

# JUDICIAL ATTRIBUTES AND SENTENCING-DEVIATION CASES: DO SEX, RACE, AND POLITICS MATTER?\*

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*Most scholars focus on whether the U.S. Sentencing Guidelines effectively constrain judges or result in disparate decisions based on a court's or defendant's location. With few exceptions, studies of the effect of judicial attributes on federal-district-court-sentencing cases have been stymied by the United States Sentencing Commission's refusal to release judges' names in their databases of sentencing facts and decisions. We test the effect of a range of judicial attributes on sentencing decisions using a database where judges must consider requests to depart from the Guidelines and the identity of judges is clearly discernible, and we analyze the effect of the landmark case U.S. v. Booker (2005). These unique data shed light on a neglected area of research, namely, whether judicial attributes traditionally analyzed by scholars affect sentencing-deviation decisions in federal district courts. The results show that judges appointed by Democratic presidents and those deciding cases after Booker tend to favor defendants more than those appointed by Republican presidents and those deciding the cases before Booker. However, female judges, especially when appointed by Republican presidents, are less likely to favor defendants.*

The scholarly literature on the effect of the United States Sentencing Guidelines is extensive. Since their inception, scholars have examined the effectiveness of the Guideline system and whether these effectively eliminated disparity in sentencing as intended by the U.S. Congress (Tiede, 2009). Besides the scholarly literature, the United States Sentencing Commission (USSC), under congressional mandate, has collected and analyzed data on sentencing cases since the Guidelines were applied in 1989. While the USSC data are comprehensive, the data do not include the names of district court judges with their decisions. As a result, the data have limited utility to judicial scholars who seek to understand sources of sentencing disparity based on judicial attributes under the Guideline system.

In this article we make the first attempt to study the effect of a wide range of judicial attributes on federal sentencing decisions at a nationwide level by analyzing an original data set of sentencing deviation cases by U.S. federal district court judges appearing in the *Federal Supplement*. Sentencing-deviation cases are those cases where district court judges consider whether to depart from the Guideline ranges at the request of the parties or on the judges' own initiative. Decisions concerning departures necessitate the use of the district court judges' broadest discretion under the Sentencing Guideline system. This is because judges must decide whether the case before them is so unusual as to warrant a departure from the statutory guideline ranges.

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Cases within the Guidelines that do not implicate a request to depart are not generally appealable and, therefore, district court judges rarely request publication of these decisions.

The research here provides a significant contribution to research on sentencing because the use of discretion exercised by district court judges under the federal Guidelines, as well as the remaining disparity in decisions due to the exercise of discretion, has remained puzzling. While the Guidelines until recently were thought to be extremely restrictive as compared to guidelines in other countries, it is unclear why disparity continues to exist. While several studies document the existence of disparity at both the individual and district level, the explanations have remained largely conjectural due to the lack of data on judges in the USSC's own sentencing databases. In this article, we provide preliminary explanations for why disparity may exist in sentencing cases by focusing on the background of judges deciding these cases. In this way, we test how and in what way judicial attributes affect sentencing.

## DISPARITY IN FEDERAL SENTENCING

Congress and legal practitioners pressed for the enactment of Sentencing Guidelines because there appeared to be too much sentencing disparity of similarly situated defendants across the nation. Frankel, a federal judge and scholar, provided one of the first criticisms of sentencing disparity, which he found to be due to district court judges' unbridled discretion (Frankel, 1972:39).<sup>1</sup> Following Frankel's lead, politicians also became gravely concerned with sentencing disparity, and as a result, after significant and lengthy debate, Congress created the United States Sentencing Guideline system, the USSC, and the mandatory requirement that judges use specific sentencing ranges to determine the length of most sentences. Reducing judicial choices in sentencing and, therefore, limiting judicial discretion was thought to be the panacea for eliminating such disparity.

Although the Guideline system reduced disparity as compared to sentencing under the pre-Guideline system, it by no means eliminated it (USSC, 2004:95-97). Currently, the USSC acknowledges disparity due to pre-sentencing procedures and inter-judge and regional differences, but dismisses most of this due to the research methods that were used in studies analyzing disparity. In its fifteen-year report, the USSC states, "The conclusion is clear: the federal sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion" (USSC, 2004:98). This conclusion seems to be based primarily on a "natural experiment" conducted by Anderson, Kling, and Stith (1999), who found that differences in sentence length between two typical judges dropped from 17 percent of the average sentence length before the Guidelines to 11 percent after the Guidelines. Other scholars involved in the debate about the extent of disparity found under the Guidelines are

<sup>1</sup> One cannot underestimate Frankel's criticism of federal judges' discretion in sentencing before the Guidelines. He states, "The sentencing power of the judges are, in short, so far unconfin'd that, except for frequently monstrous maximum limits, they are effectively subject to no law at all" (p. 8).

less positive (GAO, 1992). Waldfoegel (1998), for example, finds no decrease in disparity under the Guideline system. An earlier and seemingly contradictory study by USSC staff (Hofer, Blackwell, and Ruback, 1999) also found some surprising regional disparity by comparing sentences in the 1980s to sentences in the 1990s. In this study, disparity for drug-trafficking offenses in certain cities actually increased under the Guideline system (see also Kautt, 2002).

While many acknowledge that disparity still exists under the Guidelines, others focus on the source of disparity rather than its magnitude. Scholars and practitioners, including the USSC, believe that disparity is due to pre-sentencing differences in prosecutors charging and pleading practices (USSC, 2004; Bibas, 2005); the availability of certain types of defense attorneys (Berman, 2002); caseloads (Braniff, 1993); and local case-processing practices (Ulmer, 2005; Kautt, 2002). Still others believe disparity is primarily due to the gender, race, and ethnicity of offenders (see Albonetti, 1997; Mustard, 2001; Free, 1997, Pasko, 2002). Finally, disparity often corresponds to the region where district court judges are located. For example, the USSC itself has found in a number of studies that district court judges in the Fifth Circuit issue defendants higher sentences and depart less from the Guidelines than counterparts in the Ninth Circuit (USSC Sourcebook, 2005; Tiede, 2009).

