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The Federal Sentencing Guidelines:

A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining

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Executive Summary

Introduction and Overview of Report

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) established the United States Sentencing Commission and delegated to it authority to promulgate sentencing guidelines for the federal courts. After a period of intensive review and empirical study of the sentencing process, the Commission issued initial guidelines that took effect on November 1, 1987.

The Act mandates that the Sentencing Commission study the implementation and impact of the guidelines. Specifically, the enabling legislation requires the Commission to:

> *submit a report to the General Accounting Office, all appropriate Courts, the Department of Justice, and Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.*[1]

Congress intended that the evaluation focus on data for the four-year period immediately following the implementation of the first iteration of guidelines. The governing statute requiring the evaluation, however, did not anticipate two critically important developments that substantially retarded the rate at which guidelines were implemented nationally. First, it did not envision that, while guidelines might technically become law in November 1987, constitutional challenges would prevent consistent nationwide application until January 1989.

Second, when Congress established the effective date for the Sentencing Reform Act, it apparently contemplated that the guidelines and other "procedural" features of the new law would apply to all sentencing proceedings occurring after the guidelines took effect. After reviewing the considerable legal problems expected from implementation of mandatory guidelines in conjunction with the abolition of parole and sharp reduction of "good time" credits, the Department of Justice and the Sentencing Commission advised Congress that it should provide a clear "bright line" rule under which the new Act and the guidelines would apply only to offenses committed after the November 1, 1987, effective date. Congress so provided in the Sentencing Act of 1987,[2] thereby creating a more gradual, phased-in implementation scheme pursuant to which the guidelines are applied to post-effective date offenses as they are processed through the criminal justice system.

These delays in guideline implementation have significant consequences for the scope of the evaluation submitted to Congress. Most importantly, the sentencing guidelines cannot be said to have been in effect for four years. Rather, in reality, they have been in effect for little more than two and a half years. While every effort has been made to study the operations of the courts and the impact of the guidelines, only effects that could emerge during this foreshortened period can be reported. Thus, this evaluation report only provides a preliminary examination of the short-term effects of the guidelines during the first few years of implementation.

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[1]Pub. L. No. 98-473, § 236, 98 Stat. 1837, 2033 (1984).

[2]Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1987).

Several ancillary consequences for the evaluation are equally important to note. First, there may be a transitional period during which the full impact of the guidelines has not yet been realized. For example, the impact on the use of incarceration cannot be assessed fully until all cases in the federal courts are eligible to be sentenced under the Sentencing Reform Act. In February 1989, the first full month of data collection on guidelines cases for the Commission's evaluation, only 43.2 percent of federal offenders were sentenced pursuant to the Act. That percentage had risen to approximately 75 percent by the end of August 1990. Therefore, it is important to keep in mind that for the period reviewed in this preliminary report, full implementation of the guidelines has not occurred.

Second, there is the transitional effect caused by the relative "newness" of the guidelines system. As judges and federal court practitioners become more familiar with guideline application and more accustomed to working within such a system, certain aspects of their jobs may become more routinized and, as a result, more consistent. In the transition interim, however, it is nearly impossible to obtain reliable and valid measures of impact. Clearly, the guidelines must be implemented fully before their true impact can be measured. Similarly, it will take some time before the body of case law builds and shapes the interpretation and application of the guidelines, although certainly some significant impacts already can be seen.

Third, the abbreviated period of implementation may be too short for certain types of effects to appear or to be measured with any precision. For example, if the guidelines have had any impact on recidivism, that impact can only be measured for very short post-release periods for offenders who received short sentences.

The above notwithstanding, the Commission designed four studies in response to its statutory evaluation mandate: an implementation study that examines the operation of the guidelines, and studies of the guidelines' impact on sentencing disparity, use of incarceration, and prosecutorial discretion and plea bargaining.

In order to understand the operation of the federal courts under the guidelines system, the Commission conducted a process evaluation to describe the implementation of sentencing guidelines. The purpose of this process study is to determine, first and foremost, whether the program for sentencing reform has been implemented as intended. For this part of the evaluation, the Commission visited 12 jurisdictions during late 1990 and early 1991 and interviewed and surveyed district judges, assistant U.S. attorneys, probation officers, federal defenders, and private defense attorneys about a variety of topics concerning their work and the processing of cases under the guidelines system. These topics included, but were not limited to: 1) guideline training; 2) guideline knowledge and application; 3) the roles of judges and court practitioners; 4) factors affecting the sentencing process; and 5) charging and plea negotiation practices.

The chapter on sentencing disparity focuses on the key impact question: "Does the range of sentences meted out for defendants with similar criminal records convicted of similar criminal conduct narrow as a result of guideline implementation?" To address this question, the Commission examined sentences imposed and time served for offenders convicted of bank robbery, embezzlement, heroin, and cocaine offenses, matched for similar offense and offender characteristics.

The Commission's study of the use of incarceration focuses on three primary questions: 1) To what extent has the proportion of defendants sentenced to prison and/or probation changed from 1984-1990?; 2) How has the length of imprisonment sentences changed from 1984-1990?; and 3) To what extent are changes in the rate of imprisonment sentences and the length of imprisonment

attributable to the imposition of statutory changes, mandatory minimum sentencing statutes, sentencing guidelines, or other legislative and policy initiatives?

Finally, the study of the guidelines' impact on prosecutorial discretion and plea bargaining addresses a variety of questions, including: 1) Has the incidence of various prosecutorial outcomes, such as the filing of charges and the acceptance of guilty pleas, changed over time?; and 2) Has the likelihood of these prosecutorial outcomes changed as a result of the guidelines?

Implementation and Operation of the Guidelines

The preliminary findings suggest that the process of guideline implementation is moving steadily forward, albeit not without occasional difficulties and unevenness among jurisdictions, but with clear indications of increasing acceptance and success. Guideline sentencing is now the norm in federal courts, with more than three-fourths of the fiscal year 1991 defendants subject to the new law. The system, however, is clearly still in transition, as evidenced by the varying degrees of adjustment experienced across districts.

What follows is a summary of findings from interviews and follow-up written surveys with district judges, assistant U.S. attorneys, federal defenders, private defense attorneys, and probation officers about a variety of issues concerning court operations. The interviews were conducted by Commission staff in 1990 and early 1991 at 12 sites in 11 of the 12 judicial circuits.[3] The 258 respondents included 49 district judges and one magistrate judge; 19 U.S. attorneys or supervisory U.S. attorneys; 56 line prosecutors; seven federal defenders or supervisory federal defenders; ten line defenders; 38 private defense attorneys; 19 chief probation officers or supervisory probation officers; 47 line probation officers; and 12 clerks of court.

Additionally, the Commission conducted a national survey of judges and court practitioners in response to issues raised during the site visits. The national mail survey sample consisted of all federal district judges (745), all federal public defenders (278), and a random sample of assistant U.S. attorneys engaged in criminal work (750), federal panel attorneys (475), and probation officers preparing presentence reports or doing the investigation for those reports (750). A total of 1,802 respondents returned a completed survey, out of 2,998 sampled, for a completion rate of 60 percent.

Training: The Commission recognizes that an evolving guidelines system, coupled with a steady influx of new practitioners, produces an ongoing need for effective training programs and materials. Pursuant to its statutory mandate, the Commission has undertaken an extensive program of guideline training for judges and practitioners, placing special emphasis on the training of probation officers. From 1989 through the first 10 months of 1991, the Commission trained more than 12,000 individuals on guideline application and sentencing procedure. In addition, the Commission prepares and disseminates training publications and provides technical support and services to assist in guideline application.

The site interviews in this study included questions about training, its sources, and its adequacy from the point of view of judges and practitioners. According to the interviews, most U.S. attorney, probation, and federal defender offices provide some type of in-district guideline training. Typically, these programs focus on the training of one or more individuals at a site who, in turn, act as "specialists" to supervise others on a case-by-case basis. In contrast, while probation officers and attorneys said that they usually received training through various in-district programs, most of the judges interviewed said that they received their training from probation officers. It is not clear from the data, however, the extent to which judges' training consists of formal or informal programs. Overall, most respondents said that they had received sufficient training, and rated the training they received as "very good" or "excellent."

All respondents in non-supervisory positions were asked a series of questions assessing the level of guidelines knowledge of judges and practitioners in the court system. Most respondents rated the guidelines knowledge of others in the court system as fair, very good, or excellent. Probation officers

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[3]Eleven of the 12 sites were selected randomly; the twelfth site was selected purposively because very large districts were underrepresented in the sample.

were rated highest by all groups, while private defense counsel were given the lowest ratings by judges, probation officers, and assistant U.S. attorneys. Of the 45 judges interviewed, 13 commented that the level of guidelines knowledge of private counsel varies depending on the individual. Most respondents rated the guidelines knowledge of the judges and prosecutors in the middle of a scale ranging from excellent to poor. Federal defenders were generally rated in the middle of the scale (very good or fair), except by judges, who rated them at the higher end of the scale (excellent or very good) (*see* Tables 21-22).

Respondents were asked to rate their own knowledge of the guidelines using the same scale. Most probation officers, federal defenders, assistant U.S. attorneys, and private defense counsel rated their knowledge as very good or excellent. Supervisory probation officers tended to rate their guidelines knowledge at the high end of the scale (very good, excellent, or some other equivalent term). Supervisory assistant U.S. attorneys rated their own knowledge more modestly; of the 14 supervisors interviewed, eight said their guidelines knowledge was very good or fair. Supervisory federal defenders rated their knowledge of the guidelines from fair to outstanding. No respondent rated him or herself as poor or very poor (*see* Table 23).

A significant number of judges and practitioners reported that private defense attorneys generally do not know the guidelines. This suggests the need for an ongoing assessment of the training needs of judges and practitioners, with special emphasis on encouraging the development of guideline training programs for private defense attorneys in districts across the nation.

General Impressions of the Guidelines: Congress directed the Commission to establish a system of guideline sentencing that would be honest, ensure reasonable uniformity in sentencing by narrowing wide disparity, and that would impose appropriately different sentences for criminal conduct of differing severity.

Based on the site interviews, there is evidence that judges, prosecutors, and probation officers perceive that the Commission's guidelines have been generally successful in meeting these goals. It is important to note that a sizable majority of the judges (30 or 65%), federal prosecutors (39 or 83%), and probation officers (31 or 69%) reported that guideline sentences are "mostly appropriate" in response to the question of whether the guidelines generally fit into the respondents' sense of what is an appropriate sentence (*see* Table 25).

A more indirect source of opinions on the effectiveness of the guidelines comes in response to open-ended questions about the long-range consequences and the benefits and problems of the guidelines. Without having been specifically asked, large numbers of judges (25 or 50%), prosecutors (57 or 76%), and probation officers (39 or 59%) interviewed commented that the guidelines have reduced sentencing disparity. This suggests that judges, prosecutors, and probation officers generally agree that the guidelines have, in some measure, achieved one of the primary goals established by Congress (*see* Table 27).

In contrast, federal defenders and private defense attorneys are generally negative in their assessment of the guidelines. As shown in Table 25, only about one-third of the private attorneys (11 or 31%) and none of the ten assistant federal defenders interviewed said that sentences under the guidelines are generally appropriate. Defense attorneys (public and private) were also less likely to say that the guidelines have decreased sentencing disparity.

One question in the national survey addressed the respondent's perceptions of whether unwarranted sentencing disparity has increased, decreased, or stayed about the same under the guidelines compared to the pre-guidelines sentencing system. A majority of probation officers (296

Table 21

Judges' Evaluation of Court Practitioners Guideline Application Knowledge

Rating	Judges (N=47)							
	Probation Officer		AUSA		Federal Defender		Private Attorney	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Excellent	31	(66)	7	(15)	12	(26)	1	(2)
Very good	7	(15)	21	(45)	14	(30)	3	(6)
Fair	—	—	3	(6)	1	(2)	22	(47)
Poor	—	—	—	—	—	—	1	(2)
Very poor	—	—	—	—	—	—	—	—
Respondent gave other response[b]	5	(11)	12	(26)	3	(6)	16	(34)
Not applicable[c]	—	—	—	—	14	(30)	—	—
No answer	4	(9)	4	(9)	3	(6)	4	(9)
Breakdown of Responses by Judges Who Gave Additional Comments								
Varies from good to excellent	4	(36)	7	(44)	1	(25)	—	—
Varies from fair to good	—	—	7	(44)	2	(50)	8	(30)
Varies from fair to very poor	—	—	—	—	—	—	4	(15)
Depends on the individual	1	(9)	2	(13)	1	(25)	13	(48)
Other response	6	(55)	—	—	—	—	2	(7)

[a] Column percents appear in parentheses.

[b] Some judges gave a response that did not fit the range that was read to them (excellent, very good, fair, poor, or very poor). The breakdown for judges who gave a different response as well as those who made additional comments is included in the second part of the table: included are responses by 16 judges who commented on assistant U.S. attorneys, 11 judges who did so on probation officers, four judges on federal defenders and 27 judges on private counsel.

[c] There were no federal defenders in some of the districts.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 22

Knowledge of Guideline Application

A. Judges Rated by Others

Rating	Probation Officer (N=46)		AUSA (N=52)		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=140)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Excellent	3	(7)	3	(6)	1	(10)	3	(9)	10	(7)
Very good	15	(33)	23	(44)	3	(30)	20	(63)	61	(44)
Fair	19	(41)	21	(40)	4	(40)	9	(28)	53	(38)
Poor	8	(17)	1	(2)	—	(—)	—	(—)	9	(6)
Very poor	—	(—)	—	(—)	1	(10)	—	(—)	1	(1)
Multiple answers	1	(2)	4	(8)	1	(10)	—	(—)	6	(4)

B. Probation Officers Rated by Others

Rating	Probation Officer		AUSA (N=52)		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=94)[b]	
	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)
Excellent	N/A	N/A	14	(27)	2	(20)	14	(44)	30	(32)
Very good	N/A	N/A	29	(56)	3	(30)	15	(47)	47	(50)
Fair	N/A	N/A	5	(10)	4	(40)	3	(9)	12	(13)
Poor	N/A	N/A	1	(2)	1	(10)	—	(—)	2	(2)
Very poor	N/A	N/A	—	(—)	—	(—)	—	(—)	—	(—)
Multiple answers	N/A	N/A	2	(4)	—	(—)	—	(—)	2	(2)
Not applicable	N/A	N/A	—	(—)	—	(—)	—	(—)	—	(—)
No answer/ not asked	N/A	N/A	1	(2)	—	(—)	—	(—)	1	(1)

[a] Column percents appear in parentheses.

[b] Excludes the 46 probation officers.

Table 22 (cont'd)

C. Prosecutors Rated by Others

Rating	Probation Officer (N=46)		AUSA		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=88)[a]	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[a]	N	(%)[b]
Excellent	—	(—)	N/A	N/A	—	(—)	3	(9)	3	(3)
Very good	18	(39)	N/A	N/A	3	(30)	17	(53)	38	(43)
Fair	23	(50)	N/A	N/A	4	(40)	11	(34)	38	(43)
Poor	3	(7)	N/A	N/A	2	(20)	1	(3)	6	(7)
Very poor	—	(—)	N/A	N/A	1	(10)	—	(—)	1	(1)
Multiple answers	1	(2)	N/A	N/A	—	(—)	—	(—)	1	(1)
No answer/not asked	1	(2)	N/A	N/A	—	(—)	—	(—)	1	(1)

D. Federal Defense Attorneys Rated by Others

Rating	Probation Officer (N=46)		AUSA (N=52)		Federal Defender		Private Attorney		Total (N=98)[c]	
	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)
Excellent	3	(7)	4	(8)	N/A	N/A	N/A	N/A	7	(7)
Very good	16	(35)	19	(37)	N/A	N/A	N/A	N/A	35	(36)
Fair	4	(9)	8	(15)	N/A	N/A	N/A	N/A	12	(12)
Poor	3	(7)	3	(6)	N/A	N/A	N/A	N/A	6	(6)
Very poor	—	(—)	—	(—)	N/A	N/A	N/A	N/A	—	(—)
Multiple answers	—	(—)	—	(—)	N/A	N/A	N/A	N/A	—	(—)
Not applicable	19	(41)	11	(21)	N/A	N/A	N/A	N/A	30	(31)
No answer/not asked	1	(2)	7	(14)	N/A	N/A	N/A	N/A	8	(8)

[a] Excludes 52 assistant U.S. attorneys.

[b] Column percents appear in parentheses.

[c] Excludes the 42 federal defenders and private counsel.

Table 22 (cont'd)

Rating	Probation Officer (N=46)		AUSA (N=52)		Federal Defender		Private Attorney		Total (N=98)[a]	
	E. Private Defense Attorneys Rated by Others									
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
Excellent	1	(2)	—	(—)	N/A	N/A	N/A	N/A	1	(1)
Very good	3	(7)	11	(21)	N/A	N/A	N/A	N/A	14	(14)
Fair	22	(48)	20	(39)	N/A	N/A	N/A	N/A	42	(43)
Poor	15	(33)	11	(21)	N/A	N/A	N/A	N/A	26	(27)
Very poor	4	(9)	5	(10)	N/A	N/A	N/A	N/A	9	(9)
Multiple answers	1	(2)	4	(8)	N/A	N/A	N/A	N/A	5	(5)
Not applicable	—	(—)	—	(—)	N/A	N/A	N/A	N/A	—	(—)
No answer/not asked	—	(—)	1	(2)	N/A	N/A	N/A	N/A	1	(1)

[a] Excludes the 42 federal defenders and private counsel.

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Survey.

Table 23

Court Practitioners' Self-evaluation on Guideline Application Knowledge

Rating	Respondent Type									
	Probation Officer (N=46)		AUSA (N=52)		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=140)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Excellent	9	(20)	8	(15)	5	(50)	7	(22)	29	(21)
Very good	30	(65)	27	(52)	5	(50)	16	(50)	78	(56)
Fair	7	(15)	16	(31)	—	(–)	7	(22)	30	(21)
Poor	—	(–)	—	(–)	—	(–)	—	(–)	—	(–)
Very poor	—	(–)	—	(–)	—	(–)	—	(–)	—	(–)
Multiple answers	—	(–)	1	(2)	—	(–)	2	(6)	3	(2)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Survey.

Table 25

Opinions on the Appropriateness of Guideline Sentences

Responses	Respondent Type									
	Judge (N=46)[a]		AUSA (N=47)[a]		Federal Defender (N=10)[a]		Private Attorney (N=35)[a]		Probation Officer (N=45)[a]	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
Mostly appropriate	30	(65)	39	(83)	–	–	11	(31)	31	(69)
Mostly inappropriate	13	(28)	6	(13)	9	(90)	21	(60)	9	(20)
Mixed opinion	3	(7)	2	(4)	1	(10)	3	(9)	5	(11)

[a] Excludes respondents who were unresponsive in answering the question (four assistant U.S. attorneys and two probation officers) and respondents who were not asked the question (three judges, five assistant U.S. attorneys, and three private defense attorneys).

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 26

Opinions of Respondents Who Considered Guideline Sentences to be Mostly Inappropriate

Responses	Respondent Type									
	Judge (N=13)		AUSA (N=6)		Federal Defender (N=9)		Private Attorney (N=21)		Probation Officer (N=9)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Too lenient	5	(38)	3	(50)	–	–	–	–	1	(11)
Too harsh	7	(54)	2	(33)	9	(100)	21	(100)	7	(78)
Some too lenient/ others too harsh	1	(8)	1	(17)	–	–	–	–	1	(11)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 27

Respondents Identifying Benefits of the Guidelines System

Benefits	Respondent Type									
	Judge (N=50)		AUSA (N=75)[a]		Federal Defender (N=17)		Private Attorney (N=37)		Probation Officer (N=66)	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
Decreased disparity	25	(50)	57	(76)	7	(41)	12	(32)	39	(59)
Increased predictability	11	(22)	22	(29)	6	(35)	16	(43)	13	(20)
Longer sentences	2	(4)	20	(27)	—	—	1	(3)	7	(11)
Well constructed	6	(12)	11	(15)	1	(6)	5	(14)	18	(27)
Easier sentencing	11	(22)	1	(1)	—	—	—	—	2	(3)
Increased accountability	—	—	1	(1)	—	—	—	—	6	(9)
Increased deterrence	1	(2)	6	(8)	—	—	—	—	8	(12)
Encourage cooperation	—	—	6	(8)	—	—	1	(3)	2	(3)
Easier pleas	—	—	4	(5)	—	—	—	—	—	—
Encourage respect for law	—	—	2	(3)	—	—	—	—	3	(5)
Encourage restitution	—	—	—	—	—	—	—	—	1	(2)
No benefits	10	(20)	4	(5)	5	(29)	11	(30)	11	(17)

[a] This includes U.S. attorneys and supervising assistant U.S. attorneys.

[b] Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

or 52%) and prosecutors (224 or 51%) stated that unwarranted disparity has decreased under the sentencing guidelines. Only a very small percentage of probation officers (36 or 6%) and prosecutors (10 or 2%) reported that it has increased (*see* Table 29).

By contrast, federal defenders (62 or 44%) and private defense attorneys (68 or 28%) are more likely to say that disparity has increased under the guidelines and less likely to say that disparity has decreased (16 or 11% of the federal defenders and 45 or 19% of the private defense attorneys). Judges are about equally divided as to whether disparity has decreased (132 or 32%) or increased (116 or 28%) under the guidelines. Nineteen percent (338) of the 1,802 survey respondents indicated they thought sentencing disparity had remained about the same, while 25 percent (459) said that they did not know.

