074 **	0.0047	0.012
Circuit Rate of Dissent	-2.8628 **	0.9979	0.004
Circuit Legal Policy	-0.0000	0.0020	1.000
Reversal Rate of District (1 yr. lag)	-0.0096 *	0.0047	0.040
State Crime Rate per 100,000 population	0.0001	0.0001	0.226
State Governing Elite Ideology	0.0008	0.0071	0.602
Total Cases per District Court Judge	-0.0000	0.0003	0.978
Percent of district court cases dealing with drug trafficking	-0.3985 *	0.1724	0.021
Percent of district court cases dealing with immigration	-1.1490 **	0.4592	0.012
Before or after *Koon v. U.S.*	-0.2056 *	0.0911	0.024
Constant	1.8591 ***	0.4286	0.001
Number of districts =89, 10 observations per district	Scale Parameter =1.0412	Wald Chi^2 (11 d.f.) = 48.17 Prob > Chi^2 =0.0001	

* Significant at p<.05 (one-tailed)
** p<.01
***p<.001

Table 14.

Court of Appeals Case Disposition FY 1997 by Type of Opinion Crosstabulation

Number of Cases = 6496

CASE DISPOSITION	CIRCUIT	TYPE OF OPINION *Published*	*Unpublished*	Total
Affirmed (enforced)				
	DC Circuit	59	22	81
	1st Circuit	84	43	127
	2nd Circuit	35	256	291
	3rd Circuit	138	177	315
	4th Circuit	59	586	645
	5th Circuit	143	492	635
	6th Circuit	59	337	396
	7th Circuit	221	103	324
	8th Circuit	204	249	453
	9th Circuit	209	759	968
	10th Circuit	114	151	265
	11th Circuit	74	484	558
		1399	**3659**	**5058**
	Total			
Reversed (vacated)				
	DC Circuit	2	0	2
	1st Circuit	6	0	6
	2nd Circuit	4	2	6
	3rd Circuit	9	3	12
	4th Circuit	3	9	12
	5th Circuit	8	11	19
	6th Circuit	5	2	7
	7th Circuit	5	2	7
	8th Circuit	3	1	4
	9th Circuit	26	18	44
	10th Circuit	11	2	13
	11th Circuit	5	2	7
	Total	**87**	**52**	**139**
Reversed and remanded for resentencing				
	DC Circuit	4	1	5
	1st Circuit	21	1	22
	2nd Circuit	12	7	19
	3rd Circuit	12	11	23
	4th Circuit	18	25	43
	5th Circuit	36	23	59
	6th Circuit	12	25	37
	7th Circuit	24	5	29
	8th Circuit	20	5	25
	9th Circuit	48	37	85
	10th Circuit	19	7	26
	11th Circuit	10	15	25
	Total	**236**	**162**	**398**

Affirmed in part and reversed in part				
	DC Circuit	1	1	2
	1st Circuit	0	0	0
	2nd Circuit	1	0	1
	3rd Circuit	0	0	0
	4th Circuit	0	1	1
	5th Circuit	18	2	20
	6th Circuit	3	2	5
	7th Circuit	1	0	1
	8th Circuit	8	0	8
	9th Circuit	1	5	6
	10th Circuit	10	0	10
	11th Circuit	0	1	1
	Total	**43**	**12**	**55**
Affirmed/reversed in part remanded resentencing				
	DC Circuit	8	2	10
	1st Circuit	13	0	13
	2nd Circuit	5	10	15
	3rd Circuit	8	4	12
	4th Circuit	19	35	54
	5th Circuit	25	10	35
	6th Circuit	17	15	32
	7th Circuit	20	3	23
	8th Circuit	15	4	19
	9th Circuit	32	42	74
	10th Circuit	14	9	23
	11th Circuit	16	33	49
	Total	**192**	**167**	**359**
Dismissed				
	DC Circuit	6	0	6
	1st Circuit	0	1	1
	2nd Circuit	0	9	9
	3rd Circuit	4	10	14
	4th Circuit	2	32	34
	5th Circuit	4	119	123
	6th Circuit	10	30	40
	7th Circuit	110	33	143
	8th Circuit	1	8	9
	9th Circuit	9	36	45
	10th Circuit	27	34	61
	11th Circuit	0	2	2
	Total	**173**	**314**	**487**