Despite some acknowledgment that significant disparity persists, the limitations of the data have resulted in scholars focusing on either defendants' attributes or the practices of attorneys as causal factors. To date, there are no comprehensive studies of how a wide range of judicial attributes alone or jointly may affect sentencing cases. While sentencing disparity may be due to a combination of factors, especially attributes of judges and defendants, we focus on the former as there has been little if any quantitative work in this regard.

## JUDICIAL ATTRIBUTES AND SENTENCING

The effect of judges' attributes on decision making has been studied for a variety of courts and issue areas. It is generally thought that judicial decisions concerning similarly situated parties to lawsuits may vary due to the discretion that judges exercise even under laws that constrain such discretion, such as the Sentencing Guidelines. Furthermore, if judges have discretion, even a small amount, then it is theorized that certain judge attributes, such as their party identification, race, gender, or years on the bench, will affect that discretion. Many studies, especially those of the U.S. Supreme Court, have found a relationship between judicial decision making and judges' underlying attributes (see George, 2001, for an overview of this literature). In this article there will be no attempt to analyze all of the existing literature on judges' attributes. Rather, a review is made of what relationships exist between attributes and decision making, primarily in criminal law or sentencing decisions. While some attributes, such as party identification, have been consistently found to affect decision making, the effects of other attributes are less clear.

To analyze these attributes, many scholars focus on the partisanship of federal judges. The effect of the appointing president's party, most frequently used to measure partisanship, is well established in the literature in a variety of case areas. Indeed, scholars generally find that the party of the president appointing judges reflects the policy preferences of judges sitting on the U.S. Courts of Appeal (Cross and Tiller, 1998; Stidham, 1996; George, 2001), with judges appointed by Republican presidents tending to be more conservative than judges appointed by Democrats (Brudney, Schiavoni, and Merrit, 1999; Gotschall, 1986). For criminal cases, liberal judges tend to favor defendants more than conservative judges. Although less prevalent, the work on U.S. District Courts also has shown that party of the appointing president matters (Carp, Manning, and Stidham, 2009). Rowland and Carp (1996) show that over time district court judges appointed by Democratic presidents tend to be more liberal than judges appointed by Republican presidents and that jurists appointed by Democratic presidents are more favorable toward defendants.

There also have been two attempts to look at the president's party affiliation on his appointees' sentencing behavior. Schanzenbach and Tiller (2007) show that the political composition of both the circuit and the district courts affects sentencing decisions. Judges appointed by Republicans gave higher sentences than their Democratic counterparts for street crimes and lower sentences for white-collar and environmental crimes. These authors also ask how district court judges' sentences are affected by the political composition of the circuits in which they sit.<sup>2</sup> Despite such conclusions, Schanzenbach and Tiller did not have information on individual judges to match with case decisions for this research. Instead, they estimated political appointments of judges in general by looking at the percentage of active district court judges who were appointed by Democrats. While their study attempts to include variables on political attributes of judges, these authors have no information to tie judges' names to actual decisions. Further, they limit their study to active judges, although senior-status judges often have heavy sentencing caseloads.

Schanzenbach and Tiller (2008) attempted to correct for the lack of data on judge-specific characteristics in their earlier work by creating their own database for serious drug offenses by randomly selecting dates to search on the Public Access to Court Electronic Records (PACER) system. Their search yielded approximately 2,265 cases decided by district courts applying the sentencing guidelines nationwide. Based on their sample, they find that there were significant differences in how judges make decisions based on the party of the appointing president. In general, they conclude that judges appointed by Democratic presidents reduced offense level and lowered sentences more often than their counterparts appointed by Republican presidents. As

<sup>2</sup> Schanzenbach and Tiller (2008) characterize their 2006 findings as follows: "Democratic- and Republican-appointed district court judges used offense levels to adjust prison sentences to roughly the same degree whether they were in majority Democratic- or Republican-appointed circuits. On the other hand, Democratic appointees in majority Democratic circuits departed to a degree greater than Democratic appointees in majority Republican circuits" (p. 723).

mentioned by the authors, this was the first known study to look at how party of the appointing president affects sentencing decisions (but see Scott, 2010, analyzing inter-judge disparity for the District of Massachusetts). However, Schanzenbach and Tiller did not analyze judicial attributes other than the party of the judges.

Independent, although related to the party of the judge, is judges' ideology. The majority of judicial politics scholars, especially those dealing with the U.S. Supreme Court, find that judges' ideology affects judicial decision making (Segal and Spaeth, 1993, 2002). While the influence of ideology is prevalent in studies of the U.S. Supreme Court, the effect of ideology on different types of lower courts and case types is not definitive. For district courts, which are exclusively studied here, ideology has been determined by Giles, Hettinger, and Peppers's (2001) scores, which are created by considering not only the appointing presidents' party, but also senatorial courtesy (see also Epstein et al., 2007:306-07). While these scores are now an accepted and prevalent way of measuring district court judges' ideology, the effect of ideology measured this way has not been conclusively established for all case types (Benzoni and Dodrill, 2009).

A second group of judicial attributes analyzed in the literature is far less conclusive than the literature on party of the appointing president. The effect of race, gender, and years on the bench has not provided consistent results across issue areas. For example, the scholarship on race and judging, as a whole, has been inconclusive as to whether race has a systematic effect on judicial decision making. Part of this is due to the relative recentness of minority judges on the bench. While some studies have shown that race affects judicial decision making, others find no such relationship. These conclusions seem to be driven by what issues are being decided by the judge and what level of court is making the decision.<sup>3</sup> Further, recent studies contend that race and gender should not be analyzed separately but for their interactive effect (Collins and Moyer, 2008).