While many judges and practitioners agree that the Commission, at least in part, has met the goals identified by Congress in the Sentencing Reform Act, there is disagreement over the methods the Commission has chosen to achieve those ends. Judges, for example, report that the guidelines have gone too far in reducing judicial discretion (24 or 48%), are inflexible (21 or 42%), overburden the judiciary (19 or 38%), and overburden the prisons (16 or 32%). Responses from federal defenders and private attorneys are similar, while prosecutors and probation officers are much less likely to see problems in these particular areas (*see* Table 28). Nevertheless, the interview results point to the difficulty of achieving a uniform, proportional sentencing system without raising perceptions that the guidelines unduly restrict judicial discretion or are difficult to apply.

The guidelines reflect the congressional intent to increase the sanctions for certain drug offenses, economic crimes, and serious repeat offenders. As a result, many federal defenders and private defense attorneys assert that the guidelines are too harsh in these areas. On the other hand, a few judges, prosecutors, and probation officers say that the guidelines are too lenient (*see* Table 26).

In conclusion, the interview data reflect that while some respondents disagree with the policy decisions made by the Commission, the end result (*i.e.*, the sentence imposed under the guidelines) receives general support from the majority of judges, prosecutors, and probation officers interviewed. The majority of defense attorneys, however, said they believe that sentences under the guidelines are, for the most part, too harsh.

Roles and Influences of Judges and Court Practitioners: As was expected, the activities and roles of judges and practitioners involved in the sentencing process have changed under the guidelines system. While the participant's general responsibilities have not shifted, they have become more formalized and oriented toward fact-finding under the guidelines regime because of its impact on guideline application.

The changes brought about by the guidelines have placed the probation officer in a more independent role vis-à-vis the prosecution and defense attorneys than under the pre-guidelines system. As preparers of the presentence report and independent guideline advisors to the court, they are more active in synthesizing information from the parties and other sources for purposes of guideline application. They also play a critical role by making tentative recommendations to the court when there are disagreements between the parties with respect to the presentence report.

Disputes over guideline application have now become a familiar occurrence among the participants in the sentencing process. Anticipating this circumstance, formal procedures for dispute resolution have been instituted as part of the sentencing and court structure. Variations among probation officers and across sites are found in the methods used to resolve objections with the

Table 29

Unwarranted Sentencing Disparity Under the Sentencing Guideline System Compared to the Pre-Guideline Sentencing System[a]

	Respondent Type									
Response	Judge (N=415)		AUSA (N=436)		Federal Defender (N=140)		Private Attorney (N=240)		Probation Officer (N=571)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Disparity now increased	116	(28)	10	(2)	62	(44)	68	(28)	36	(6)
Disparity now decreased	132	(32)	224	(51)	16	(11)	45	(19)	296	(52)
Disparity about the same	117	(28)	44	(10)	34	(24)	53	(22)	90	(16)
Don't know	50	(12)	158	(36)	28	(20)	74	(31)	149	(26)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type.

SOURCE: U.S. Sentencing Commission, 1991 National Survey.

Table 28

Percent of Respondents Identifying Problems with the Guideline System

Problems	Judge[a] (N=50)		AUSA[b] (N=75)		Federal Defender (N=17)		Private Attorney (N=37)		Probation Officer (N=66)	
	N	(%)[c]	N	(%)[c]	N	(%)[c]	N	(%)[c]	N	(%)[c]
Reduce judicial discretion	24	(48)	11	(15)	14	(82)	21	(57)	19	(29)
Inflexible	21	(42)	11	(15)	11	(65)	22	(59)	16	(24)
Too harsh	6	(12)	14	(19)	9	(53)	17	(46)	17	(26)
Too lenient	—	—	13	(17)	—	—	—	—	4	(6)
No impact on disparity	9	(18)	12	(16)	5	(29)	7	(19)	24	(36)
Overburden judiciary	19	(38)	31	(41)	7	(41)	13	(35)	30	(45)
Too complex	6	(12)	5	(7)	6	(35)	3	(8)	16	(24)
Overburden prisons	16	(32)	6	(8)	7	(41)	12	(32)	18	(27)
Increased recidivism	6	(12)	2	(3)	5	(29)	6	(16)	5	(8)
No impact on deterrence	3	(6)	—	—	—	—	2	(5)	1	(2)
No parole	—	—	—	—	1	(6)	5	(14)	1	(2)
Reduce prosecutorial discretion	—	—	1	(1)	—	—	—	—	—	—
Promote disrespect for law	—	—	—	—	2	(12)	—	—	—	—
Discourage cooperation	—	—	1	(1)	—	—	—	—	—	—
No problems	3	(6)	14	(19)	—	—	—	—	5	(8)

[a] Includes one magistrate judge.

[b] Includes U.S. attorneys and supervising assistant U.S. attorneys.

[c] Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

presentence report prior to submission to the court for final resolution. These methods might differ in the manner in which the disputes are presented to the court or in the extensiveness of pre-hearing meetings with the parties.

The majority of respondents in most sites indicated that plea agreements under the guidelines generally represent the seriousness of the actual offense conduct. However, a few probation officers cited this issue as problematic because of its impact on their ability to prepare presentence reports and guideline calculations. Interactions were particularly troublesome in the one non-random site where some respondents indicate that the parties negotiate plea agreements that do not reflect the entire offense behavior. These plea agreements are generally accepted by the court, notwithstanding the probation officer's efforts to apply the guidelines correctly, creating conflict among probation, prosecution, defense attorneys, and to some degree the court.

Table 44 summarizes data from the site surveys that reflects the relative influence or control practitioners believe they and judges have over sentencing.[4] Assistant U.S. attorneys give judges and probation officers a very high rating, and place themselves not too far behind; defense attorneys rate prosecutors and probation officers very high; and probation officers rate judges and prosecutors the highest, and place themselves not far below that. Defense attorneys are rated lowest by every other group, and the lowest score of all is defense attorneys rated by defense attorneys. It is interesting to note that each group of practitioners rates themselves as having less power than other practitioners.

All parties are viewed as possessing some degree of influence over the sentencing process, although defense attorneys' responses indicate that they feel most powerless at the sentencing stage. Prosecutors are generally perceived to influence sentencing through charging, plea negotiations, advocacy of guidelines calculations, sentencing recommendations, and motions for substantial assistance. Defense attorneys are seen to be most influential in the areas of plea negotiations and advocacy for reductions in guideline calculations. Probation officers are perceived to be most influential in conducting the presentence investigation, providing information to the court, determining the appropriate guideline range, and making sentencing recommendations. Finally, judges exercise the most control in guideline application, fact-finding, dispute resolution, selecting a sentence within the range, departing, and acceptance of plea agreements. Tables 38-39 and 42-44 summarize findings regarding respondents' perceptions of the roles and influences of judges and practitioners.

Charging and Plea Practices: Prosecutorial charging practices and plea negotiations play a more visible and potentially enhanced role under the guidelines. Department of Justice policies prescribe strict standards for plea negotiations, and Sentencing Commission policies set forth definite standards for court acceptance of plea agreements. The implementation study found evidence, in at least one jurisdiction, indicating some prosecutorial circumvention of guideline policies, circumvention that went largely unchecked by judges who were generally opposed to the guidelines or the resulting guideline range. In an effort to ensure that cooperation yields a sentence benefit,

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[4]The question about prosecutors, probation officers, and defense attorneys was: "In your experience with the guidelines, how much influence do practitioners have over the sentencing process?" The question about judges was, "In your experience with the guidelines, how much control do judges exercise over the sentencing outcome?" Pre-coded answers of "very great," "great," "moderate," "some," and "little or none" were scored 5, 4, 3, 2, or 1, respectively. Respondents who circled two responses were assigned a score midway between the two responses selected (*e.g.*, if "some" and "moderate" were both circled, a score of 2.5 was assigned).

Table 44

Average Amount of Influence Practitioners Have Over Sentencing[a]

Practitioner	Respondent Type			
	AUSA (N=52)	Defense (N=42)	Probation Officer (N=46)	Total (N=140)
Assistant U.S. attorney	3.4	4.2	3.6	3.7
Defense attorney	2.5	2.3	2.8	2.5
Probation officer	3.8	4.2	3.4	3.8
Judge	3.9	2.8	3.8	3.5

[a] Five pre-coded responses ranged from "very great," with an assigned score of five, to "little or none," with an assigned score of one.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Surveys.

Table 38

Prosecutors' Areas of Influence Over the Sentencing Process

Area of Influence	Respondent Type: AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Charging	18	(32)	28	(58)	18	(38)	64	(42)
Plea negotiations	9	(16)	5	(10)	23	(49)	37	(25)
Influencing other practitioners (unspecified)	1	(2)	3	(6)	1	(2)	5	(3)
Influencing the probation officer	8	(14)	8	(17)	5	(11)	21	(14)
Influencing the court	4	(7)	4	(8)	2	(4)	10	(7)
Determining appropriate guideline application	11	(20)	7	(15)	2	(4)	20	(13)
Making sentencing recommendations (other than 5K)	10	(18)	1	(2)	2	(4)	13	(9)
Making 5K motions	11	(20)	14	(29)	11	(23)	36	(24)
Other responses	8	(14)	7	(15)	5	(11)	20	(13)
Prosecutors have no influence	1	(2)	—	—	1	(2)	2	(1)
Total substantive responses	81	(—)	77	(—)	70	(—)	228	(—)
No answer/unresponsive/unclear	5	(9)	7	(15)	2	(4)	14	(9)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 39

Defense Attorneys' Areas of Influence Over the Sentencing Process

Area of Influence	AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Charging; pre-indictment negotiations	—	(—)	5	(10)	—	(—)	5	(3)
Plea negotiations	9	(16)	15	(31)	20	(43)	44	(29)
Influencing other practitioners (unspecified)	2	(4)	3	(6)	2	(4)	7	(5)
The probation officer	6	(11)	7	(15)	7	(15)	20	(13)
The court	19	(34)	7	(15)	15	(32)	41	(27)
The prosecutor	4	(7)	3	(6)	1	(2)	8	(5)
Unspecified practitioner regarding guideline application	11	(20)	5	(10)	4	(9)	20	(13)
The client	6	(11)	4	(8)	2	(4)	12	(8)
Knowledge of the guidelines	3	(5)	3	(6)	4	(9)	10	(7)
Making sentencing recommendations	8	(14)	11	(23)	13	(28)	32	(21)
Defense attorneys have no influence	8	(14)	3	(6)	3	(6)	14	(9)
Other responses	3	(5)	3	(6)	—	(—)	6	(4)
Total substantive responses	79	(—)	69	(—)	71	(—)	219	(—)
No answer	1	(2)	6	(13)	—	(—)	7	(5)

[a] Column percents appear in parentheses and are based upon the number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 42

Probation Officers' Areas of Influence Over Sentencing

Area of Influence	Respondent Type							
	AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Preparing the report, providing information; independent analysis	11	(20)	2	(4)	16	(34)	29	(19)
Providing information to the court	14	(25)	14	(29)	20	(43)	48	(32)
Private interaction with the judge	5	(9)	5	(10)	1	(2)	11	(7)
Determining appropriate guideline application	39	(70)	26	(54)	21	(45)	86	(57)
Making sentencing recommendations	13	(23)	11	(23)	15	(32)	39	(26)
Interviewing the defendant	3	(5)	—	—	2	(4)	5	(3)
POs have little or no influence	—	—	3	(6)	3	(6)	6	(4)
Other responses	—	—	—	—	1	(2)	1	(1)
Total substantive responses	85	(–)	61	(–)	79	(–)	225	(–)
No answer/unresponsive	2	(4)	5	(10)	—	—	7	(5)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 43

Judges' Areas of Control Over Sentencing

Area of Control	Respondent Type: AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Guideline application	15	(27)	—	—	10	(21)	25	(17)
Fact finding (unspecified)	8	(14)	3	(6)	4	(9)	15	(10)
Dispute resolution	8	(14)	6	(13)	6	(13)	20	(13)
Deciding where (within the range) to sentence	16	(29)	10	(21)	6	(13)	32	(21)
Ability to depart	15	(27)	19	(40)	14	(30)	48	(32)
Acceptance of plea	2	(4)	3	(6)	10	(21)	15	(10)
Substantial assistance	2	(4)	4	(8)	1	(2)	7	(5)
Guideline manipulation	4	(7)	2	(4)	—	—	6	(4)
Other responses	1	(2)	2	(4)	—	—	3	(2)
Total substantive responses	71	(—)	49	(—)	51	(—)	171	(—)
No answer; unresponsive	4	(7)	11	(23)	8	(17)	23	(15)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

some plea negotiations apparently extend beyond the formal avenues provided by the guidelines to include charge reductions and agreements with respect to application of guideline factors. This practice, together with the issue of substantial assistance departures, are areas that warrant continued careful monitoring by the Commission and the Department of Justice.

In terms of the interaction between sentencing guidelines and plea negotiations, two of the most important issues are the incentives to plead (or negotiable areas under the guidelines), and whether the plea agreement adequately reflects the seriousness of the actual offense behavior. Concerning the incentive to negotiate a plea, at least one-third of the prosecutors interviewed identified either a motion for a departure based upon substantial assistance, a recommendation for awarding acceptance of responsibility, or a recommendation for a sentence at the low end of the guideline range (or, less often, a specific sentence) as the most important incentives they can offer in negotiating a plea. For the most part, defense attorneys agree with this assessment, although they place more emphasis on dismissing counts or being allowed to plead to a reduced charge and are less likely to see acceptance of responsibility as an incentive.

The issue of whether negotiated pleas reflect the total offense behavior is difficult to assess. The interview data provide respondents' perceptions as to estimates of the number or proportion of pleas that fail to reflect all readily provable offense conduct. The most that can be said is that some prosecutors in some situations will accept a plea to less than the total offense behavior. Evidentiary problems aside, about one-fourth of prosecutors interviewed indicate they sometimes will not charge all known criminal behavior if the offender is cooperating with authorities in the investigation of other offenders or if the resulting guideline range appears to over-sanction the offense conduct (*e.g.*, offenders with a limited role in the offense).

It is clear from the interviews that charging and plea negotiation practices vary across sites. While there appear to be cases in each site in which offenders are allowed to plead to less than the most serious, readily provable offense, this practice appears to be routine in only one of the sites studied, the non-randomly selected site chosen as a representative of large districts with relatively high departure rates. In this site, the judges appear to be strongly opposed to the guidelines and, as a matter of practice, have endorsed a system in which guideline calculations are based solely on the facts outlined in the plea agreement. Probation officers at this site report that they attempt to apply the guidelines based on their own independent assessment of the facts, but typically are overruled by the judges who generally accept the guideline calculations from the plea agreement. Another indication of the uniqueness of this site is that five out of seven prosecutors interviewed here stated that they are willing to accept a plea reflecting less than the total offense behavior if they believe the guideline sentence to be inappropriate. While the numbers are small, this is by far the highest proportion in any of the sites visited.

The other 11 sites are less extreme. Prosecutors and probation officers in four of the sites reported some disagreements over application of the relevant conduct guideline. Prosecutors complain that probation officers are sometimes overly aggressive in applying relevant conduct; in other cases, probation officers say prosecutors withhold important information from them. In two sites (including one in which reportedly there are conflicts between prosecutors and probation officers over relevant conduct), judges are divided over the application of the guidelines. Judges in each of the sites reportedly accept plea agreements without question, prompting probation officers to complain that these judges are "manipulating" the guidelines.

There do not appear to be any consistently recurring disputes between prosecutors and probation officers over the application of relevant conduct in the other five sites. The judges in these sites generally appear committed to advancing the goals of the guidelines system and typically review

plea agreements to ensure that the agreements adequately reflect the seriousness of the offense behavior.

There are some differences among the sites in the use of fact stipulations in plea agreements, binding plea agreements, and pre-indictment pleas. While these are potential sources of abuse on the part of prosecutors, the fact that they are used is not in itself evidence of abuse. In general, their use appears to be a continuation of accepted pre-guidelines practice.

Within the guideline structure, charging and plea practices have a more visible impact, for some types of cases, on the severity of a defendant's punishment than under the previous indeterminate sentencing system. Prior to institution of the guidelines, the sentencing judge was bound only by the statutory maximum for the charges of conviction, while the U.S. Parole Commission determined the amount of time to be served based on its independent assessment of the seriousness of the defendant's actual offense conduct and extensiveness of criminal history.

Under the current determinate guidelines system, the potential exists for closer association between charging and plea practices and sentence severity than in the former indeterminate sentencing system. This is particularly true for offenses such as bank robbery that are treated by the guidelines as separate and distinct instances of criminal conduct. Although the relevant conduct guideline takes into account criminal behavior beyond the elements of the offense of conviction for all offenses, plea negotiation practices and, in the case of separate and distinct offenses, charging practices by the prosecutor have the potential to influence the applicable guideline range.

In many ways, the data suggest that judges and attorneys attempt to make charging and plea practices under the guidelines mirror similar practices under the pre-guidelines system. Rather than relying exclusively on tools available under the guidelines system (*e.g.*, using a motion for substantial assistance to reward a cooperating offender), judges and court practitioners are tempted to limit available information so as to constrain sentencing exposure under the guidelines for that cooperating offender. In general, the court reaches the same result using either method; however, limiting sentencing information tends to keep the plea process behind closed doors, whereas using the visible tools available through open disclosure in court allows for monitoring of court practices and review upon appeal.

Courts may view the plea negotiation process as outside the confines of their responsibilities, and for that reason be reluctant to disturb an agreement reached by the parties. In fact, it is interesting to note that nearly three-fourths of the judges interviewed (30) indicated that they accept plea agreements when presented, rather than defer acceptance until they have reviewed the presentence report. Moreover, approximately two-thirds of the judges (28) indicated that they felt bound to honor the terms of plea agreements. These responses indicate a reluctance on the part of some judges to disrupt the plea process, perhaps even in cases where the ability of the plea to reflect the seriousness of the offense is in question.

In summary, the implementation study of charging and plea practices portrays a system in transition. Judges, prosecutors, and defense attorneys are experimenting with methods of operating within the structure of sentencing guidelines. That experimentation period is in no way complete and suggests the importance of continued monitoring of the plea negotiation process.

Statements of Reasons: Court statements of sentencing reasons are essential both to the process of appellate review of sentences and to the Commission's multiple purposes in reviewing guideline application. They represent one important part of Congress' plan for increasing accountability in the sentencing process. Despite the importance of statements of reasons for guideline

implementation and system improvement, however, some courts do not provide justification for sentencing decisions adequate for the purposes of appellate review. Additionally, there has been some persistent reluctance to submit statements of sentencing reasons to the Commission despite the clear directive in the statute. It should be recognized that over time, as the courts of appeals have clarified their needs and as the Commission has worked with the Administrative Office to simplify the reporting process, court compliance with requirements for statements of reasons has improved. Nevertheless, some districts continue to have inordinately low reporting rates. This hinders the Commission's work, including its ability to report accurately important guidelines system indicators (*e.g.*, departure rates) for which statements of reasons are essential.

Departures: Properly understood and used, a court's departure authority is a critical component in the successful implementation of the guidelines system. Departures are recognized by the statute and guidelines as necessary and appropriate in certain cases in which an important factor is not reflected in the guidelines that "should result" in a different sentence. Concomitantly, departures are central to the improvement of the guidelines system; hence, the Commission is continuously engaged in monitoring, analyzing, and appropriately responding to the exercise of court departure authority.

With respect to substantial assistance, the interview and survey responses suggest that variations in both the criteria used by prosecutors in determining whether to make the motions and the extent of the departures may require the Department of Justice and the Commission to carefully monitor and perhaps address these issues in the future.

The implementation studies and the body of departure case law that has developed to date suggest that court departure authority is not uniformly understood or exercised by sentencing judges. A categorical unwillingness to depart or a departure on questionable grounds may reflect, in part, a judicial disagreement with either the overall philosophy and purposes of the guidelines or with the appropriateness of a guidelines sentence in an individual case. The courts of appeals have developed a sophisticated body of case law to guide sentencing judges in their departure decisions, reflecting an ongoing process that should lead to more uniformity in this area.

Appellate Review: The innovation of sentence appellate review, while imposing additional demands on court resources, apparently has functioned well to date. Review of the appellate courts' interpretations of the major guidelines provisions reveals a high degree of uniformity among the circuits, with some important exceptions. A body of sentencing law, notably similar among circuits in most respects, has quickly developed. The Commission has benefitted from this evolving body of appellate law and has begun to address significant inter-circuit conflicts in guideline interpretation on a selective basis.

The empirical data show that while defendants have availed themselves of the newly-created statutory right to appeal their guideline sentence, a high percentage of the time they have a relatively low overall success rate. On the other hand, the government has appealed very selectively with a moderate degree of success (*see* Tables 76-78).

Overall, appeals are taken by either defendants or the government in only a small proportion of all criminal cases. Appeals based exclusively on sentencing issues, however, are a substantial proportion of all appeals for both the defense (1,358 or 33%) and the government (58 or 62%). On the whole, the Supreme Court of the United States and the courts of appeals have strongly confirmed that the sentencing guidelines pass constitutional muster. The Supreme Court rejected the constitutional challenges to the Sentencing Reform Act and establishment of the Commission on the issues of excessive delegation of power and separation of powers in Mistretta v. United States, 488

Table 76

Appeals Initiated by Defendants and U.S. Attorneys

Type	Appeals Initiated			
	Defendant		U.S. Attorney	
	N	(%)[a]	N	(%)[a]
Sentence	1358	(32.7)	58	(61.7)
Conviction	601	(14.5)	4	(4.3)
Conviction and sentence	2191	(52.8)	32	(34.0)
Total	4150	(100.0)	94	(100.0)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission Monitoring Data File, January 18, 1989 to September 30, 1989; Administrative Office of the U.S. Courts, Appeals Data File.