The effect of the judge's race in criminal cases, and more specifically sentencing, also is not consistent, and most scholars focus only on African-American jurists and fail to look at other minority groups. For Pennsylvania state courts, Ulmer (2005) finds that black male judges are 50 percent more likely to give shorter sentences than their white female counterparts. In the federal arena, Gotschall (1986) finds that in the courts of appeals, black judges voted for the accused and prisoners more than whites, and Smith (1983) finds that black judges are more sympathetic to defendants than white jurists. Looking at race and gender together, Collins and Moyer (2008) find that female judges belonging to minority groups are more likely to favor defendants than other members on the bench. In contrast, Sisk, Heise, and Morriss (1998), studying the effect of race on district court judges, find that race did not affect decisions about

<sup>3</sup> Race of judges in the courts of appeal has been found to positively influence employment (Crowe, 1999) and sex-discrimination claims (Gotshall, 1983), but has had little effect on race-discrimination (Gotshall, 1983) and unfair-labor cases (Merritt and Brudney, 2001). Race also has had a limited effect on decision making at the district-court level across a wide range of subject areas (Segal, 2003; Walker and Barrow, 1985).

whether the U.S. Sentencing Guidelines were unconstitutional when initially adopted. However, African-American judges, who found the Guidelines were unconstitutional, tended to do so more on due-process grounds than white judges.

Sherer (2004), in a study of black judges on the court of appeals, uses a different method of analysis than used in the previous studies, noting that prior studies of the effect of race on judges have suffered from "serious case selection problems" (p. 661). She attributes this to scholars looking at "criminal cases in the aggregate" (p. 661), rather than distinguishing between differences in criminal case types. In her own study, Sherer, looks at different types of criminal cases separately to test how a multitude of case facts, as well as judicial attributes, influence judges' votes. Using this method, she finds that black judges are more likely to uphold defendants' allegations of police misconduct in search-and-seizure cases. Unlike the literature on the party of the appointing president, the manner in which race of the judges may affect decision making is still open for debate for a range of issue areas.

As with race, the literature dealing with the effect of gender on judicial decision making does not point to a gender effect for all courts and issue areas (George, 2001; Songer, Davis, and Haire, 1994; Ashenfelter, Eisenberg, and Schwab, 1995; Sisk, Heise, and Morriss, 1998; Kulik, Perry, and Pepper, 2003; Gryski, Main, and Dixon, 1986; Walker and Barrow, 1985). Gender seems to have no effect in most issue areas (Peresie, 2005; Songer and Crews-Meyer, 2000), but does influence decisions in employment discrimination (Songer, Davis, and Haire, 1994; Brudney, Schiavoni, and Merrit, 1999; Boyd, Epstein, and Martin, 2010) and civil rights (Peresie, 2005). Women also affect collegial decision making when they sit with men on courts of appeals panels (Farhang and Wawro, 2004).

The literature on the effect of the judges' gender in criminal cases is similarly inconclusive. While some studies have found that male and female jurists treat defendants similarly (Kritzer and Uhlman, 1997), others determined that gender does influence criminal decisions in the lower courts. For example, Gruhl, Spohn, and Welch (1981) find that women in courts in a northeastern city tended to sentence female defendants to more time than their male counterparts. Further, male judges voted against defendants in criminal cases more when they sat with women judges (Massie, Johnson, and Gubala, 2002). Despite the growing interest in the effect of gender on the bench, there have been few recent studies of lower-court judges testing its impact in criminal cases.

Finally, the length of a judge's tenure on the bench is not often tested directly as a judicial attribute. However, new research in this regard reveals that Supreme Court justices may change their behavior the longer they serve (Epstein et al., 1998) and that federal district court judges may shift the way they vote on civil-rights cases. Further, Kaheny, Haire, and Benesh (2008) find that judges on the U.S. Court of Appeal "are more predictable in their voting during their early and late career stages" (p. 490). Despite these more recent studies, traditionally, tenure on the bench has been conceptualized as a function of the judge's age. Although most of these studies have rarely

established that the age of the judge provides a consistent indicator of judicial behavior (e.g., Ashenfelter, Eisenberg, and Schwab, 1995, for district courts; Goldman, 1975, for U.S. Courts of Appeal; and Tate, 1981, for the U.S. Supreme Court), Eisenberg and Johnson (1991) found that the age of federal district court judges may affect rulings on race-discrimination claims.

In criminal law, no consistent relationship has been found between the age of judges and the punishment they order. Cook (1973) found no relationship between a judge's age and the harshness of sentences for draft-law violators, but Kritzer (1978) did. Further, Sisk, Heise, and Morriss (1998) found that age did not seem to affect district court judges' decisions as to the constitutionality of the Sentencing Guidelines. As noted by Gibson (1983), the problem with studying age as a variable is that it is "difficult to disentangle the variety of effects (including generational effects, effects of socialization to the judicial position, and period effects)" on decision making (p. 24).

### WHY MIGHT JUDICIAL ATTRIBUTES AFFECT FEDERAL SENTENCING?

While there is much in the scholarly literature to suggest that judicial attributes may affect sentencing outcomes, there are few recent and conclusive studies that show how a range of attributes may affect outcomes. Based on the literature and deductive reasoning about the criminal process at the federal level, we believe that some, but not all judicial attributes will affect sentencing-deviation cases.

First, scholars strongly suggest that the party of the appointing president affects sentencing outcomes, such that judges appointed by Democrats decide cases in a manner that is more favorable to defendants, while G.O.P. appointees are less supportive. We hypothesize that party of the appointing president will have the same effect on sentencing-deviation cases. In other words, we hypothesize that judges appointed by Democratic presidents are more likely to vote in favor of defendants than judges appointed by Republican presidents in these cases. While politicians of both parties have electoral incentives to appear tough on crime, we believe historically that presidents from the Democratic party are somewhat more sympathetic to defendants due to a stronger commitment to civil rights and due process than their Republican counterparts. Therefore, we hypothesize that:

**H<sub>1</sub>** = District court judges appointed by Democratic presidents will vote in favor of defendants more in sentencing-deviation cases than district court judges appointed by Republican presidents.

While the party of the appointing president may serve as a proxy for a judges' particular proclivity for defendants' rights, we do not believe the other judicial attributes when analyzed alone will significantly affect decision making. We predict this because criminal sentencing is highly regulated (even after *Booker*), and sentencing cases often constitute a significant portion of judges' dockets. Further, sentencing is somewhat mundane and mechanical. Ninety-nine percent of federal sentencing cases result in a plea bargain and judges have little involvement in such cases until the sen-

tencing hearing. While an individual judge's ideology, gender, or race may play an important role in highly political cases, there is no reason to believe that these attributes would similarly influence rather routine sentencing cases. In other words, judges' personal stake in these types of cases may be substantially lower than in other cases, and, therefore, we predict that personal ideology, gender, race, and years on the bench are less important in decision making involving federal sentencing.

Although we believe that individual judicial attributes analyzed alone may matter little in sentencing, we do think that these attributes, interacting with the president's party identification, indeed affect decision making. In other words, it is not simply race or gender that affect decision making, but their interplay with presidential appointment that matters. Therefore, we hypothesize that female judges and minority judges appointed by Democrats will be more sympathetic to defendants and, thus, more likely to vote in favor of defendants than female judges and minority judges appointed by Republican presidents. Therefore, we hypothesize that:

**H<sub>2</sub>** = Female district court judges appointed by Democratic presidents will vote in favor of defendants more in sentencing-deviation cases than female district court judges appointed by Republican presidents.

**H<sub>3</sub>** = District court judges appointed by Democratic presidents who are members of a minority group will vote in favor of defendants more in sentencing-deviation cases than minority members appointed by Republican presidents.

The final hypothesis that we test is the effect of *Booker* on judges' proclivities to vote for or against defendants. We hypothesize that *Booker* will make district court judges more likely to vote in favor of defendants. This hypothesis does not test the effect of judicial attributes on sentencing decisions, but rather tests whether a major change of law that gives judges' more discretion in sentencing affects case outcomes. While judges historically tend to depart downward more than upward (USSC, 2003:31-32), we further predict that judges are more likely to vote in favor of defendants after *Booker* because the cost of doing so has been greatly reduced. In *Booker*, the Supreme Court changed the standard of review for departure decisions from "de novo" to "reasonableness." This change assures district court judges that their decisions will be given due deference and, therefore, after *Booker* it is less likely that such decisions would be appealed or reversed when judges choose to depart from the Guidelines. Therefore, we hypothesize that:

**H<sub>4</sub>** = District court judges will favor defendants more in sentencing-deviation cases after *U.S. v. Booker* (2005) than before this decision.

As explained below, the hypotheses and predictions are tested using a unique database that ties federal judges' attributes to decisions in particular types of sentencing cases.



## DATA AND METHODS

Our study investigates a number of judicial characteristics and their effect upon a specific type of criminal case, namely, sentencing-deviation cases. Looking at only one area of criminal law rather than aggregating all criminal cases together provides a more precise analysis of the effect of judicial attributes (Scherer, 2004). We analyze criminal-sentencing decisions by U.S. district court judges that were published in the *Federal Supplement* from the period 1997 to 2008 and implicate judicial discretion to depart from the Guidelines or not. Through the U.S. Sentencing Guidelines, the USSC and Congress specifically chose to limit federal judges' discretion by mandating that judges sentence defendants to more precise prison terms that fall within specified perimeters.

Specifically, U.S. trial judges were required to calculate criminal sentences by using the USSC's sentencing table. The table has two axes: a horizontal axis that determines a defendant's criminal-history category and an offense-level axis that classifies the severity of a defendant's offense. To determine the sentence of any offense under the Guidelines, district court judges first must determine a defendant's criminal-history category. There are six possible criminal-history categories that are determined by criminal history ranging from 0 to 13. Second, district court judges must determine the offense level ranging from 1 to 43. The offense level is specified in the Guidelines that categorize crimes by type and assign an offense level based on whether the crime involved certain additional factors, such as the presence of a firearm or a victim. The offense level may be further altered depending on the role that the defendant had in a crime and whether he or she accepted responsibility for committing it.

Once these two determinations have been made, the judge is required to sentence a defendant to a number of months in prison that falls within the sentencing range determined by uniting the criminal-history and offense-level axes of the sentencing table. The discretion delegated to judges for sentencing decisions for particular crimes ranges from sentencing decisions that may vary by as little as 6 months (e.g., 0 to 6 months or 24 to 30 months) to sentencing decisions that may vary as much as the length of time between 360 months (30 years) and a defendant's natural life. In this way, discretion to sentence "is cabined within a guideline range" (Campbell and Bemporad, 2004:1), and the legislature on the recommendation of the USSC specifically determines this range.

Sentencing decisions are separated from findings of guilt established in plea bargains or after trials. Although the majority of federal-sentencing cases are decided by a plea agreement between prosecutors and defense attorneys, district court judges may either accept the plea agreement and its recommended sentence or disregard it and independently determine the sentence. Further, unlike state criminal cases, federal judges often disregard the plea agreements between prosecutors and defense attorneys (Tiede, 2008).