Table 77

Disposition of Appeals Initiated by Defendants and U.S. Attorneys

Type	Appeals Disposed			
	Defendant		U.S. Attorney	
	N	(%)[a]	N	(%)[a]
Affirmed, enforced	2758	(84.4)	28	(39.4)
Reversed, vacated	182	(5.6)	27	(38.0)
Affirmed in part and reversed in part	133	(4.1)	4	(5.6)
Remanded	74	(2.3)	7	(9.9)
Other dismissed	120	(3.6)	5	(7.0)
Total	3267	(100.0)	71	(100.0)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission Monitoring Data File, January 18, 1989 to September 30, 1989; Administrative Office of the U.S. Courts, Appeals Data File.

Table 78

Appeals by Type, Disposition, and Appellant

Type and Disposition	Appellant			
	Defendant		U.S. Attorney	
	N	(%)[a]	N	(%)[a]
Sentence				
Affirmed, enforced	773	(77.8)	19	(40.4)
Reversed, vacated	82	(8.3)	21	(44.7)
Affirmed in part and reversed in part	42	(4.2)	2	(4.3)
Remanded	37	(3.7)	1	(2.1)
Other (dismissed)	59	(5.9)	4	(8.5)
Total	993	(100.0)	47	(100.0)
Conviction or other non-sentencing issues and sentence				
Affirmed, enforced	1536	(86.6)	9	(39.1)
Reversed, vacated	84	(4.7)	5	(21.7)
Affirmed in part, and reversed in part	73	(4.1)	2	(8.7)
Remanded	28	(1.6)	6	(26.1)
Other (dismissed)	53	(3.0)	1	(4.3)
Total	1774	(100.0)	23	(100.0)
Conviction or other non-sentencing issues[b]				
Affirmed, enforced	449	(89.8)	—	(—)
Reversed, vacated	16	(3.2)	—	(—)
Affirmed in part, and reversed in part	18	(3.6)	—	(—)
Remanded	9	(1.8)	—	(—)
Other (dismissed)	8	(1.6)	—	(—)
Total	500	(100.0)	—	(—)

[a] Column percents appear in parentheses.

[b] The four government appeals in the conviction or other non-sentencing issues category are excluded from the table, thus reducing the total government appeals reversed or vacated by one. The information on appeal disposition is missing for the other three cases in this category.

SOURCE: U.S. Sentencing Commission Monitoring Data File, January 18, 1989 to September 30, 1989; Administrative Office of the U.S. Courts, Appeals Data File.

U.S. 361 (1989). Subsequently, the courts of appeals have uniformly rejected challenges to the sentencing guidelines under the due process clause.

Significant differences among the circuits exist in some areas of guideline interpretation. These differences no doubt result in some disparity in guideline application, pending resolution of issues by the courts themselves or the Commission. The Commission has sought to be attentive to its role in resolving guideline interpretation conflicts among circuits. Particularly when the appellate courts have indicated a possible problem with the language of the guidelines, the Commission has responded by revising the relevant guideline or commentary to make its intent more clear.

Guidelines sentencing, including the process of appellate review, is evolutionary. With a right to review in the appellate courts, defendants enjoy unprecedented opportunities to ensure that their sentences are correctly and reasonably determined. The government has the opportunity to vindicate the public's interest in an appropriate, correctly determined sentence in individual cases and to selectively pursue important issues of guideline application. The Commission actively monitors and analyzes the development of this "law of sentencing" to assess the areas in which guideline amendments, research, or legislative action may be needed. This process, in turn, enables the Commission to better accomplish its congressionally mandated task of reviewing and revising the guidelines as appropriate.

Summary

On the whole, the implementation study provides a snapshot of a system that, while still at an early stage in its development, is making definite, substantial progress toward successful guideline implementation. The rate and level of that progress is slower and more uneven in some jurisdictions, perhaps because of greater degrees of initial guideline resistance, case processing pressures, uniqueness, or other reasons. Yet, even in what some might describe as "problem" jurisdictions, there are many positive indications that a "settling-down" process is occurring. In many other jurisdictions where the guidelines were more readily accepted, one can see that, on the whole, the guidelines system is operating relatively smoothly. While sentencing-related aspects of the federal criminal justice system clearly remain in an adjustment stage at this time, the early picture described by the implementation study holds promise that, with time, the sentencing guidelines system will be able to achieve the ambitious goals Congress intended.

Disparity in Sentencing

Introduction

Congress directed the Commission to examine the impact of the guidelines on disparities in sentencing as part of the congressionally mandated evaluation. This section reviews the Commission's preliminary examination of sentencing disparity before and after guideline implementation. The impact evaluation of sentencing disparity seeks to determine whether the range of sentences for defendants with similar criminal records convicted of similar criminal conduct has narrowed as a result of guideline implementation.

Before turning to methodological issues, it is important to understand how the Commission defines disparity. The literature is replete with a number of different definitions, contributing to problems in categorizing and replicating prior research. In evaluating the guidelines, the Commission uses the definition of disparity provided by Congress. That is, disparity exists when defendants with similar criminal records found guilty of similar criminal conduct receive dissimilar sentences (28 U.S.C. § 991(b)(1)(B)).

I. Measurement Issues

The pre-guideline and guideline periods present quite different contexts for studying disparity in sentencing.[5] Prior to the guidelines, courts had virtually unfettered sentencing discretion, constrained only by the maximum or mandatory minimum set by statute. Sentences imposed by the courts were indeterminate, and as such were subject to reductions determined by the Parole Commission of up to two-thirds of the original sentence.

The federal criminal justice system, like other dynamic systems, changes regularly, but the change resulting from guideline implementation fundamentally altered judges' and practitioners' approaches to sentencing. Principally, with the abolition of parole, the sentence imposed under the guidelines essentially became the sentence served. With the sentence-altering potential of the Parole Commission eliminated, judges were required to impose "real time" sentences.

While concerns regarding the appropriateness and difficulties of comparing disparity under pre/post contexts remain, an impact evaluation would be incomplete without attempting such a comparison. The reader is cautioned, however, that fundamental decisions regarding basic sentencing premises undoubtedly have been altered in the transition from a discretionary to a more structured guidelines sentencing system. Accordingly, results should be interpreted keeping these contextual differences in mind.

The difficulty in identifying defendants found guilty of similar criminal conduct occurs in trying to attain consensus on what criminal conduct is "similar." While this issue can be debated, a logical measure for evaluating the impact of the guidelines is to take the factors shown to be

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[5]Technically, the "after" portion of the comparison will be limited to defendants sentenced after January 18, 1989, the date of the Mistretta decision. Because pre-Mistretta guideline data do not include courts that found the guidelines unconstitutional, the data including pre-Mistretta cases may be biased.

relevant pre-guidelines that were used to develop offense groupings under the guidelines.[6] Thus, for example, robberies are defined as similar when they match a set of specific characteristics that relate to the dollar loss, object of the robbery, weapon use, victim injury, role in the offense, and so forth. Similarly, thefts, embezzlement, and larceny are treated as similar when matched on dollar loss, degree of planning, role in the offense, and so forth.

For purposes of the evaluation, a compromise in this definition had to be made to accommodate the small sample size created by the truncated period permitted for the evaluation. The compromise matches on as many relevant factors as possible while still permitting a sufficient number of cases for analysis. Consequently, this approach limits the degree to which residual disparity might actually be further reduced under the guidelines if perfect matches were available in sufficient numbers.

The standard identified above defines the measurement for defendants convicted of similar criminal conduct. To address the second part of the disparity definition (*i.e.*, defendants with similar criminal records), the evaluation establishes a composite categorization that takes into account both the pre-guidelines' Parole Commission Salient Factor Score and the guidelines' Sentencing Commission Criminal History Category to permit a pre/post comparison.

Having established a method for distinguishing defendants convicted of similar criminal conduct and setting the parameters for distinguishing defendants with similar criminal records, it is important to discuss the limitations of acceptable variation in sentencing. Congress established parameters that defined the Commission's flexibility in determining sentencing ranges for similar defendants:

> *If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.*[7]

The evaluation, therefore, looks not only at the difference in sentence variation pre- and post-guideline implementation, but also considers whether the range of sentences complies with the 25-percent range identified by Congress.

By abolishing parole and reducing the deduction for good time, the Sentencing Reform Act laid the foundation for "truth in sentencing" (*i.e.*, the sentence imposed should reflect the sentence served). As a first step, therefore, the impact evaluation compares the sentences actually imposed by the court pre-guidelines and guidelines for similar defendants convicted of similar offenses.

The second measure of sentence length, time served (or to be served) in prison, is more difficult to define. Some of the defendants in the study, sentenced in the pre-guideline period, have not

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[6]The Commission's past practices study analyzed approximately 10,000 pre-guideline cases and constructed similar groupings based on decisions by judges. Thus, the groupings identified as similar under the guidelines have an empirical base in pre-guideline practice. For further explanation, *see* Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883, 913-39 (1990); Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 8-14, 18-20, 28-31 (1988).

[7]28 U.S.C. § 994(b)(2).

served their entire sentences, and consequently actual time served is not available. An alternative measure is "expected time to be served"; that is, the amount of time a defendant can expect to spend in prison at the time of sentencing. The first possible release date, the presumptive parole date established by the Parole Commission for sentences of one year or more, can serve as a reasonable, albeit imperfect, measure for establishing expected time to be served for pre-guidelines sentences.[8]

The presumptive parole date represents one usable measure of the expected time to be served without consideration of offenders' misconduct while in prison. Similarly, guideline sentences imposed, less the maximum amount of credit for good behavior, can represent the expected time that a convicted offender will have to spend in prison for the convicted offense.[9]

The downside of using an expected "time to be served" measure is that it is likely to result in some distortion of pre-guideline sentences in the direction of assuming they were shorter in length than might otherwise be the case. Nevertheless, this seems the most strategic way to proceed. Because the spread of sentences pre-guidelines may be understated due to the choice of measure, this potential pre-guideline reduction should be kept in mind in comparing sentence spread pre- and post-guidelines.

II. Methodology

The impact portion of the disparity study examines four major offense types: bank robbery, cocaine distribution, heroin distribution, and bank embezzlement. These categories were selected to ensure adequate samples at the aggregate level and to examine offense types that represent a varied cross-section of federal crimes (*i.e.*, street crimes, white-collar crimes, and drug offenses) that make up a large proportion of the federal caseload.

Data are drawn from FPSSIS,[10] an augmented FPSSIS dataset constructed by the Commission representing offenders sentenced in 1985, the Commission's guidelines sentence monitoring system, and the Federal Bureau of Prisons. A case, defendant, or offender represents a single sentencing event for a single defendant. Multiple defendants in a single sentencing event are treated as separate cases. If an individual defendant is sentenced more than once during the time period, each sentencing event is identified as a separate case.

The Administrative Office of the U.S. Courts collected sentencing factors as part of its FPSSIS data collection effort until September 30, 1990. These factors were incorporated in FPSSIS to assist the Commission with its development of guidelines and their collection proved time-consuming for

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[8]Pre-guideline sentences of one year or less receive reductions for good time; if guideline sentences were for one year or less, the sentence imposed serves as the expected time to be served.

[9]In their evaluation of the Minnesota Guidelines, the Minnesota Sentencing Guidelines Commission calculated the "duration" of pre-guidelines, indeterminate sentences on the basis of "target release date decisions" made by the Minnesota Parole Commission, less good-time -- in essence, the same strategy employed here. Minnesota Sentencing Guidelines Commission, The Impact of the Minnesota Sentencing Guidelines 27 (1984).

[10]Federal Probation Sentencing and Supervision Information System of the Administrative Office of the U.S. Courts.

probation officers. Through its monitoring effort, the Commission collects similar information on defendants sentenced under the guidelines.

The elimination of this FPSSIS data collection means that several sentencing variables pre-guidelines and guidelines might have slightly different meanings. In developing measures for the analyses, every attempt has been made to make the variables comparable, and in some cases, pre-guideline and guideline variables have been recoded from original case documents to ensure their comparability.

The datasets contain information on pre-guideline defendants sentenced during fiscal year 1985 compiled in preparation for the Commission's past practices study prior to guidelines drafting. These data predominantly come from the Administrative Office of the U.S. Courts, with special data collection by the Commission to augment the existing dataset. Because the constitutional challenges to the guidelines delayed nationwide implementation for 15 months, there are far fewer guideline cases available for analysis than originally anticipated. Therefore, in order to increase the sample size, the guideline dataset for bank robbery, bank embezzlement, and heroin distribution offenses covers more than one fiscal year (*i.e.*, offenders sentenced between January 19, 1989, and September 30, 1990).

The cocaine study uses a different dataset. The Anti-Drug Abuse Act of 1986 set equivalencies for various types and amounts of drugs, and in so doing established different equivalencies for powder cocaine and cocaine base. Data available through FPSSIS do not distinguish between powder cocaine and cocaine base (crack). The guidelines incorporated the statutory equivalencies by equating one unit of cocaine base to 100 units of cocaine powder (*see* U.S.S.G. §2D1.1). For the evaluation study, the Commission's Monitoring Unit undertook a special data collection effort that produced a file identifying the particular type of cocaine. Consequently, the cocaine dataset represents a much shorter timeframe, from September 1990 to December 1990. Augmented FPSSIS serves as the pre-guideline data source for the sample of cocaine distribution cases.

Each dataset represents single counts of conviction, or multiple counts that generally would not enhance the sentence either pre-guidelines or guidelines. For example, a conviction on three counts of embezzlement would be included because under the guidelines it does not affect the guideline range whether the defendant was convicted on one or three counts. Similarly, conviction on a single or multiple counts of embezzlement pre-guidelines, while providing the offender with added statutory exposure, rarely resulted in additional time at sentencing. Also, a substantive count and an aiding and abetting count to the substantive count are included. Cases that involve additional counts that enhance the sentence (*e.g.*, a second bank robbery or a conviction under 18 U.S.C. § 924(c)) are eliminated from the sample.

The bank embezzlement dataset contains 1,143 cases (536 pre-guidelines and 607 guidelines); the bank robbery sample 1,376 cases (503 pre-guidelines and 873 guidelines); the heroin distribution sample 1,489 cases (542 pre-guidelines and 947 guidelines); and the cocaine distribution sample 1,944 cases (332 pre-guidelines and 1,612 guidelines).

A. Statistical Analyses

The statistical analyses focus on four offense categories and consist of a distributional analysis, with various measures of dispersion, and a test of statistical significance.

1. Distributional Analysis

This analysis focuses on sentence distribution and addresses the following question: Does the range of sentences for defendants with similar criminal records convicted of similar criminal conduct narrow following guideline implementation?

The analysis considers the distribution of sentences imposed by the court and a measure of time to be served by the offender both pre-guidelines and guidelines. Descriptive results are presented in terms of the minimum and maximum of the range, the median, mean, interquartile range, and variance. The analysis tests for statistically significant changes in the sample variance to determine whether the distribution of sentences has narrowed significantly as a result of guideline implementation.

2. Tests of Statistical Significance

The statistical analysis of the variation in imposed prison sentences or time served involves determining whether the variance of either quantity has decreased significantly under the guidelines. The usual test of this hypothesis involves forming the ratio of the sample variances and looking up the value for this ratio in a table of the F-distribution.

III. Findings

A. Distributional Analysis for Bank Robbery

Bank robbery represents a traditional federal offense that involves aspects of what might be called a "street crime." Based on actual offense conduct, this analysis groups offenders into relevant subcategories of similar offenders with similar offense characteristics. For example, research shows that defendants who possess a weapon during a bank robbery seldom discharge or otherwise use it; therefore, the few cases that involve weapon use or discharge are eliminated from the pre-guideline and guideline samples.

In constructing a sample of similar offenders convicted of similar bank robberies, the data were subdivided into offenders:

- who took less than $10,000;
- who either acted alone or were equally culpable with other participants;
- who did not injure anyone;
- who did not cooperate with authorities;
- who pleaded guilty as opposed to going to trial;
- who robbed only one bank in each case;
- who had little or no prior criminal record for the first sample and a moderately serious criminal record in the second sample; and
- who were not career offenders as defined by statute.

To further distinguish each sample, the Commission subdivided each group into offenders who had no weapon and those who had a weapon but did not use it. Although departures from the guideline range represent statements by the court that the cases are atypical, the Commission cannot identify comparable cases during the pre-guidelines period and, therefore, departure cases, other

than those for substantial assistance,[11] remain in each sample.[12] Categorizing offenders into similar offense and offender characteristics results in small sample sizes; therefore, results from this analysis may be affected and should be interpreted with caution.

Because the bank robbery sample becomes quite small as offenders and offenses become more similar, only the two categories of criminal history that occurred most frequently were analyzed. The first criminal history category represents offenders with very little or no criminal history. The second category represents offenders with a moderately serious criminal history (*i.e.*, offenders with at least one serious criminal conviction and other minor criminal convictions).

"Box and whisker" plots provide a graphic display of changes in the range of sentences from pre-guideline to guideline cases. The "box" represents the middle 80 percent of offenders and the "whiskers" represent 10 percent of offenders at the high and low ends of the sentencing range. Figures 4 and 5 illustrate the sentencing ranges for similarly-situated bank robbery offenders; Figure 4 represents the first criminal history category and Figure 5 represents the second, more serious, criminal history category (*i.e.*, Criminal History Category III). Each figure contains two sets of box and whiskers: the first represents offenses with no weapon present, while the second represents offenses in which a weapon was possessed and/or brandished. The first two plots in each set represent the range of sentences imposed by the court. The second two plots represent the range of expected time to be served for pre-guideline and guideline offenders. Tables 81 and 82 present the same information in tabular form, with additional measures of dispersion.

For the first category of similarly situated bank robbery offenders, offenders with little or no criminal history who committed the offense without a weapon (*see* Figure 4), sentences imposed by the court for pre-guideline offenders (n=17) range from zero months (probation) to 120 months; sentences imposed by the court for offenders under the guidelines (n=80) range from zero to 60 months, a dramatic reduction. The first box of pre-guideline sentences imposed by the courts shows that the middle 80 percent of pre-guideline offenders receive sentences between four and 120 months, with a median sentence of 24 months and an average or mean sentence of 42.2 months. The second box of guideline sentences imposed by the courts shows that the middle 80 percent of guideline offenders receive sentences between 21 and 42 months, with a median sentence of 29 months and a mean of 29.5 months. Subtracting the sentence at the bottom of the box from the sentence at the top of the box results in a decrease in the range of sentences imposed by the court for the middle 80 percent of offenders from 116 months pre-guidelines to 21 months under the guidelines.[13] In terms of statistical significance, the reduction in variance following guideline implementation is statistically significant at the .0001 level.

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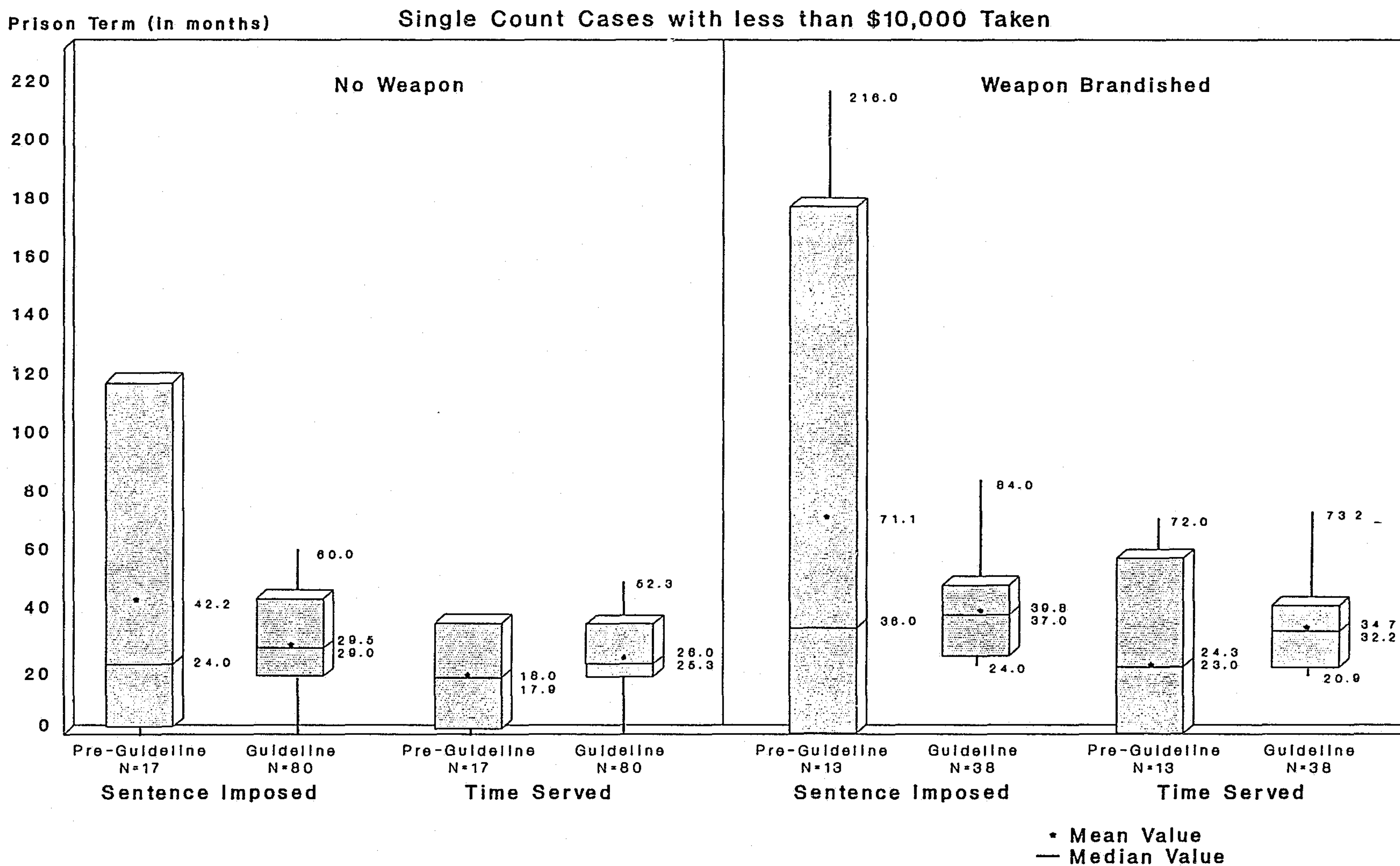
[11]Through augmented FPSSIS, the Commission was able to provide an approximate measure of cooperation pre-guidelines. This made it possible to eliminate this special group of offenders from the similar samples.