The cases analyzed in this study are those where district court judges had to decide, in a plea bargain or after a trial, whether to honor prosecutors' or defendants' requests to depart from the sentencing Guidelines. Despite the mandatory nature of

the Guidelines, until Booker (2005), the Guidelines allowed judges to sentence defendants outside of the sentencing table ranges in very limited circumstances. First, according to the Guidelines, district court judges could sentence outside of the fixed ranges because of “specific offender characteristics” including such things as age, education, and socioeconomic background (Guidelines §§ 5H1.1 to 5H1.12). Although district court judges could sentence below the Guidelines because of these specific offender characteristics, the USSC determined that these factors “are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range” (Guideline policy statement). It should be remembered that the Guidelines were originally adopted to avoid disparities in sentences and to treat similar individuals equally. Consequently, the USSC suggested that special offender characteristics should not be considered except in certain, more unusual cases. Second, under the Guidelines, the USSC and legislature determined that district court judges have the authority to “depart” from the Guidelines in limited circumstances. One of these circumstances allows judges to depart downward from the Guidelines to reward defendants who substantially assisted the government or to depart upward, issuing a greater sentence, when defendants refused to provide assistance (18 USSC §3553(e)). Substantial assistance departures are warranted only if the government requests it and the judge grants the motion.

Besides cases involving substantial assistance, under Section 3553(b)(1) of the sentencing guidelines, departures may be warranted when the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described. The Guidelines include a list of twenty specific reasons allowing judges to depart from them. Some of these reasons warrant sentences above the guideline range, some below the guideline range, and some both above and below the range. One of the most significant reasons is if the judge discovers “meaningful unusual circumstances” justifying the departure (USSC, 2002:1697). Third, the government and defendants may reach a plea agreement that allows for a sentence outside of the guidelines. However, such plea agreements are not binding, and the judge has discretion entirely to disregard them. (Sentencing Guidelines §6B1.1; Federal Rules of Criminal Procedure §11(c)(3)(A)).

Our analysis involves cases involving decisions to deviate or depart from the Guidelines that are published in the *Federal Supplement* from 1997 to 2008. These sentencing-deviation cases implicate district court discretion to either sentence above or below the Guidelines pursuant to requests by the defendant or prosecutor or by the judge’s own initiative. Scholars studying federal district courts have effectively analyzed cases published in the *Federal Supplement* (Dolbeare, 1969; Carp and Rowland, 1983; Rowland and Carp, 1996).

For each published sentencing-deviation case, we determine whether the judge

favored the defendant or not. For the sentencing-deviation cases, a vote in favor of the defendant was one in which district court judges deviated downward from the Guidelines warranting a lower sentence or would not affirm the prosecutor's request for a sentence that was above the Guidelines. A vote against a defendant was a decision whereby the judge agreed to deviate above the Guideline range, thus warranting a higher sentence, or the judge denied a defendant's request for a downward departure.

The distribution of decisions for and against defendants and judicial attributes for sentencing-deviation cases is shown in Table 1. The database used for this analysis is almost evenly distributed between decisions for and against defendants, which is the key dependent variable in this study. Indeed, 55 percent of the database consists of decisions in which the judge made a decision that was unfavorable to defendants, and 45 percent consists of cases favorable to defendants. Judges analyzed in the database also were fairly evenly distributed politically. Fifty-three percent of judges were appointed by Republican presidents and 47 percent by Democrats. As far as ideology, 49 percent received a Giles, Hettinger, and Peppers (2001) score of zero or less and 51 percent of greater than 0 to 1. As far as judicial attributes, the majority of judges analyzed in this study were white and male. However, judges were fairly evenly split between serving on the bench less or more than ten years. The breakdown of judicial attributes is less evenly distributed when gender is analyzed through the lens of partisanship and race. As stated before, white males predominate the data set. Of these men, 14 percent were nonwhite and 45 percent were appointed by Democratic presidents. Of the women, 12 percent were nonwhite and 59 percent were appointed by Democratic presidents. The majority of the defendants, 90 percent, were male, and 22 percent of the cases involved drug crimes, 13 percent economic crimes, 12 percent immigration crimes, and 45 percent all other crimes.

The distribution of cases before and after the decision in *U.S. v. Booker* showed the most variability in distribution. The majority of sentencing-deviation cases analyzed for the period 1997 to 2008 occurred after *Booker*. The distribution of these sentencing-deviation cases is not surprising because *Booker* gave judges wider discretion in sentencing, including the option to depart. The decision also required judges to provide written reasons for departures because under the new regime established by *Booker*, courts of appeals would review district court decisions under a reasonableness standard rather than *de novo*. The effort spent in documenting these unusual cases may have resulted in more judges providing them to West Publishing after this landmark decision.

To determine whether the sample of *Federal Supplement* cases is representative, we compared the distribution of judicial attributes and case types in our sample to a random sample of unpublished departure cases, from Westlaw. This random sample revealed that the distribution of cases and judges' attributes are roughly the same as published cases.<sup>4</sup> The only major exception was that the random sample included 75

**Table 1**  
**Summary of Data Distribution for Sentencing-Deviation**  
**and Other Criminal Cases**

<b>Attribute</b>	<b>Sentencing-Deviation Cases</b>
<b>Nature of decision</b>	
Against defendant	277 (55%)
For defendant	227 (45%)
<b>Gender</b>	
Male	426 (85%)
Female	78 (15%)
<b>Race</b>	
White	434 (86%)
Nonwhite	70 (14%)
<b>Party of appointing president</b>	
Republican	266 (53%)
Democrat	238 (47%)
<b>Judicial ideology*</b>	
Liberal	248 (49%)
Conservative	256 (51%)
<b>Years on the bench</b>	
< 10 years	247 (49%)
> 10 years	257 (51%)
<b>Decision date</b>	
<i>Pre-Booker</i>	206 (41%)
<i>Post-Booker</i>	298 (59%)
<b>Defendants' sex</b>	
Male	234 (90%)
Female	32 (10%)
<b>Offense types</b>	
Drug crimes	111 (22%)
Economic crimes	65 (13%)
Gun crimes	64 (13%)
Immigration crimes	41 (8%)
Other	213 (45%)

\* Judicial ideology refers to the Giles, Hettinger, and Peppers (2001) scores. Liberal refers to scores ranging from -1 to 0 and conservative refers to scores from 0 to +1.

percent post-*Booker* cases while the published cases included 59 percent. This difference would result an underrepresentation of the significance of *Booker* in our data set.

A logit regression was used to analyze the effect of judicial attributes on the likelihood of judges voting in favor of defendants for federal-sentencing-deviation cases as discussed above. A logit analysis is used because the dependent variable is dichotomous, measuring simply whether judges decided in favor of or against a defendant in a particular case.

The estimation equation used for the logit model is as follows:

$$\begin{aligned} \text{Vote in favor of defendant} = & \beta^0 + \beta^1 \text{Democrat appointment} + \beta^2 \text{Judges' ideology} + \beta^3 \text{Female} + \beta^4 \text{Minority} \\ & + \beta^5 \text{Bench years} + \beta^6 \text{Female} * \text{Democrat appointment} + \beta^7 \text{Minority} * \text{Democrat appointment} \\ & + \beta^8 \text{Female} * \text{Minority} * \text{Democrat appointment} + \beta^9 \text{Booker} + \beta^{10} \text{Female defendant} + \beta^{11} \text{Drug crimes} + \\ & \beta^{12} \text{Economic crimes} + \beta^{13} \text{Gun crimes} + \beta^{14} \text{Immigration crimes} + \end{aligned}$$

The independent variables used in this regression are based on the literature review and our theory as to which variables influence judicial decision making for sentencing-deviation cases and which are proper controls for this type of analysis. The first variable, *Democrat appointment*, captures whether the district court judge was appointed by a president from the Democratic party (coded 1) or the Republican party (coded 0). The second variable, *Judges' ideology*, is the individual Giles, Hettinger and Pepper (2001) scores for each district court judge. These scores range from -1 to +1, with -1 representing the most liberal ideology to +1 representing the most conservative ideology. We initially had concerns about multi-collinearity as our variable for the party of the president and the Giles, Hettinger, and Peppers scores were highly correlated (i.e., -0.88). Despite the high correlation, we believe that the two variables are distinct and capture two very different concepts. Further, a test for joint significance and a likelihood ratio test revealed that both variables should indeed be included in our model.<sup>5</sup>

We included dichotomous variables indicating whether a judge was female

<sup>4</sup> Twenty cases from a random search of 665 unpublished sentencing-deviation cases from 1997 to 2008 (i.e., the years of our study) revealed a sample with similar case attributes as the cases used for this study in the *Federal Supplement*. Specifically, 31 percent of the judges favored the defendant, 38 percent were appointed by democratic presidents, 37 percent had liberal Giles, Hettinger, and Peppers scores, 19 percent were female, 13 percent were from minority groups, and 19 percent were from judges with less than ten years of experience. Of the decisions, 6 percent had women defendants, 38 percent involved drug crimes, 13 percent involved economic crimes, 19 percent involved gun crimes, and 6 percent involved immigration crimes.

<sup>5</sup> The  $\chi^2$  for the joint significance test was 7.41 ( $p=0.03$ ), indicating that the two coefficients were not simultaneously equal to zero and, therefore, it was better to include both variables in the equation. The likelihood ratio was 7.48 ( $p=0.02$ ) indicating that the unrestricted model including data for party of the president as well as judges' ideology was better than the restricted model, which did not include these two variables.

(*Female*) and whether a judge belonged to a minority group (*Minority*). Further, we also included a binary independent variable (*Bench years*) for whether judges served less than ten years on the bench at the time of each decision included in the database. Tenure is an appropriate control variable pursuant to the suggestions of Kaheny, Haire, and Benesh (2008).

For controls we included the sex of the defendant (*Female defendant*) as judges may be more lenient toward female defendants who more often care for children and elderly parents. We also included the offense types that constitute an important consideration in the judges' decisions. As convincingly shown by Scherer (2004), not including offense types could result in significant omitted-variable bias as much of the judges' decisions turn on the application of law to specific facts. As a result, we divided the cases into five offenses: drug crimes, economic crimes, gun crimes, immigration crimes, and all other crimes.

Our theory predicts that certain judicial attributes affect judges' decisions in sentencing-deviation cases when interacted with party of the appointing president. As a result, we have included interactions to capture several possible relationships. The first interaction highlights the relationship between party of the appointing president and judges' gender. We specifically interact the party of the appointing president with whether the judge is female or not (*Female\*Democrat appointment*). The second interaction measures the relationship between whether the judge was appointed by a president from the Democratic party and is also a member of a minority group (*Minority\*Democrat appointment*). Finally, we believed that the president's party identification, gender, and race all may affect judicial decision making, and so we have included a variable interacting party of president, female, and minority to analyze this relationship (*Female\*Minority\*Democrat appointment*). By creating the interaction terms in this way, we can test at the same time the impact of gender (male or female), race (minority member or not), and party of the president (Democrat or Republican).

An additional independent variable (*Booker*) was used to determine if the case was decided before or after the U.S. Supreme Court's landmark decision in *U.S. v. Booker* (2005), whereby the U.S. Supreme Court found that mandatory sentencing guidelines violated the U.S. Constitution's Sixth Amendment right to trial. The *Booker* decision created a major change in the Guideline system by converting the judges' application of these Guidelines from mandatory to solely advisory. It is expected that *Booker* would have an impact on sentencing-deviation cases as this decision was aimed precisely at the mandatory nature of the Sentencing Guideline system, making it easier for judges to depart.