[12]For comparative purposes, the Commission provides the range of sentences imposed and time to be served after departures have been removed for guideline cases.

[13]If departure cases are removed from the guideline sample, the range of sentences is further reduced under the guidelines from zero to 60 months including departures to 18 to 51 months excluding departures (n=67). For the middle 80 percent of guideline offenders excluding departures, the range is 24 to 42 months, not substantially different from the middle 80-percent range of guideline offenders including departures.

Figure 4
DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE BANK ROBBERY CASES
Offenders in Criminal History Category I



SOURCE: U.S Sentencing Commission

Table 81

BANK ROBBERY/NO CRIMINAL HISTORY DOLLAR AMOUNT < $10,000 (n = 148)

Part A — No Weapon

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 17)	Guideline (n = 80)	Pre-Guideline (n = 17)	Guideline (n = 80)
Minimum	0.00	0.00	0.00	0.00
Maximum	120.00	60.00	40.00	52.27
Interquartile range	78.00	9.00	25.28	7.84
90th percentile - 10th percentile	116.00	21.00	36.20	16.98
Mean	42.24	29.45	17.98	25.99
Median	24.00	29.00	17.94	25.26
Sample Variance	1838.44	96.66	161.82	70.92
F statistic p-value	19.02	< .0001	2.22	.0260

Part B — Weapon Possessed/Brandished

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 13)	Guideline (n = 38)	Pre-Guideline (n = 13)	Guideline (n = 38)
Minimum	0.00	24.00	0.00	20.91
Maximum	216.00	84.00	72.00	73.17
Interquartile range	144.00	13.00	30.00	11.33
90th percentile - 10th percentile	180.00	24.00	60.00	20.91
Mean	71.08	39.79	24.30	34.74
Median	36.00	37.00	23.00	32.23
Sample Variance	6461.08	135.85	577.42	103.64
F statistic p-value	47.56	< .0001	5.57	.0004

Source: U.S. Sentencing Commission Evaluation Study

The analysis turns next to the question of estimated time to be served in recognition of the fact that solely analyzing sentence imposed by the court ignores some of the pre-guideline sentencing disparity that presumably was addressed by the Parole Commission. While parole guidelines could not correct for disparities in the "in" (prison)/"out" (probation) decision, they presumably responded to the time served question.

An examination of the second set of plots for offenders with little or no criminal history who committed bank robberies without a weapon shows that the time to be served by pre-guideline offenders (n=17) ranges from zero to 40 months, while the guideline offenders' (n=80) time to be served ranges from zero to 52.3 months, an apparent widening of the range under the guidelines. However, the middle 80 percent of pre-guideline offenders' time to be served ranges from four to 40 months, with a median of 17.9 months and a mean of 18 months. The middle 80 percent of guideline offenders' time ranges from 21 to 38 months, with a median of 25.3 months and a mean of 26 months. This represents a substantial decrease in the range of time to be served for the middle 80 percent from 36 months pre-guidelines to 17 months under the guidelines, a substantial reduction in the middle 80-percent range of time to be served.[14] Moreover, the reduction in variance is significant at the .05 level. Again, under the guidelines, for the vast majority of cases, there is a dramatic reduction in disparity.

For offenses in which a weapon was possessed and/or brandished (*see* Figure 4), sentences imposed by the court pre-guidelines (n=13) range from zero to 216 months, while sentences imposed for guideline offenders (n=38) range from 24 to 84 months. The middle 80 percent of pre-guideline offenders receive sentences ranging from zero to 180 months, with a median sentence imposed of 36 months and a mean of 71.1 months. Sentences imposed for the middle 80 percent of guideline offenders range from 27 to 51 months, with a median sentence imposed of 37 months and a mean of 39.8 months. As before, this represents a substantial decrease in the range of time to be served for the middle 80 percent, from 180 months pre-guidelines to 24 months under the guidelines.[15] Again, this substantial reduction in variance is statistically significant at the .0001 level.

A comparison of time to be served tells a similar story, with ranges decreasing considerably following guideline implementation. Time to be served for pre-guideline offenders (n=13) ranges from zero to 72 months, while time to be served for guideline offenders (n=38) ranges from 20.9 to 73.2 months. The middle 80 percent of pre-guideline offenders' time to be served ranges from zero to 60 months, with a median time of 23 months and a mean of 24.3 months. For guideline offenders, the middle 80 percent of time to be served ranges from 23.5 to 44.2 months, with a median time of 32.2 months and a mean of 34.7 months. Again, this represents a substantial

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[14]The range of time to be served for guideline offenders excluding departures (n=67) reduces to 21 to 44 months, a substantial reduction from the zero-to-52-month range for guideline offenders including departures. The range for the middle 80 percent is not reduced by eliminating departure cases.

[15]The range of sentences imposed is further reduced by eliminating departure cases from the guideline sample. Excluding departures (n=32), the range is 25 to 60 months, compared to a range of 24 to 84 months for guideline sentences including departures. The middle 80-percent range is not reduced further.

decrease in the range for the middle 80 percent, from 60 months pre-guidelines to 21 months under the guidelines.[16] The reduction in variance is statistically significant at the .05 level.

For offenders with little to no criminal history convicted of similar bank robberies, the distributional analysis shows that not only have the ranges of sentences imposed by the court under the guidelines narrowed sharply following guideline implementation, but the ranges of time to be served have narrowed considerably as well. The guidelines have reduced disparity beyond the leveling effect of the parole guidelines, even when departures are included.

The Commission examined similarly situated bank robbery offenders pre-guidelines and guidelines to test whether this narrowing effect holds for offenders with more serious criminal histories. Pre-guideline offenders with a moderately serious criminal history who committed bank robberies without a weapon (n=25) receive sentences imposed by the court that range from zero months to 180 months, while sentences imposed by the court for guideline offenders (n=57) range from 18 to 131 months (*see* Figure 5). The first box shows that the middle 80 percent of pre-guideline offenders receive sentences between six and 144 months, with a median sentence of 72 months and a mean of 78.6 months. The second box shows that the middle 80 percent of guideline offenders receive sentences between 30 and 56 months, with a median sentence of 37 months and a mean of 42 months. A comparison of the middle 80-percent range for pre-guideline and guideline offenders shows a decrease in this range from 138 months pre-guidelines to 26 months under the guidelines for sentences imposed by the court.[17] The reduction in variance under the guidelines is statistically significant at the .0001 level.

The second set of plots for offenders with a moderately serious criminal history who committed bank robberies without a weapon reports the range of time to be served by pre-guideline offenders (n=25) as zero to 60 months, while the time to be served for guideline offenders (n=57) ranges from 16 to 114.1 months, an apparent increase in the range under the guidelines. However, an examination of the middle 80 percent of offenders tells a more important story. The middle 80 percent of pre-guideline offenders' time to be served ranges from five to 54 months, with a median time of 42 months and a mean of 38.3 months. The middle 80 percent of guideline offenders' time ranges from 26 to 49 months, with a median time of 32.2 months and a mean of 36.9 months. This represents a decrease in the range of time to be served for the middle 80 percent from 49 months pre-guidelines to 23 months under the guidelines, a substantial reduction in the range of time to be served following guideline implementation.[18] At this more serious criminal history level, the reduction in variance is not statistically significant.

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[16]The range of time to be served for guideline offenders excluding departures is 22 to 52 months, a further reduction from the 21-to-73-month range for guideline offenders including departures. The middle 80-percent range of time to be served for guideline offenders excluding departures reduces minimally.

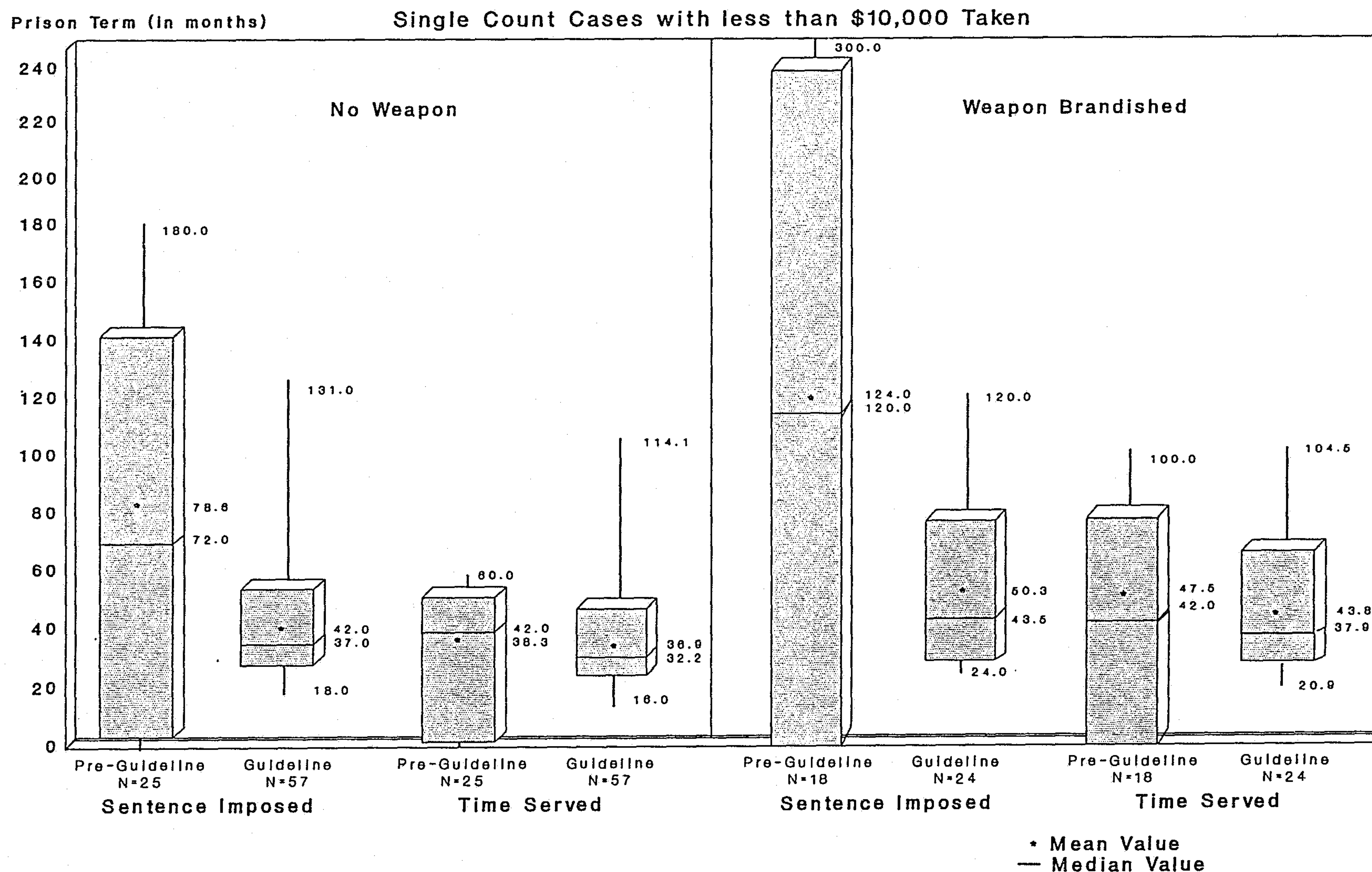
[17]Eliminating departure cases (n=51) does not reduce further the guideline range including departures, and only minimally reduces the middle 80-percent range for these bank robbers with moderately serious criminal histories.

[18]Eliminating departure cases (n=51) from the guideline sample reduces minimally the range (22 to 114 months) from the range for the guideline sample including departures (16 to 114 months). The middle 80-percent range is not reduced by removing departures.

Figure 5

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE BANK ROBBERY CASES

Offenders in Criminal History Category III



SOURCE: U.S Sentencing Commission

Table 82

BANK ROBBERY/CRIMINAL HISTORY CATEGORY III
DOLLAR AMOUNT < $10,000 (n = 124)

Part A — No Weapon

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 25)	Guideline (n = 57)	Pre-Guideline (n = 25)	Guideline (n = 57)
Minimum	0.00	18.00	0.00	15.68
Maximum	180.00	131.00	60.00	114.12
Interquartile range	60.00	12.00	25.00	10.45
90th percentile - 10th percentile	138.00	26.00	49.28	22.65
Mean	78.56	42.02	38.29	36.87
Median	72.00	37.00	42.00	32.23
Sample Variance	2596.84	269.62	359.00	204.29
F statistic p-value	9.61	< .0001	1.76	.1616

Part B — Weapon Possessed/Brandished

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 18)	Guideline (n = 24)	Pre-Guideline (n = 18)	Guideline (n = 24)
Minimum	0.00	24.00	0.00	20.91
Maximum	300.00	120.00	100.00	104.53
Interquartile range	108.00	20.00	12.00	17.42
90th percentile - 10th percentile	240.00	48.00	80.00	41.82
Mean	124.00	50.25	47.49	43.77
Median	120.00	43.50	42.00	37.89
Sample Variance	5743.06	500.89	554.62	380.10
F statistic p-value	11.47	.0010	1.46	.2700

Source: U.S. Sentencing Commission Evaluation Study

For offenses in which a weapon was possessed and/or brandished (*see* Figure 5), sentences imposed by the court for these offenders with moderately serious criminal records pre-guidelines (n=18) range from zero to 300 months, while sentences imposed for guideline offenders (n=24) range from 24 to 120 months. The middle 80 percent of pre-guideline offenders receive sentences ranging from zero to 240 months, with a median sentence imposed of 120 months and a mean of 124 months. Sentences imposed for the middle 80 percent of guideline offenders range from 30 to 78 months, with a median sentence imposed of 43.5 months and a mean of 50.3 months. Again, this represents a decrease in the range of sentences imposed for the middle 80 percent from 240 months pre-guidelines to 48 months under the guidelines.[19] And, once more, this reduction in variance is statistically significant at the .05 level.

Finally, for pre-guideline offenders with moderately serious criminal records convicted of bank robbery in which a weapon was possessed and/or brandished (n=18), time to be served ranges from zero to 100 months, while post-guideline offenders' time to be served ranges from 20.9 to 104.5 months (n=24). The middle 80 percent of pre-guideline offenders' time to be served ranges from zero to 80 months, while the middle 80 percent of post-guideline offenders' time to be served ranges from 26 to 68 months. Like all other categories of bank robbery analyzed, the range of time to be served for the middle 80 percent substantially decreases for guideline cases; in this instance, from 80 months pre-guidelines to 42 months for guideline cases decided post-Mistretta.[20] Although some categories contain only a few cases, the ranges of sentences imposed by the court and time to be served by offenders decreases under the guidelines. For these similarly situated bank robbery offenders with moderately serious criminal records, disparity decreases considerably after guideline implementation, although the statistical test is not significant.

Summary: The data strongly suggest that in all matched categories similar offenders convicted of similar bank robberies receive dramatically more similar sentences under the guidelines than did comparable offenders pre-guidelines.

B. Distributional Analysis for Bank Embezzlement

Embezzlement serves as the impact evaluation's representative of a typical white-collar offense. For purposes of this analysis, similar offenders convicted of similar bank embezzlement include offenders:

- who acted alone;
- who planned the embezzlement (as opposed to committing a spontaneous theft);
- who did not cooperate with authorities; and
- who had little or no criminal history record.

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[19]The range of time to be served for guideline offenders excluding departures (n=21) is somewhat reduced from 24 to 120 months including departures to 30 to 120 months excluding departures. The middle 80-percent range of guideline offenders excluding departures is reduced by five months from the range of guideline offenders including departures.

[20]Again, eliminating departure cases does not reduce substantially the range of sentences for guideline offenders with more serious criminal histories (four-month reduction). The range of middle 80-percent guideline offenders excluding departures is reduced by that same four months.

Dollar loss assists in distinguishing among bank embezzlement cases; therefore, two categories of similar embezzlement offenses based on loss that include sufficiently large sample sizes are examined: 1) $10,000 - $20,000; and 2) $20,000 - $40,000.

For the first loss category, 27 pre-guideline offenders and 56 post-Mistretta guideline offenders embezzled between $10,000 - $20,000. For pre-guideline offenders, sentences imposed by the court range from zero to 48 months, while sentences imposed by the court for guideline offenders range from zero to 18 months (*see* Figure 6 and Table 83). The middle 80 percent of sentences imposed by the court for pre-guideline offenders ranges from zero to 12 months, with a median sentence imposed of zero and a mean of 4.3 months. For guideline offenders, the middle 80 percent of sentences imposed by the court ranges from zero to six months, with a median sentence imposed of four months and a mean of 3.8 months. This represents a six-month reduction in the range of sentences imposed by the court for the middle 80 percent, from 12 months pre-guidelines to six months under the guidelines.[21] The reduction in variance for similar offenders convicted of embezzlement with loss of $10,000 - $20,000 from pre-guidelines to guidelines is significant at the .05 level.

Time to be served for offenders convicted of embezzlement reveals a somewhat different pattern than bank robbery. This results primarily from the relatively short sentences imposed in the first instance. Congress directed that the Commission's guideline ranges could not exceed six months or 25 percent, whichever is greater. At the lower offense levels, the guidelines produce sentencing ranges from zero to six months. Additionally, Congress directed that sentences of less than 12 months would not be eligible for good conduct time, thus prohibiting changes to sentences imposed for these low level offenses. For pre-guideline offenders, time to be served ranges from zero to 16 months, with a similar zero to 16 month range for guideline offenders. For pre-guideline offenders, the middle 80 percent of time to be served ranges from zero to nine months, with a median sentence of zero months and a mean of 2.5 months. For guideline offenders, the middle 80 percent of time to be served ranges from zero to six months, with a median time of four months and a mean of 3.8 months. This represents a three-month reduction in the range of time to be served for the middle 80 percent, from nine months pre-guidelines to six months under the guidelines.[22] The reduction in variance is statistically significant at the .05 level.

The second category, representing embezzlements of between $20,000 - $40,000, consists of 36 pre-guideline offenders and 71 guideline offenders. Sentences imposed by the court for pre-guideline offenders range from zero to 60 months, while sentences imposed by the court under the guidelines range from zero to 30 months (*see* Figure 6 and Table 83). For pre-guideline offenders, the middle 80 percent of sentences imposed by the court ranges from zero to 24 months, with a median sentence imposed of one month and a mean of 6.2 months. The middle 80 percent of guideline offenders ranges from zero to ten months, with a median sentence imposed of six months and a mean of six months. This represents a decrease in range of sentences imposed for the middle

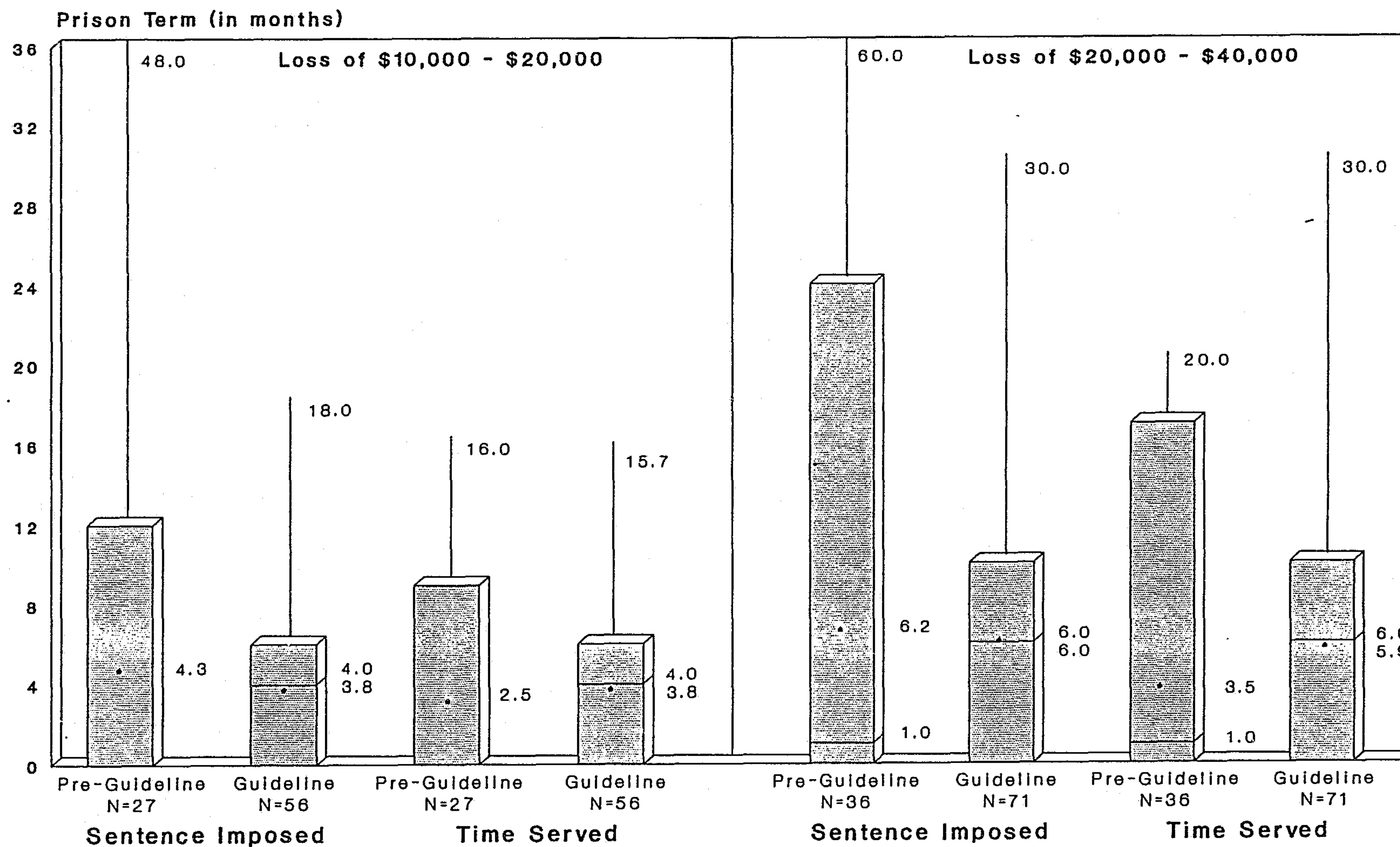
[21]Elimination of departure cases (n=46) from the guideline sample does not reduce further the range of sentence imposed under the guidelines including departures. The middle 80 percent of guideline offenders excluding departures ranges from four to eight months, a reduction of two months from the zero-to-six-month range for guideline offenders including departures.