## RESULTS

The results provided in Table 2 show the coefficients using a logit analysis. As discussed below, the results confirm the hypotheses regarding the effect of party of the appointing president, the effect of *Booker*, and the effect of some of the interaction terms on judicial decision making. In other words, the results confirm that judges

**Table 2**  
**Effect of Judicial Attributes on Decision Favoring Defendant**

Democrat	<b>0.80</b> (0.42)
Judges ideology	0.31 (0.58)
Female	<b>-1.65**</b> (0.56)
Minority	0.02 (0.51)
Years on Bench	0.01 (0.01)
Female*Democrat	<b>1.82**</b> (0.67)
Minority*Democrat	-0.45 (0.63)
Female*Minority*Democrat	0.72 (1.02)
<i>Booker</i>	<b>0.36</b> (0.19)
Female defendant	0.47 (0.31)
Drug crime	<b>0.61*</b> (0.25)
Economic crime	0.11 (0.31)
Gun crime	<b>0.56</b> (0.30)
Immigration crime	<b>0.77*</b> (0.37)
Constant	<b>-1.19**</b> (0.32)
N	504
Pseudo R <sup>2</sup>	0.06

Notes: ( ) indicates standard error. Boldface indicates statistically significant at  $p < 0.10$ , \* $p < 0.05$ , and \*\* $p < 0.01$ .

appointed by Democratic presidents, women judges appointed by Democratic presidents, and judges deciding cases after *Booker* are more likely to vote in favor of defendants than judges appointed by Republican presidents or who decided cases before *Booker*. The results, as to gender, however, defied our prediction that gender alone is not a significant predictor in these types of cases. Rather than having no effect, female judges were surprisingly less likely to vote in favor of defendants, but this result was

tempered by the party of the appointing president as discussed below.

While the logistic regressions provide information about whether judicial attributes affect decision making, the coefficients are difficult to interpret without further analysis. Therefore, to interpret the above coefficients for these various regressions, a first difference analysis was undertaken (King, Tomz, and Wittenberg, 2000). As seen by the quantities of interest in Table 3, when the independent variables are set equal to the median value for all the binary independent variables, the first difference provides us with an understandable coefficient that can be interpreted in terms of probability of voting for defendants. When analyzing these coefficients, both the magnitude of the coefficient as well as its significance should be taken into account.

The results indicate that the variables for party of appointing president of the judge, gender and gender's interaction with party, as well as whether the case was decided after *Booker*, are significant. When the party of the appointing president switches from Republican to Democrat, judges are 19 percent more likely to vote in favor of defendants. Judges that are female are 24 percent less likely to vote for defendants, and judges who decide cases after *Booker* are 8 percent more likely to vote for defendants. The significance and sign of the coefficients for party of the appointing president and *Booker* were as expected. The coefficient and sign for gender were unexpected. Female judges are less likely to favor defendants. As indicated from the outset, the literature on gender and judging has been inconsistent. In some instances, the judges' gender affects decision making while in others it does not. In the case of sentencing-deviation cases, from public-opinion surveys we know that females in general fear crime more than men (Chiricos, Eshholz, and Gertz, 1997; Stanko, 1995). Female judges' negative decisions toward defendants may be based on a general propensity of females to fear crime more than men. It is possible that these general propensities affect female judges in their determinations regarding sentencing.

The results were as we hypothesized for the other judicial attributes in our analysis: the race of judges and the number of years on the bench had no significant effect. Although not statistically significant, whether a judge is a member of a minority group makes them 2 percent more likely to decide in favor of defendants. The number of years on the bench also has a positive coefficient indicating that the probability of voting in favor of the defendant increases the longer the judge has served. Because the average number of years on the bench for judges in this data set was ten years, we also tested the probability of voting in favor of a defendant with this ten-year cut off. Judges serving ten or more years on the bench were 3 percent more likely to rule for defendants in these types of cases.

The sex of the defendant was not significant. However, three of the four offense types (drugs, guns, and immigration) were significant and positive. This suggests that in some of the more prevalent areas of crimes, judges inundated with high caseloads may favor defendants who commit these crimes compared to all others.

As far as the interactions, as presented in Table 4, the only statistically significant interaction was the relationship between party of the appointing president and



**Table 3**  
**Effects of Independent Variables on Whether District Court Judges Rule in Favor of Defendant**

<b>When this characteristic Shifts from....to...</b>	<b>Likelihood of ruling in favor of defendant (%)</b>
Appointing president: Republican to Democrat	<b>19</b>
Judges ideology: Liberal to Conservative	12
Female: male to female	<b>-24</b>
Minority: white to nonwhite	2
Bench year: <10 years to >10 years	3
<i>Booker</i> : pre- to post-decision	<b>8</b>
Case facts:	
Other to Drug crime	<b>14</b>
Other to Economic crime	3
Other to Gun crime	<b>13</b>
Other to Immigration crime	<b>19</b>

**Notes:** Boldface indicates that the 95 percent confidence interval around a simulated first difference did not contain zero, signifying statistical significance. Based on a logit model estimated in Stata 10.0, with first differences drawn from 1,000 simulations performed by CLARIFY (Tomz, Wittenberg, and King, 2000). Positive coefficients mean more likely to vote in favor of defendant, negative percentages mean less likely to vote in favor of defendant

the judge’s gender. As mentioned above, the predicted probability of voting for a defendant decreased 24 percent when the gender of the judge switched from male to female. However, as revealed by the empirical analysis, presidential party and gender are interrelated. While female judges tend to vote against defendants they do so more when they are Republican appointed (-65 percent) than when appointed by a Democratic president (-29 percent). Conversely, male judges tend to favor defendants more than female judges—24 percent more if they are Republican appointed, but 65 percent more if they are appointed by a Democrat.