[22]Eliminating departure cases does not reduce further the time to be served range for guideline offenders. The range for the middle 80 percent of guideline offenders is reduced two months by excluding departure cases.

Figure 6

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE EMBEZZLEMENT CASES

Offenders in Criminal History Category I



NOTE: Unless indicated, medians are 0.

SOURCE: U.S Sentencing Commission

• Mean Value

- Median Value

Table 83

BANK EMBEZZLEMENT/NO CRIMINAL HISTORY (n = 190)

Part A — $10,000 - $20,000 Loss

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 27)	Guideline (n = 56)	Pre-Guideline (n = 27)	Guideline (n = 56)
Minimum	0.00	0.00	0.00	0.00
Maximum	48.00	18.00	16.00	15.68
Interquartile range	6.00	0.00	4.72	0.00
90th percentile - 10th percentile	12.00	6.00	8.97	6.00
Mean	4.26	3.84	2.47	3.80
Median	0.00	4.00	0.00	4.00
Sample Variance	98.20	8.36	18.46	7.26
F statistic p-value	11.76 .0256		2.54 .0474	

Part B — $20,000 - $40,000 Loss

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 36)	Guideline (n = 71)	Pre-Guideline (n = 36)	Guideline (n = 71)
Minimum	0.00	0.00	0.00	0.00
Maximum	60.00	30.00	20.00	30.00
Interquartile range	6.00	5.00	4.72	5.00
90th percentile - 10th percentile	24.00	10.00	17.00	10.00
Mean	6.22	5.96	3.55	5.93
Median	1.00	6.00	0.95	6.00
Sample Variance	163.78	23.10	30.14	420.94
F statistic p-value	7.09 .0134		1.34 .2874	

Source: U.S. Sentencing Commission Evaluation Study

80 percent from 24 months pre-guidelines to ten months under the guidelines.[23] The reduction in variance is statistically significant at the .05 level.

Much the same pattern emerges from the analysis of time to be served in the $20,000 - $40,000 category. While the range of time to be served under the guidelines (0-30 months) is ten months wider than the range of time to be served pre-guidelines (0-20 months), the range for the middle 80 percent of offenders' time to be served under the guidelines is seven months (0-10 months) narrower than time to be served pre-guidelines (0-17 months).[24] This reduction in variance is not statistically significant.

Summary: The data suggest that there has been a reduction under the guidelines in both measures of range — sentence imposed and expected time to be served. However, perhaps a more important finding in the bank embezzlement analysis stems from an examination of the change in median sentences. The increase in the median sentence imposed and time to be served represents an important shift in sentencing patterns for embezzlement offenses. In addition to disparity being reduced, many more defendants convicted of embezzlement under the guidelines are receiving short sentences of imprisonment compared to pre-guideline practices in which more received probation.

C. Distributional Analysis for Heroin Trafficking

The Anti-Drug Abuse Act of 1986 requires that sentences for certain drug distribution, trafficking, manufacturing, importing, and exporting offenses be driven by the drug amounts. The statute prescribes mandatory minimum sentences corresponding to specified amounts of each major drug. Consequently, using drug amounts to distinguish similar offenses, the disparity analysis of heroin cases includes offenders:

- who trafficked in between 100 and 400 grams of heroin;[25]
- who did not possess a weapon in the commission of the offense;
- who did not cooperate with the government;
- who acted alone or were equally culpable with other participants; and
- who had little or no criminal history.

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[23]Eliminating departure cases (n=60) from the guideline sample reduces substantially the range of sentence imposed for offenders in this category. That is, it further reduces the range, from zero to 30 months for guideline offenders including departures to zero to 16 months excluding departures. The middle 80-percent range is reduced only minimally by excluding departures from the guideline sample.

[24]As with the sentence imposed range for these offenders, the elimination of departure cases from the guideline sample substantially reduces the range of time to be served, from zero to 30 months including departure cases to zero to 15 months excluding departure cases. Again, the middle 80-percent range for guideline offenders only minimally reduces time to be served compared to guideline offenders including departures.

[25]Small sample sizes for the categories defined by Congress prohibit analyses in all but one category. Categories for the pre-guideline sample resulted in less than ten offenders for most categories.

While statutorily-authorized departures for substantial assistance to the government have been removed from the guideline sample, other departures from the guideline range remain in the sample and can be seen primarily in the "whiskers," generally for the lower ten percent of offenders.

The pre-guideline sample of similar heroin offenders who distributed 100 to 400 grams, did not possess a weapon, did not assist authorities, were equally culpable, and had little or no criminal history consists of 40 offenders, while the guideline sample consists of 72 offenders (*see* Figure 7 and Table 84). Sentences imposed by the court for pre-guideline offenders range from zero to 180 months, while sentences imposed by the court for guideline offenders range from 15 to 97 months. The middle 80 percent of sentences imposed pre-guidelines ranges from zero to 78 months, with a median sentence of 36 months and a mean of 40.2 months. The middle 80 percent of sentences imposed under the guidelines ranges from 44 to 72 months, with a median sentence of 60 months and a mean of 58.1 months. This amounts to a decrease in the range of sentences imposed for the middle 80 percent from 78 months pre-guidelines to 28 months under the guidelines, more than a four-year reduction in the range of sentence imposed by the court.[26] This reduction in variance is statistically significant at the .0001 level.

For the pre-guideline offenders, time to be served ranges from zero to 60 months, while the guideline offenders' time to be served ranges from 13.1 to 84.5 months, an increase in the total range under the guidelines. However, the range decreases for guideline offenders when comparing the middle 80 percent. The middle 80 percent of pre-guideline offenders' time to be served ranges from zero to 43 months, with a median time to be served of 25.7 months and a mean of 22.4 months. The middle 80 percent of guideline offenders' time to be served ranges from 38.3 to 62.7 months, with a median time of 52.3 months to be served and a mean of 50.6 months. Therefore, the range of time to be served for the middle 80 percent has decreased from 43 months pre-guidelines to 24 months under the guidelines.[27] The reduction in variance is not statistically significant at the .05 level.

Summary: Small sample sizes prevent most comparisons of heroin offenders convicted pre-guidelines and guidelines. However, in the one group with a sufficiently large sample size, the results for defendants convicted of distributing between 100 and 400 grams of heroin match those for bank robbery: disparity is reduced under the guidelines for both sentences imposed and time

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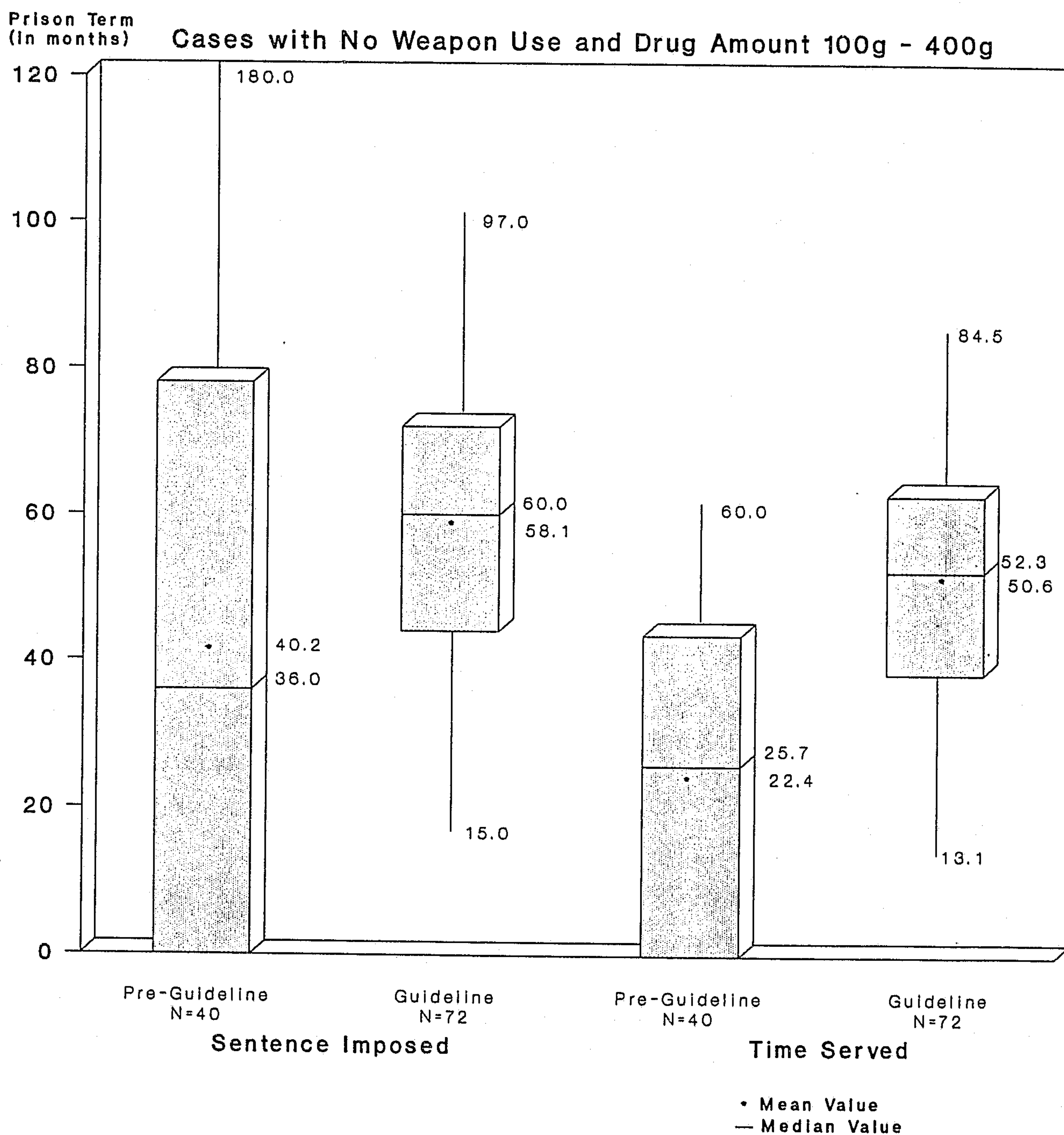
[26]Elimination of the departure cases (n=64) from the guideline sample results in a further reduction, a reduction at the low end of the sentencing range. For guideline defendants including departures, sentence imposed ranges from 15 to 97 months, while sentence imposed for guideline defendants excluding departures ranges from 36 to 97 months. The middle 80-percent range for guideline defendants excluding departures is reduced further from a range of 44 to 72 months including departures to a range of 51 to 72 months excluding departures.

[27]As with sentence imposed, the reduction in range of time to be served for guideline defendants excluding departures (n=64) occurs at the low end of the range; *i.e.*, time to be served for guideline defendants including departures ranges from 13.1 to 84.5 months, while time to be served for guideline defendants excluding departures ranges from 31.4 to 84.5 months. The middle 80-percent range for guideline defendants excluding departures reduces by six months at the low end to a range of 44 to 63 months.

Figure 7

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE HEROIN CASES
Offenders in Criminal History Category I



NOTE: Sample consists of defendants who acted alone or as an equal participant, and who provided little or no assistance to authorities.

SOURCE: U.S Sentencing Commission

TABLE 84

Heroin Distribution/No Criminal History (n = 112)

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 40)	Guideline (n = 72)	Pre-Guideline (n = 40)	Guideline (n = 72)
Minimum	0.00	15.00	0.00	13.07
Maximum	180.00	97.00	60.00	84.50
Interquartile range	30.00	12.00	16.54	10.45
90th percentile - 10th percentile	78.00	28.00	43.46	24.39
Mean	40.18	58.13	22.44	50.63
Median	36.00	60.00	25.73	52.27
Sample Variance	1613.84	169.94	210.48	128.96
F statistic p-value	9.50	< .0001	1.63	.0748

Source: U.S. Sentencing Commission Evaluation Study

to be served.[28] That range is reduced even further at the low end after departures have been removed from the guideline sample.

D. Distributional Analysis for Cocaine Trafficking

Congress distinguished between cocaine and cocaine base (crack) in the Anti-Drug Abuse Act of 1986 by setting the penalties for crack cocaine significantly higher than those for powder cocaine. Therefore, the cocaine analysis examines the distribution of sentences pre-guidelines and guidelines solely for offenses involving powder cocaine. As with the analysis involving heroin distribution, similar cocaine offenses principally represent specific drug amounts. The cocaine analysis is limited to a single category with reasonably high sample sizes. For this study, similar cocaine offenders convicted of similar offenses include offenders:

- who trafficked in between 500 grams and two kilograms of powder cocaine;
- who did not possess a weapon in the commission of the offense;
- who did not cooperate with the government;
- who acted alone or were equally culpable with other participants; and
- who had little or no criminal history.

The final sample of similar offenders convicted of similar cocaine trafficking offenses includes 44 pre-guideline offenders and 81 guideline offenders.

For pre-guideline offenders convicted of cocaine distribution of between 500 grams and two kilograms, sentences imposed by the court range from zero months to 108 months, while sentences imposed by the court under the guidelines range from 36 to 120 months (*see* Figure 8 and Table 85). The middle 80 percent of sentences imposed pre-guidelines range from 12 to 60 months, with a median sentence of 30 months and a mean of 31.7 months. For the guideline sample, the middle 80 percent of sentences imposed range from 53 to 70 months, with a median sentence of 60 months and a mean of 61.9 months. This represents a decrease in the range of sentence imposed for the middle 80 percent from 48 months pre-guidelines to 17 months under the guidelines. The reduction in sample variance is significant at the .05 level.

For pre-guideline offenders, time to be served ranges from zero to 46 months, while time to be served under the guidelines ranges from 31 to 104 months. For this middle 80 percent, time to be served pre-guidelines ranges from nine months to 30 months, with a median sentence of 22.4 months and a mean of 21 months. Under the guidelines, time to be served for the middle 80 percent ranges from 46 to 61 months, with a median sentence of 52.3 months and a mean of 54 months. This represents a reduction in the range of time to be served from 21 months pre-guidelines to 15 months under the guidelines.[29] The reduction in variance is not statistically significant.

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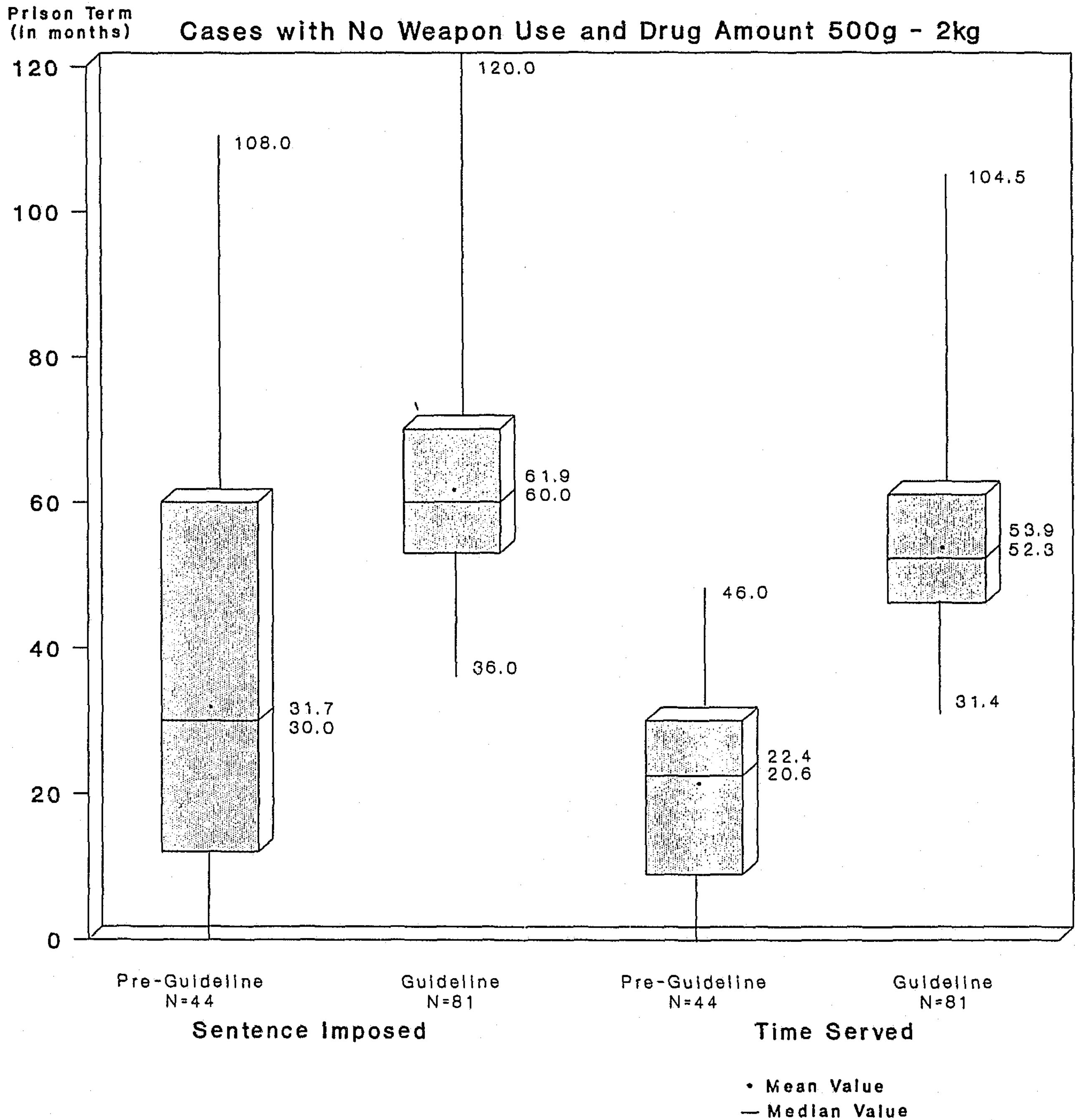
[28]Because the pre-guideline sample is drawn from data collected prior to the Anti-Drug Abuse Act of 1986, some of the leveling effect seen under the guidelines likely should be attributed to the mandatory minimum statutes contained in that legislation.

[29]Examination of the guideline sample excluding defendants (n=75) who received departure sentences shows that the range for the middle 80 percent drops to 52 to 63 months, making the reduction in range more dramatic, from 21 months pre-guidelines to 11 months under the guidelines. The reduction in variance is not statistically significant excluding departures.

Figure 8

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE COCAINE CASES
Offenders in Criminal History Category I



NOTE: Sample consists of defendants who acted alone or as an equal participant, and who provided little or no assistance to authorities.

SOURCE: U.S Sentencing Commission

Table 85

COCAINE DISTRIBUTION/NO CRIMINAL HISTORY (n = 119)

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 44)	Guideline (n = 81)	Pre-Guideline (n = 44)	Guideline (n = 81)
Minimum	0.00	36.00	0.00	31.36
Maximum	108.00	120.00	46.00	104.53
Interquartile range	18.00	3.00	12.27	2.61
90th percentile - 10th percentile	48.00	17.00	21.03	14.81
Mean	31.66	61.85	20.60	53.93
Median	30.00	60.00	22.43	52.27
Sample Variance	525.49	115.35	119.88	87.82
F statistic p-value	5.66 .0022		1.70 .1720	

Source: U.S. Sentencing Commission Evaluation Study

Summary: The cocaine disparity study suggests that the range of sentences imposed and time to be served for similarly situated cocaine offenders has narrowed considerably following guideline implementation. The reduction in disparity is even more pronounced once departure cases are eliminated. Substantial variations appear in the top and bottom ten percent of sentences, a finding that suggests the need for future research in the area of departures and interaction of the guidelines with mandatory minimum penalties.

Use of Incarceration

Introduction

The Sentencing Reform Act directed the Sentencing Commission, as part of its evaluation study, to examine the impact of the guidelines on the use of incarceration. For purposes of this study, the Commission defines use of incarceration as the likelihood that a convicted offender will receive a sentence of imprisonment under the guidelines and, if imprisoned, the length of that imprisonment. Consequently, this impact study addresses the questions of how many offenders are sentenced to prison (under pre-guideline and guideline law) and for how long.

I. Competing Interventions

The impact of the guidelines on the use of incarceration must be analyzed in relation to other legislative and policy changes occurring within the same timeframe that may have influenced the system. Any impact study, therefore, must attempt to disentangle the effects of the guidelines from those of other legislative and policy changes.

This concern is of particular importance for drug offenses, an area in which recent legislative initiatives, in addition to the Sentencing Reform Act, have substantially altered the sentencing structure. For example, the Anti-Drug Abuse Act of 1986 established mandatory minimum sentences for a variety of drug offenses, while the 1988 Anti-Drug Abuse Act expanded the reach of the mandatory sentences applicable to substantive trafficking offenses to include convictions for conspiracy and attempt offenses. Because drug offenses comprise the largest category of offenders sentenced under the guidelines, it is essential that any aggregate analysis of drug sentences consider the effects of these recent major drug laws along with the effects of the guidelines.

II. Methodological Procedures

The presence of intervening legislation such as the 1986 and 1988 drug acts, along with other historical events that may have influenced sentencing practices, suggests that a simple pre/post model is inadequate to evaluate the use of incarceration; rather, a time series analysis appears to be a more rigorous and appropriate methodology. Using this strategy, sentencing data are aggregated into monthly observations and plotted over lengthy periods, before and after implementation of the guidelines. Relevant policy changes, such as enactment of the drug laws and implementation of the guidelines, can be analyzed as interventions in the series and modeled for the size and form of their effects. The temporal ordering of "shocks" to the time series will permit, to some extent, an analysis of the effects of individual policies. Furthermore, interrupted time series analysis can model interventions that produce incremental or abrupt changes. This feature is particularly useful for the evaluation in light of the fact that application of the guidelines was "phased-in" as offenses occurred on or after November 1, 1987, and were processed through the system to the point of sentencing.[30] Similarly, it is a useful device in measuring the impact of

[30]Studies show that following a change in sentencing policy, a phenomenon characterized as a "racheting process" can occur in which sentence severity gradually increases (or rarely, decreases) as judges and practitioners, as well as policymakers, adjust to the new policy. *See, e.g.*, Casper, Brereton & Neal, The Implementation of California's Determinate Sentencing Law (1981) and McCoy & Tillman, Controlling Felony Plea Bargaining (1986).

each of the drug acts, the penalty provisions of which applied prospectively to offenses occurring after the effective date of each act.

III. Findings

A. General Trends in Numbers of Offenders Sentenced

Figure 12 plots the number of cases sentenced from July 1984 through June 1990 in the federal system. The number of cases sentenced rose during this period from a low of 2,418 in December of 1984 to a high of 4,087 in January of 1990, a 69-percent increase. This upward trend is evident prior to the Anti-Drug Abuse Act of 1986 and appears to taper off slightly until November 1988, at which time a brief downward trough is evident before it resumes increasing in early 1989.

The brief trough in sentencing, followed by the immediate upswing after the Supreme Court's ruling in Mistretta v. United States, likely is due to the postponement of cases in many districts awaiting the decision on the constitutionality of the guidelines. Cases postponed prior to the ruling (resulting in the trough) were brought into court for sentencing shortly after the decision on January 18, 1990, causing the significant intervention identified by the model. Because of the close proximity of the Anti-Drug Abuse Act of 1988 and the Mistretta decision, increases occurring after January 1989 may be a result of either or both interventions.

Figure 12 also shows a steady trend upward from 1984 in the number of defendants sentenced to prison. All interventions, except the Anti-Drug Abuse Act of 1988, produced significant positive impacts on the number of cases sentenced to prison. Thus, it appears that each intervention provided an additional surge in an already initiated trend of increased use of incarceration.

Of the three specific offense categories studied, drug offenses clearly experienced the largest change in numbers of defendants sentenced to prison during the time period of the study, rising from 431 offenders during the first month to 1,037 in the last month studied. While this upward trend began well before the Anti-Drug Abuse Act of 1986 and continued thereafter, only the Mistretta decision represented a statistically significant increase in the numbers of drug offenders imprisoned. As with the number of total sentences, a temporary but significant decline in drug sentences occurred prior to the Mistretta decision.

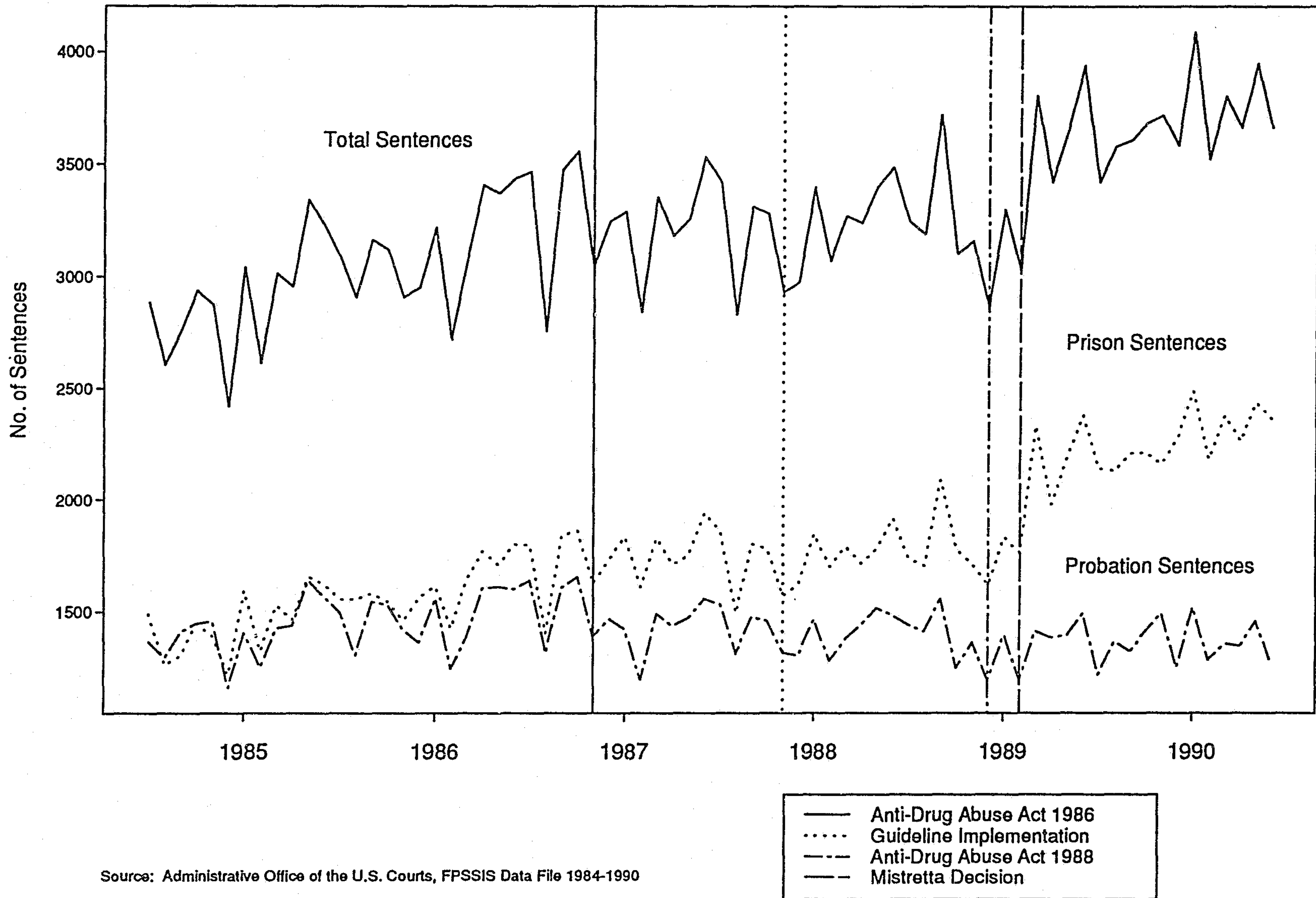
The numbers of robbery and economic offenders sentenced to prison also increased during this period, although less dramatically. The number of robbery offenders sentenced to prison increased from 79 to 96 cases in the first and last months of study, respectively, while economic offenders increased from 249 to 415. Only the Mistretta intervention shows a significant impact for these two offense types.

B. The In/Out Decision

While the previous section clearly shows that numbers of offenders and offenders sentenced to prison increased during the study period, Figures 14 and 15 provide more important information concerning the rate of imprisonment (and probation) during this same timeframe. Figure 14 shows that the proportion of cases sentenced to prison has increased over time, from 52 percent during the first month of the study (July 1984) to 65 percent during the last month (June 1990). By definition, the proportion of cases sentenced to probation varies inversely with the rate of imprisonment.

Figure 12

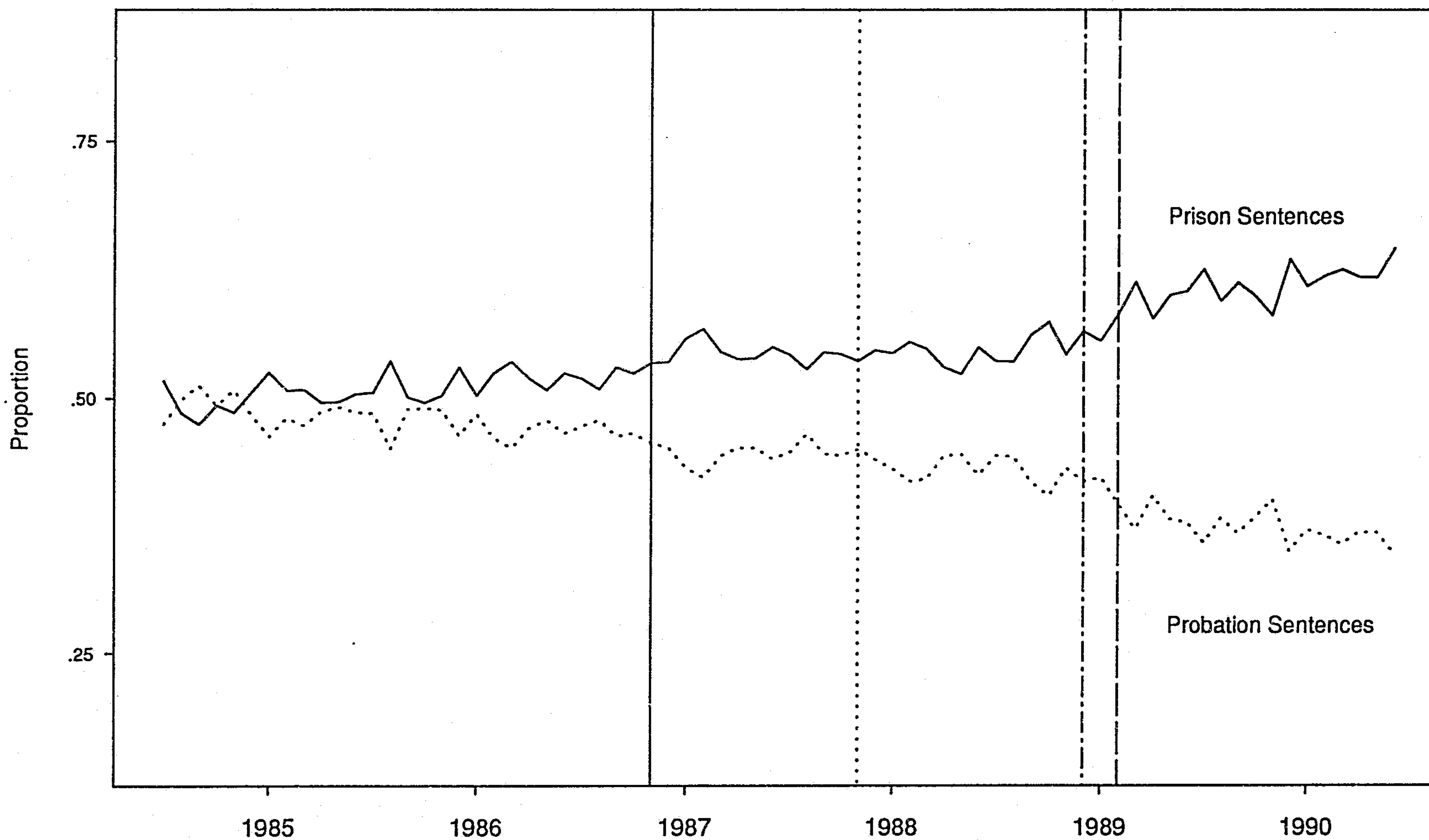
Prison and Probation Sentences: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

Figure 14

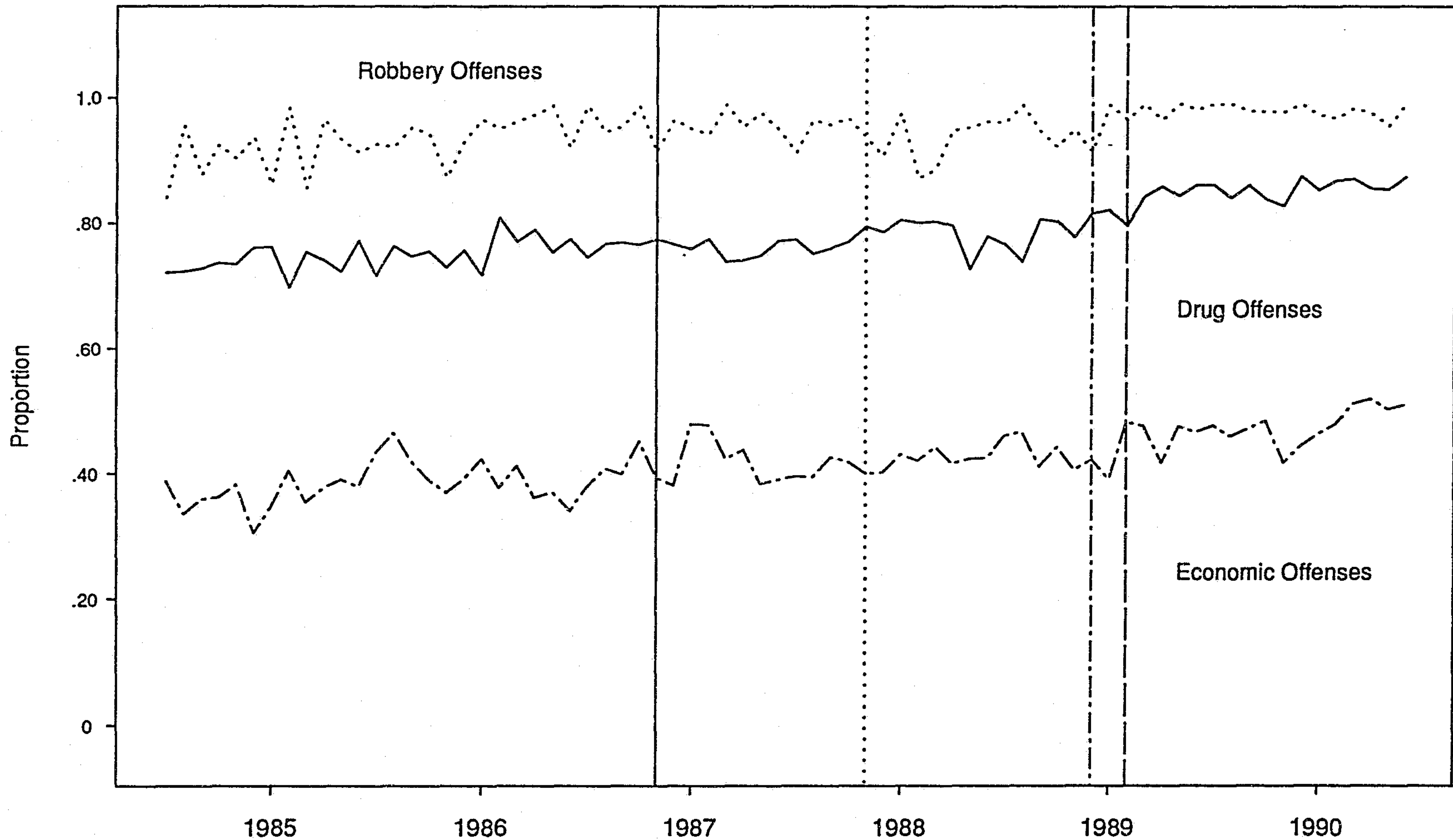
Prison and Probation Sentences as Proportions of All Sentences: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

Figure 15

Proportions of Sentences that Include Prison for Specific Offense Types: July 1984 to June 1990



——	Anti-Drug Abuse Act 1986
·····	Guideline Implementation
—·—	Anti-Drug Abuse Act 1988
— —	Mistretta Decision

Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

While the increase in the rate of imprisonment appears to begin prior to the first intervention, statistically significant positive impacts are found for the Anti-Drug Abuse Act of 1986, as well as the Mistretta decision. As noted before, because of anomalies in the system caused by pre-Mistretta delays, the time period and impact of the Anti-Drug Abuse Act of 1988 and Mistretta decision are not clearly delineated. The Mistretta intervention may be acting as a proxy for a delayed guideline impact generated by courts who had ruled the guidelines unconstitutional. Alternatively, the Mistretta intervention may act as a proxy for the Drug Abuse Act of 1988 that took effect during an unusual slow-down period prior to the Supreme Court decision and would be expected to have a gradual impact over time.

Figure 15 illustrates changes in imprisonment rates for the three offense types studied. The rate of imprisonment for robbery offenses increased over time from 84 percent during the first month of study to 99 percent during the last month. Similarly, the rates increased from 72 percent to 87 percent for drug offenses and from 39 percent to 51 percent for economic offenses.[31]

The time series analysis indicates that initial implementation of the guidelines and the Anti-Drug Abuse Act of 1988 result in significant changes in the rates of incarceration for drug offenders, while the Mistretta decision produced a similar effect on robbery and economic offenses.

C. Sentence Length

This section reviews the average lengths of imprisonment imposed during the study period. Two separate analyses are conducted for each time series of sentence length, the first excluding probation (zero prison terms) and the second including zero prison terms. The first series indicates the average term of imprisonment only for those that received some prison term. The second analysis mitigates any downward influences on mean sentence length caused by movement from probation to shorter prison terms. While such movement actually increases sentence severity, it reduces average lengths in models that omit probation.

As shown in Figure 16, mean sentence lengths across all offenses during this time period nearly doubled, increasing from 24 months in July 1984 to 46 months in June 1990 (excluding zeros). The mean sentence length increased from 13 to 30 months when zeros are included (*see* Figure 17). These increases in the average terms of imprisonment reflect statistically significant impacts of three major interventions — the Anti-Drug Abuse Act of 1986, the initial implementation of the guidelines, and the Mistretta decision.

Overall, mean prison terms for drug offenders increased throughout the study period from 27 months in July 1984 to 67 months in June 1990, an increase of 248 percent. Drug sentences increased significantly at each intervention point except the 1988 Drug Act.

Figure 16 shows that average prison terms for robbery offenders also increased over the study period. Increases primarily occurred after initial guideline implementation and the Mistretta decision; both interventions produced significant positive changes. Mean sentences for robbery offenses were 60 months in July 1984 and rose to 78 months in June 1990.

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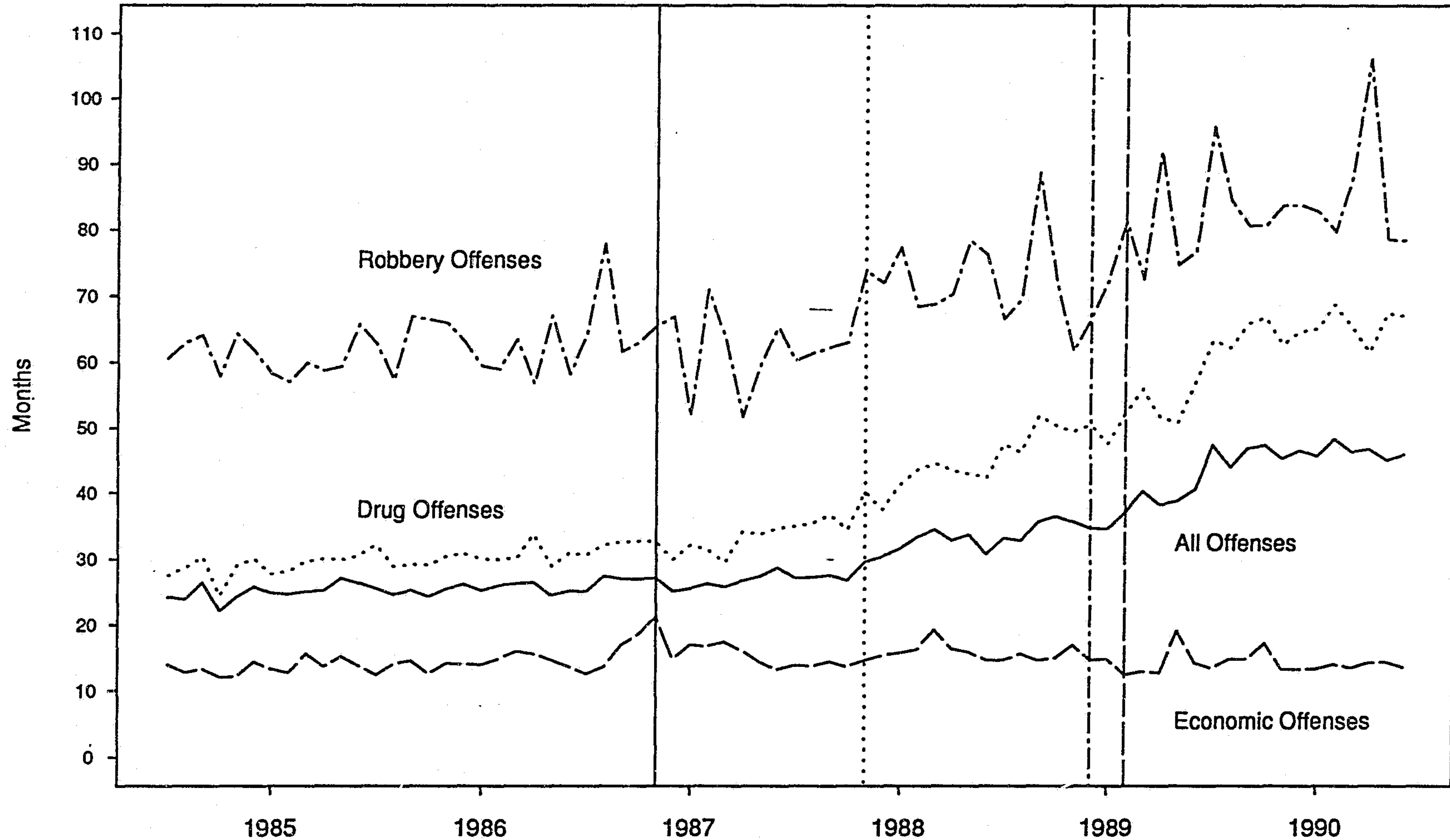
[31]Even though a major increase in the use of alternative sentences for economic crimes would be anticipated with the implementation of the guidelines, the analysis summarized in Figure 15 does not test for this effect. Alternative sentences for economic offenses, however, are incorporated into the later analyses on the length of incarceration.