As for race, as previously mentioned, minority judges are 3 percent more likely to vote for defendants than white judges, although this coefficient is not statistically significant. The interaction between race and party of the appointing president showed an interesting relationship between these two variables. Minorities that are appointed by Republicans are 9 percent more likely to decide in favor of defendants. Conversely, white Democrats are 11 percent more likely to vote against defendants compared to 2 percent of white Republicans also ruling this way.

**Table 4**  
**Effects of Interaction Terms on Whether District Court Judges**  
**Rule in Favor of Defendant**

<b>Effect of.....</b>	<b>Likelihood of voting in favor of defendant (%)</b>
<i>Sex of judge and party of appointment president</i>	
Female and Democrat appointment	-30
Male and Democrat appointment	67
Female and Republican appointment	-65
Male and Republican appointment	24
<i>Race of judge and party of appointing president</i>	
White and Democrat appointment	-11
Non-white and Democrat appointment	0
White and Republican appointment	-2
Non-white and Republican appointment	9
<i>Interaction of sex, race and appointing presidents' party</i>	
Female if white and Democrat appointment	-33
Female if white and Republican appointment	-24
Female if minority and Democrat appointment	-18
Female if minority and Republican appointment	-24
Male if white and Democrat appointment	33
Male if minority and Democrat appointment	32
Male if white and Republican appointment	18
Male if minority and Republican appointment	24

**Notes:** Boldface indicates that the 95 percent confidence interval around a simulated first difference did not contain zero, signifying statistical significance. Based on a logit model estimated in Stata 10.0, with first differences drawn from 1,000 simulations performed by CLARIFY (Tomz, Wittenberg, and King, 2000). Positive coefficients mean more likely to vote in favor of defendant, negative percentages mean less likely to vote in favor of defendant.

Further, the three-way interaction between party of the appointing president, gender, and race again does not yield statistically significant results, but it is clear from analyzing different combinations of these variables that they all interact in complex and interesting ways. The sex of the judge has a substantial effect on all these interactions. All interactions involving female judges result in judges being less likely to vote for defendants, while all the interactions involving male judges result in judges being more likely to vote for defendants. Of the female judge combinations that all disfavor defendants, those that are minorities and appointed by Democratic presidents

Table 5  
Results for Matching as a Robustness Check

Treatment	Coefficient Unmatched Data	Coefficient Matched Data	Standard Error	Z Value
Appointing President is Democrat	<b>0.80</b>	<b>0.75</b>	0.41	1.81
Female	<b>-1.65**</b>	<b>-1.66**</b>	0.56	-2.95
<b>Booker</b>	<b>0.36</b>	<b>0.40*</b>	0.19	2.07

**Notes:** Boldface indicates statistically significant at  $p < 0.10$ ,  $*p < 0.05$ , and  $**p < 0.01$ .

have the smallest likelihood of voting against defendants.

All interactions involving male judges resulted in judges being more likely to vote for defendants. Male judges that were white or minorities appointed by Democrats were 33 percent and 32 percent more likely to vote for defendants. Male judges appointed by Republicans were 18 percent more likely to vote for defendants if they were white and 24 percent more likely if they were minorities.

Finally, whether judges decided a case before or after *Booker* affects how judges make decisions. For sentencing-departure cases, in which *Booker* is most apparently applicable, judges were 8 percent more likely to vote for defendants after *Booker* than before this decision. The significance of the coefficient is not surprising because *Booker* provided judges with more discretion. The magnitude of the coefficient may appear relatively small to those hoping that *Booker* would completely unravel the Guideline system. However, most judges on the district courts had been trained in pre-*Booker* procedures and changing their practices would not be expected to occur instantaneously.

As an additional robustness check for our results, we undertook a nearest-neighbor matching analysis similar to that advocated by Boyd, Epstein, and Martin, 2010 (see also, Ho et al., 2007a, 2007b). Because we were not just concerned with the effect of one judicial attribute as were these authors, we conducted three separate analyses matching separately on the three most significant variables of party of appointing president, female judge, and *Booker* as separate treatment variables. Using the sub-classification method and matched data, the variables remained significant with the coefficients in the same direction as our logit results. Table 5 compares our results to the matched data results on these three coefficients. The magnitude of the coefficient for appointing president was slightly lower with the matched data than unmatched data. The magnitude for the variables for female judge and *Booker* were slightly larger for the matched data than the unmatched data.

\* \* \*

This article began with a discussion about why disparity in sentencing may persist despite sentencing guidelines mandated to limit judicial discretion and disparity. The results show that various judicial attributes related to appointing presidential partisanship and gender, as well as the interaction of these two variables, may explain some of this disparity. The research confirmed our general hypotheses that party of the appointing president affects the probability of voting for defendants in sentencing-deviation cases. In general, judges associated with the Democratic party through the appointment process are more likely to vote for defendants, while those who are associated with Republicans are not. Furthermore, our hypotheses for the effect of all other attributes also were confirmed except for our hypothesis concerning gender. While being a female made a judge more likely to rule against defendants, this result is highly dependent on the party association of female judges. Finally, the results indicate that the interaction between different combinations of judicial attributes is a fertile area for further research on sentencing-deviation cases.

This study has provided unique and preliminary findings regarding the effect of various judicial attributes in judicial sentencing. Future research would include hypotheses that suggest under what conditions certain judicial attributes have the greatest impact. Further, scholars may analyze how attributes of defendants as well as judges interact in sentencing decisions. This, in turn, would provide both scholars and practitioners a more complete picture of what factors influence sentencing decisions when judges use their discretion within the confines of a relatively rigid sentencing regimen. **jsj**

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