Figure 16

Mean Prison Sentence by Type of Offense: July 1984 to June 1990

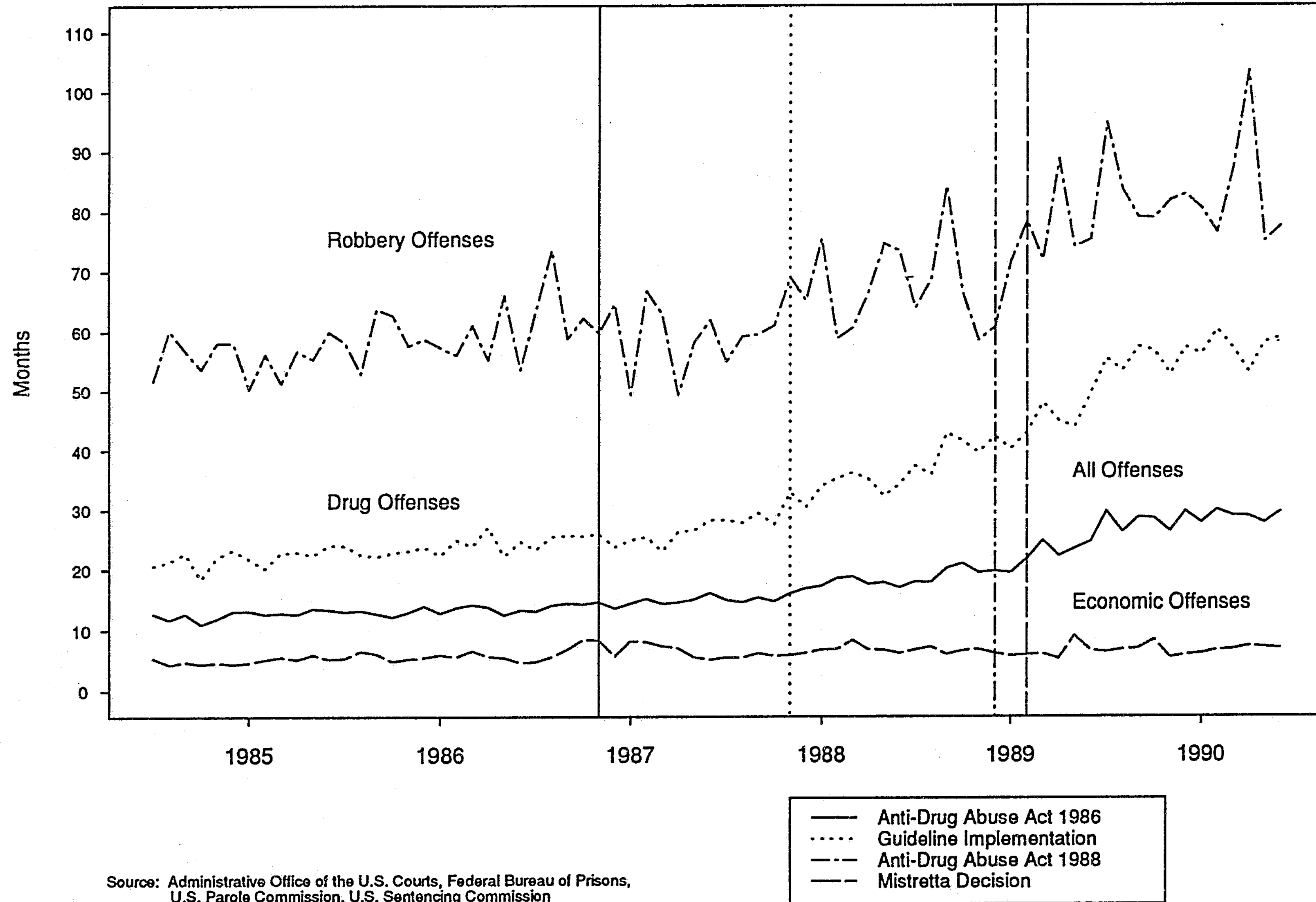


Anti-Drug Abuse Act 1986
Guideline Implementation
Anti-Drug Abuse Act 1988
Mistretta Decision

Source: Administrative Office of the U.S. Courts, Federal Bureau of Prisons, U.S. Parole Commission, U.S. Sentencing Commission

Figure 17

Mean Total Sentence by Type of Offense: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, Federal Bureau of Prisons, U.S. Parole Commission, U.S. Sentencing Commission

Interestingly, the majority of the increase occurred among cases involving mandatory minimum firearms charges. Mean prison terms for cases not involving such mandatory minimum charges only varied from 60 to 66 months at the extreme ends of the period. It is likely that, while the typical robbery case without mandatory minimum firearms enhancements has only been affected slightly, the guidelines system has more dramatically increased sentences for cases with such mandatory minimum gun charges by not allowing reductions in sentences for the underlying bank robbery count, thus ensuring that the mandatory minimum consecutive term actually serves as an enhancement to the substantive count. Because the pre- and post-guidelines means differed by less than 60 months, it appears that the consecutive terms increased sentences, but not by as much as the full 60 months intended by Congress. Little difference is found between average robbery sentences with and without zeros due to the fact that probation was used so rarely for these offenses throughout the entire study period (*see* Figures 16 and 17).

Figure 16 indicates that average prison terms are reduced slightly for economic offenses when zeros (no prison terms) are not included, but have remained relatively stable (*see* Figure 17) if zeros are included.[32] As indicated earlier, the intervention for the Mistretta decision showed significant increases in prison rates for economic offenders. However, it is likely that offenders previously receiving probation now receive short prison terms and drive averages down in the first model. Leaving probation cases in the second model shows that mean sentences actually have remained relatively stable over time.

IV. Conclusion

This analysis illustrates major system changes after significant interventions during the last several years. However, the exact causal links or chains creating the changes are not clearly delineated by this type of analysis. For example, the Anti-Drug Abuse Act of 1986 created an increased penalty structure that targeted major drug offenders for particularly long prison sentences. The Act also increased the number of investigative and prosecutorial staff to fight this type of crime. It is clear that a result of these changes is increasing numbers of drug offenders being sentenced to prison. If the nature of these drug offenses is similar to those previously processed in the federal system, a stronger conclusion could be drawn that the new penalty structures are impacting rates of imprisonment and sentence lengths. However, if the new laws are resulting in the conviction of higher-level offenders or individuals involved in more serious drug offenses, subsequent changes in imprisonment rates and sentence lengths may be a result of the changing nature of the offenders processed.

The study reported in this chapter indicates a system that, between 1984 and 1990, experienced significant increases both in the use of incarcerative sentences and in the average length of prison sentences. Due to considerable changes that occurred not only in legislation and sentencing policy but also in the volume, seriousness, and composition of the criminal behavior they seek to regulate, any causal influences are too confounded and close in proximity to be separately assessed and evaluated. Further research should be undertaken to disentangle these causal relationships between the interventions and the systemic changes.

[32]Because alternatives to imprisonment (community confinement, intermittent confinement, and home detention) are frequently available within the guideline ranges applied for economic crimes, sentences to these alternatives have been included as prison equivalents in the mean terms generated for Figures 16 and 17.

Prosecutorial Discretion and Plea Bargaining

Introduction

Congress was mindful of the fact that prosecutorial discretion in charging decisions and plea negotiations could potentially undercut the full impact of the guideline sentencing system. In particular, Congress was concerned that prosecutors could use one or more of the traditionally available charging and plea negotiation vehicles to circumvent and therefore undermine the goals of the Sentencing Reform Act, and consequently reintroduce unwarranted sentencing disparity into the system. Without some check on plea bargaining, "prosecutorial decisions — particularly decisions to reduce charges in exchange for guilty pleas — could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system."[33]

In the Sentencing Reform Act, Congress directed the Commission to promulgate policy statements to assist federal courts in deciding whether or not to accept plea agreements.[34] Such policy guidance was intended to provide "an opportunity for meaningful judicial review of proposed charge-reduction plea agreements, as well as other forms of plea agreements, ... while at the same time [guarding] against improper judicial intrusion upon the responsibilities of the Executive Branch."[35] Further, Congress required that the Sentencing Commission's evaluation report include "an evaluation of the impact of the sentencing guidelines on prosecutorial discretion [and] plea bargaining."[36] This portion of the evaluation report is intended to address that specific congressional mandate.

I. The Impact Studies

Several obstacles inhibit the design of a straightforward quantitative study of the impact of sentencing guidelines on prosecutorial discretion and plea bargaining. Primarily, much of the plea negotiation process involves "behind the scenes" discussions between prosecutors and defense attorneys that generally are not memorialized. Evidentiary problems and defendant cooperation may affect the outcome of a plea negotiation (*i.e.*, the sentence), but often there is little record of how this outcome evolved. Without data on specific decision points in this plea process, quantitative analysis cannot be performed.

In addition, quantitative data reflecting prosecutorial practices historically have numerous shortcomings. Standardization of data collection efforts has not been a priority for individual U.S. attorneys' offices until recently. For example, one U.S. attorney's office may use a defendant-based system, while another may use a case-based system and consequently the data fall short of providing

[33]S. Rep. No. 225, 98th Cong., 1st Sess. 167 (1983).

[34]28 U.S.C. § 994(a)(2)(E) directs the Commission to issue policy statements to guide courts in exercising "the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1)."

[35]S. Rep. No. 225, *supra* note 33, at 167.

[36]Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, ch. II, § 236, 98 Stat. 1837, 2033 (1984).

specific details of charging practices in any systematic fashion. Furthermore, as is true of the other impact studies included in this report, a number of substantive changes in the federal criminal justice system over the past decade have made disentangling the effects of a single reform very difficult. Therefore, what may appear to be the consequence of one such change, (*e.g.*, guideline implementation) may in fact be the result of another (*e.g.*, enactment of mandatory minimum penalties).[37]

In recognition of these obstacles to quantitative analysis, the Commission focused a significant portion of the interviews with judges and court practitioners in the implementation study on plea bargaining and prosecutorial discretion (*see* Chapter Three, Part F, Charging and Plea Practices). Through examples and open-ended questions, the Commission attempted to examine the plea negotiation processes at work within the federal court system. In addition, the Commission authorized Commissioner Ilene H. Nagel and Professor Stephen J. Schulhofer to conduct an in-depth study of plea practices under the sentencing guidelines to further examine these important issues.[38]

In addition to the qualitative research in Chapter Three of the evaluation report, this section examines the issue of whether and how the guidelines might impact on the use of prosecutorial discretion. Two different methodologies are used in analyzing the available quantitative data. The first study presents an over-time analysis that deals most directly with the issue outlined by Congress, *i.e.*, the impact of the guidelines on prosecutorial behavior. The study provides an aggregate portrait of changes and trends in prosecutorial outcomes (*e.g.*, the number of cases settled by guilty plea) occurring before and after the implementation of the guidelines, while controlling for other possible competing influences on prosecutors' behavior such as changes in legislation. Ideally, findings from this study will help place the results of other impact studies in the larger context of changes in the federal system.

The second impact study describes a variety of plea negotiation strategies possible under the guidelines, and examines a 25-percent sample of all guideline cases sentenced between July 1, 1990, and September 30, 1990, as a measure of the impact of negotiated pleas on guideline sentences.

II. Over-time Analysis of Prosecution Stages and Outcomes

A. Research Questions

To address more broadly the issue of the way in which prosecutorial behavior may have been affected by the implementation of the sentencing guidelines, monthly time series data were constructed and analyzed for a number of prosecutorial outcomes. These outcomes represent either discrete decision steps in the processing of criminal cases or the characteristics of cases that pass through the system. Rather than addressing issues that affect the processing of individual cases,

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[37]For an initial look at prosecutorial practices in relation to mandatory minimum penalties, *see* U.S. Sentencing Commission's Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991).

[38]The Process of Plea Negotiation Under Federal Sentencing Guidelines: The Early Post-Mistretta Experience (available at the Commission; expected public distribution, spring 1992). *See also* Schulhofer & Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Amer. Crim. L. Rev. 231 (1989).

this analysis examines the court system as a whole and the processing of cases through that system. The benefit of this type of time series analysis is the ability to separate the effects of various legislative, policy, and internal changes in the court system from one another as potentially competing explanations for observed changes in the system over time. For example, this mode of analysis makes it possible to get a sense of the relative impact certain interventions (*e.g.*, the sentencing guidelines) have had on the processing of criminal cases. In addition, the analysis addresses such questions as:

- What changes have occurred over time in the number of matters initiated, cases filed, and cases resolved by guilty plea or at trial?
- Is the proportion of cases resolved by guilty pleas and trials related to guideline implementation?
- What is the relationship between other sources of intervention (*e.g.*, legislative and policy changes) and the proportion of cases resolved through guilty plea or trial?

In brief, the findings of this study suggest that the legislative and policy changes examined have either no effect on prosecutorial behavior (as measured by aggregate time series) or do not have consistent effects. Changes in the system appear to be affected more by the number of cases processed and possibly by increased case severity (at least for controlled substance and firearms violations) than by any specific efforts to affect the prosecution of criminal cases.

B. Data Sources and Outcome Measures

Monthly time series measurements for these analyses have been constructed from two datasets maintained by the Executive Office of the U.S. Attorneys: 1) Docket and Reporting System for Fiscal Years 1984-1986, and 2) Criminal Master File with Auxiliary Events and Charge Files (referred to as the new data system) for Fiscal Years 1987-1990. These datasets contain processing information about matters initiated, cases filed, and cases resolved in the U.S. attorneys' offices in each federal district.

The two data archives used are not identical. The later Criminal Master File contains more information about matter and case processing than does the older system. However, a number of discrete processing stages were available consistently throughout the time period of the study.

C. Sources of Change in Prosecutorial Outcomes

The following events are examined for their impact on prosecutorial outcomes over time:[39]

- the Anti-Drug Abuse Act of 1986 (November 1986);
- the implementation of the sentencing guidelines (November 1987);[40]
- the Anti-Drug Abuse Act of 1988 (November 1988);

[39] Effective dates of these interventions are not specified precisely. For example, in the case of the Anti-Drug Abuse Act of 1988 (effective on November 18, 1988), an approximate intervention point of November 1988 is used.

[40] Due to numerous constitutional challenges, the guidelines were not implemented nationwide until the Supreme Court issued its decision in Mistretta on January 18, 1989.

- the United States Supreme Court's decision in Mistretta affirming the constitutionality of the guidelines (January 1989); and
- the issuance of a memorandum by Attorney General Thornburgh announcing Department of Justice plea negotiation and charging policy (March 1989).

A priori, one might expect these various legislative changes and policy directives to have an effect on case processing. However, the form and timing of these effects may differ. The decision in Mistretta, for example, might have had an immediate impact by ending the period of constitutional uncertainty and releasing into the system a backlog of cases that awaited the Supreme Court's resolution. In contrast, the Anti-Drug Abuse Acts and initial implementation of the guidelines would have more gradual effects, as would the implementation of the guidelines, as the proportion of eligible matters and cases increased in the system over time. Both types of effects are tested in this section, and, when appropriate, their varying results are reported.

D. Results

Table 138 presents prosecutorial outcomes, by year, from 1984 to 1989. Note that in 1986 some of the numbers might be reflective of data problems due to the transition from the old to the new data system. Overall, the criminal justice system in these years experienced an upward trend in the number of investigative matters initiated, cases filed, and cases resolved. For example, of all matters initiated between 1984 and 1989, the rate of cases filed increased from 45.8 to 50.3 percent, and, of all cases filed, the rate of pleas increased from 63.6 to 71.1 percent.

Figures 20 through 23 present results of the various time series. The series of proportions are not included in these figures, but each figure contains the two series numbers that are used to calculate each of the proportions. In other words, for each monthly observation point the proportion of a given outcome would be the number of cases with that outcome (*e.g.*, "guilty pleas") over the total number of relevant cases (*e.g.*, "cases filed").

While the models test mean levels for all federal cases, those trends might be appreciably different for specific offense types within the same timeframe. As one test of this hypothesis, two of the possible offenses — drugs and bank robbery — were examined separately. Drug cases, constituting the largest portion of all cases in the system, probably drive the direction of the general trends. Controlled substance violations are the obvious targets of the two Anti-Drug Abuse interventions, and they also represent offenses that are aggregable under the guidelines, two facts with definite implications for plea agreements. Bank robberies, on the other hand, constitute a smaller portion of all federal cases, do not involve aggregable offense behavior under the guidelines, and present a different scenario for plea considerations.[41] Fluctuations in the plea rates of cases involving these offenses compared to all cases are presented in Figures 24, 25, and 26, respectively.

Figure 24 shows that the ratio of guilty pleas to all drug cases resolved each month during the period October 1986 to March 1990 remains fairly constant.[42] This general pattern is repeated

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[41]As explained more fully in other sections of this report, this means that the number of drug trafficking counts generally does not affect the guideline range, while the number of robbery counts does.

[42]The earlier Docket and Reporting System contains less complete information about charges than does the later Criminal Master File. Comparable series could not be constructed for (continued...)

Table 138

Prosecutorial Outcomes, by Year

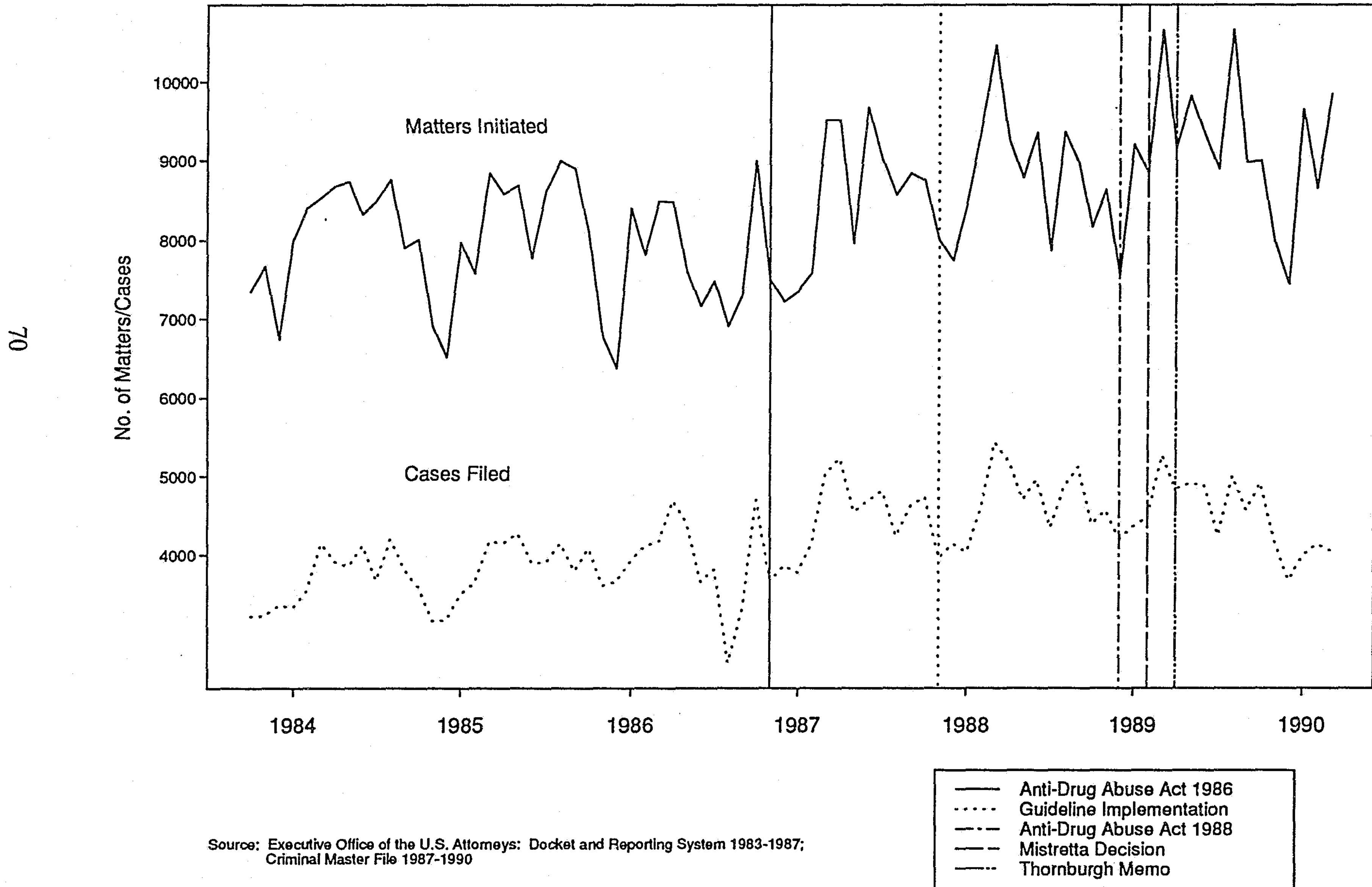
Outcome	1984	1985	1986	1987	1988	1989
Matters Initiated	97256	97207	93384	102545	106225	109967
Cases Filed	44537	46854	46960	53974	56422	55361
Cases Resolved	32093	33872	37420	44245	45822	45068
Guilty Pleas	28309	29882	32009	38158	39101	39360
Trials Initiated	3784	3990	5411	6087	6721	5708

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1989.

[42](...continued)
substantive offense categories without using the broadest possible definitions. Consequently, only data from the Criminal Master File is presented for the drug and bank robbery offense categories.

Figure 20

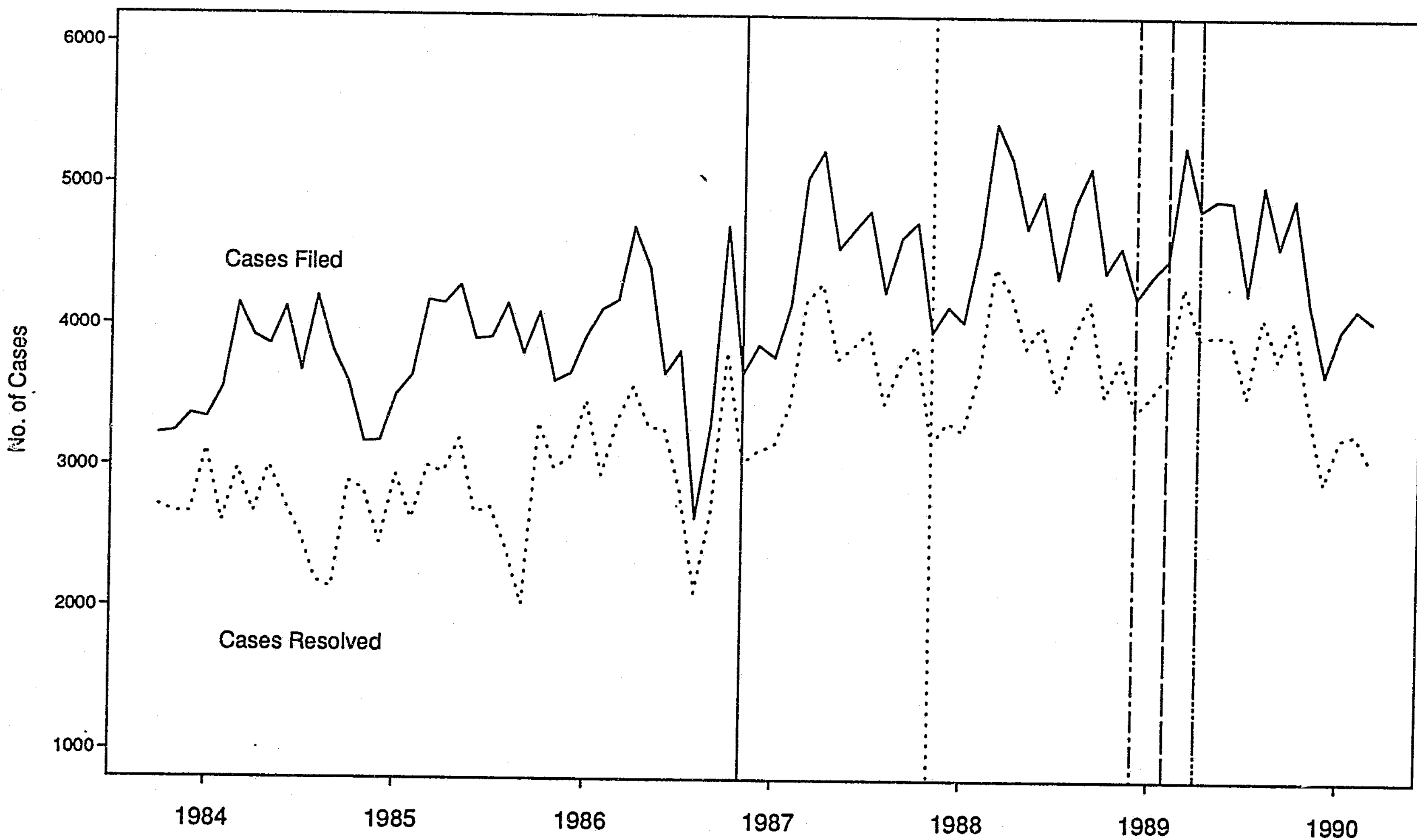
Matters Initiated and Cases Filed: October 1983 to March 1990



Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 21

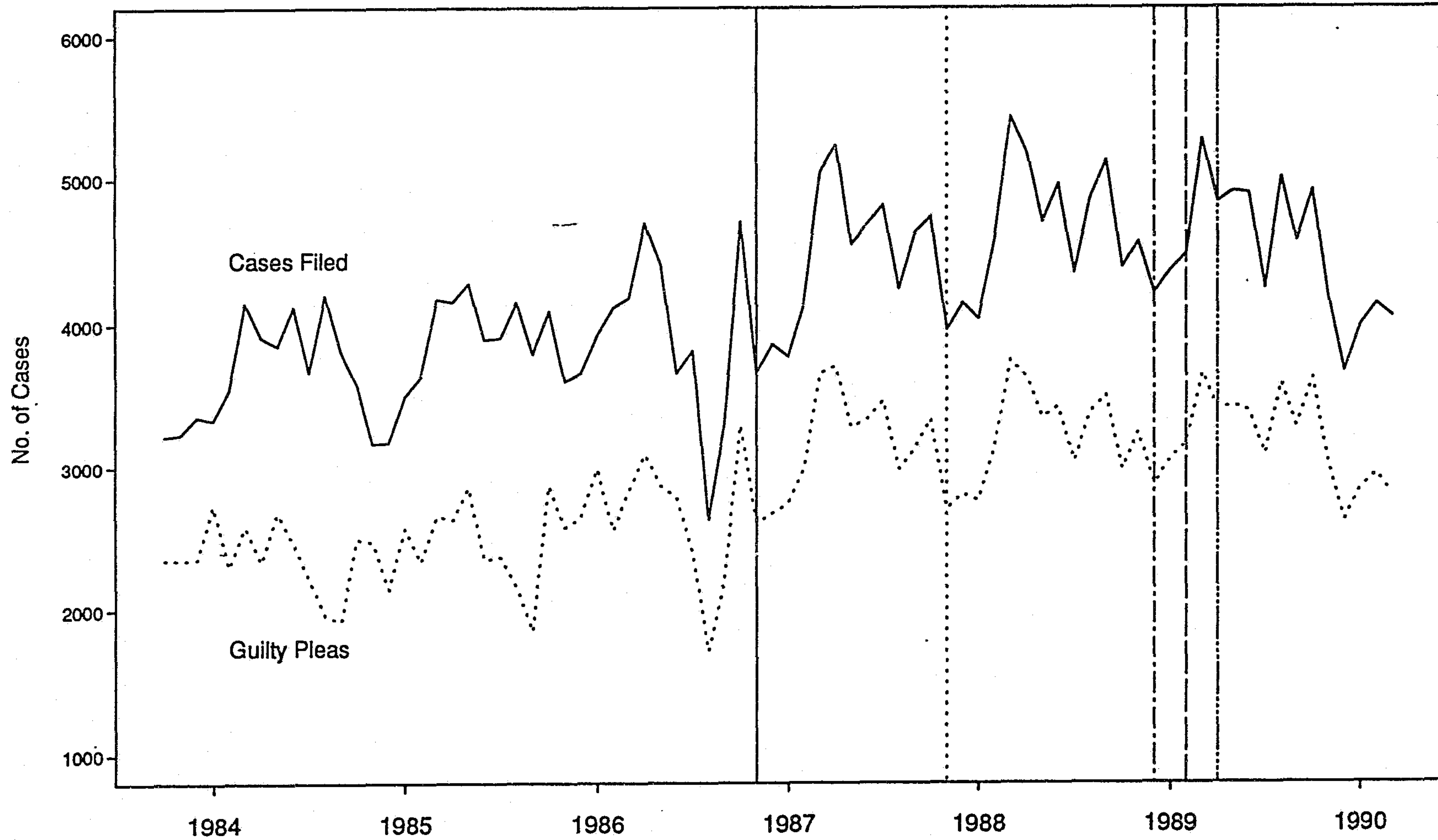
Cases Filed and Cases Resolved: October 1983 to March 1990



Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 22

Cases Filed and Guilty Pleas: October 1983 to March 1990

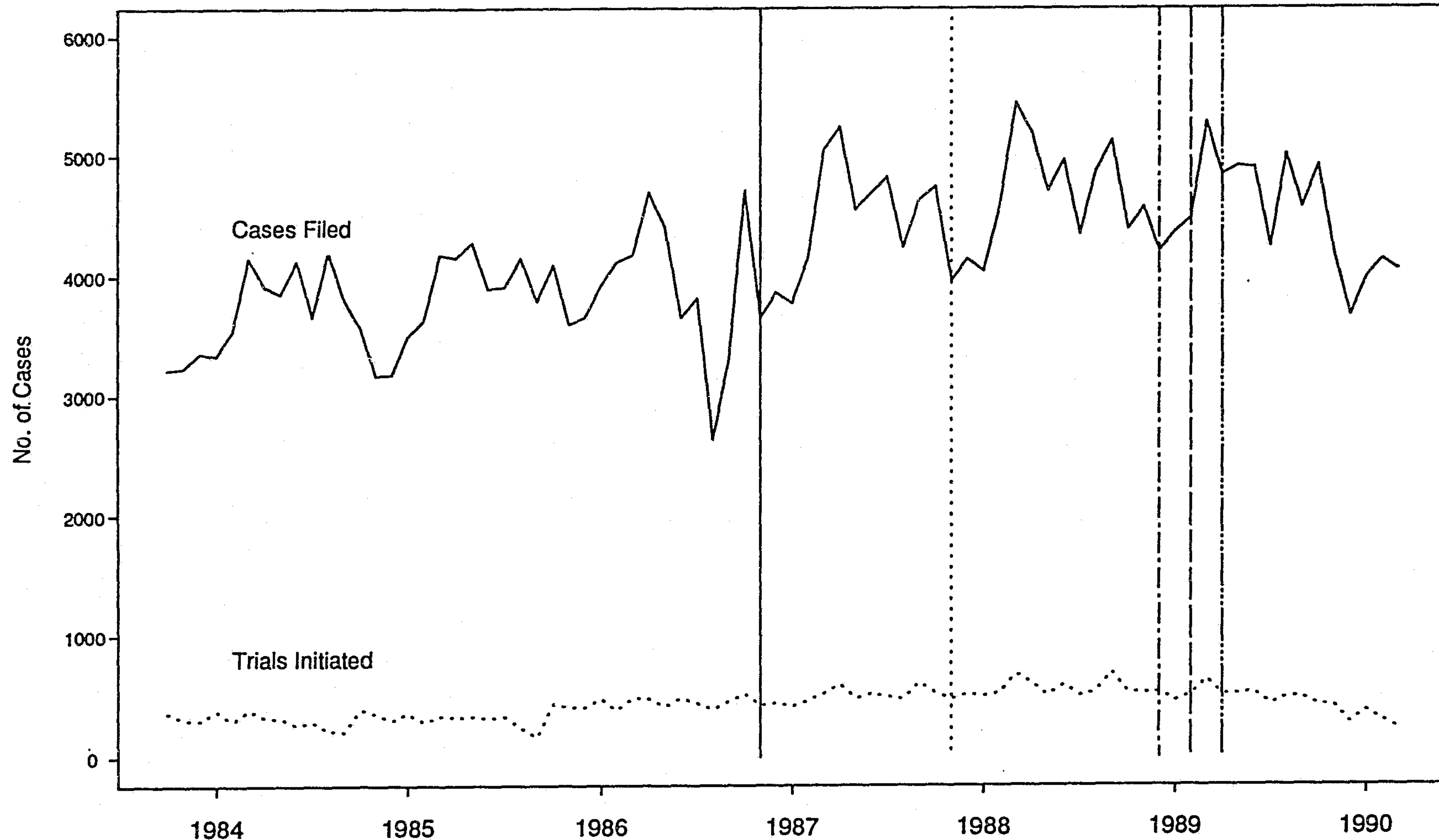


———	Anti-Drug Abuse Act 1986
· · · · ·	Guideline Implementation
—·—	Anti-Drug Abuse Act 1988
— —	Mistretta Decision
—···	Thornburgh Memo

Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 23

Cases Filed and Trials Initiated: October 1983 to March 1990

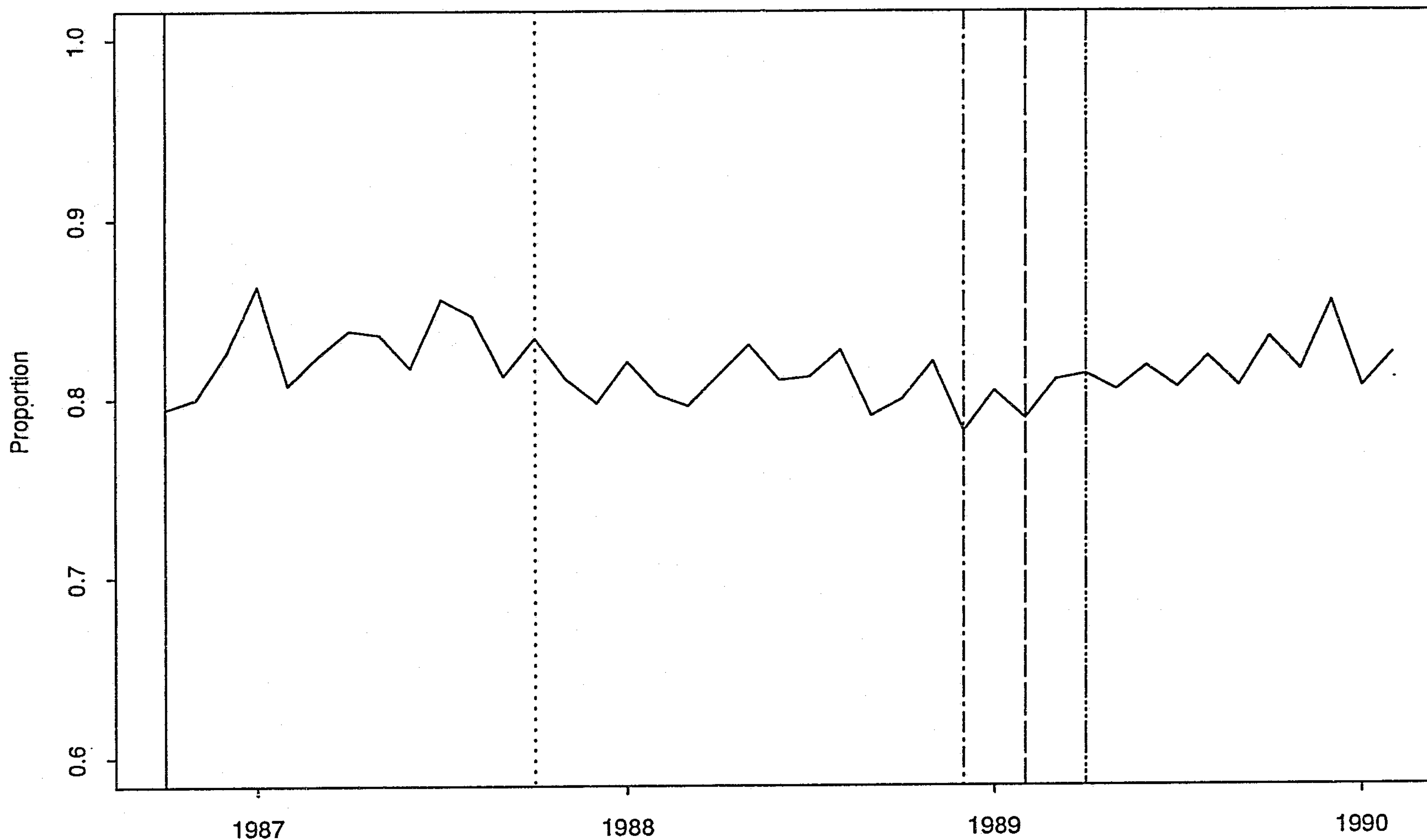


Anti-Drug Abuse Act 1986
Guideline Implementation
Anti-Drug Abuse Act 1988
Mistretta Decision
Thornburgh Memo

Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 24

Proportion of Convictions by Guilty Plea: October 1986 to March 1990
Drug Cases



Source: Executive Office of the U.S. Attorneys: Criminal Master File 1987-1990

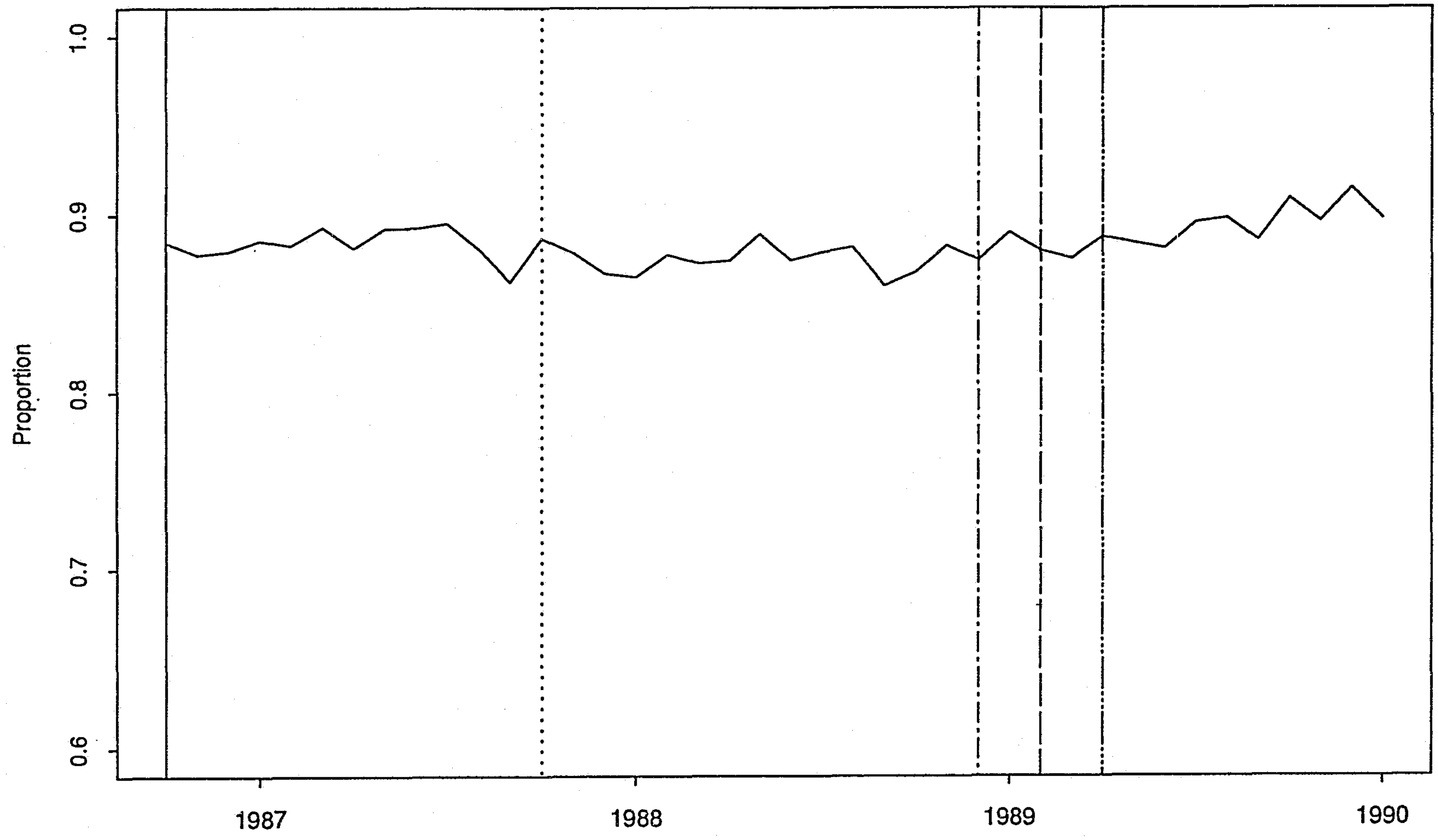
Figure 25

Proportion of Convictions by Guilty Plea: October 1986 to March 1990
Robbery Cases

Source: Executive Office of the U.S. Attorneys: Criminal Master File 1987-1990

Figure 26

Proportion of Convictions by Guilty Plea: October 1986 to December 1989



Line style	Event
———	Anti-Drug Abuse Act 1986
·····	Guideline Implementation
—·—	Anti-Drug Abuse Act 1988
— —	Mistretta Decision
—···	Thornburgh Memo

Source: Executive Office of the U.S. Attorneys: Criminal Master File 1987-1990

for bank robberies (*see* Figure 25) and all cases (*see* Figure 26), although in robberies the series is based on a smaller number of cases and the fluctuations over time are sharper.

E. Summary

It appears that none of the legislative or policy interventions tested produced consistent changes in the mean levels of various time series describing prosecutorial outcomes. While these interventions appear to have the potential for initiating changes in the processing of cases, no such changes are discernible at this point in time.

Of particular interest is the lack of an effect associated with the guidelines on the number and proportion of guilty pleas among filed cases.[43] This finding stands in stark contrast to the prediction by some that the guidelines would cause (or have caused) an increase in the rate of defendants going to trial. To the contrary, the data analyses support the conclusion that this has not happened. If the number of trials has increased, it is due to the fact that more cases are being filed; the rate of defendants' choosing to enter guilty pleas or stand trial has not changed appreciably as a result of guideline implementation.

This study provides an initial look at the over-time impact of the guidelines on prosecutorial case processing. Due to a number of important and interrelated interventions occurring so temporally close to each other (with each individually affecting the system at a different pace and with varying lag times), a more accurate assessment of the various possible impacts might be gained only with the passage of time.

III. Impact of the Plea on Sentences

A. Introduction

In determining a final sentencing range, the guidelines consider much of the defendant's "real offense" conduct. Consequently, charging practices, guilty pleas, and plea agreements under the guidelines may reflect an accommodation to the realities of such a system. Thus, a number of avenues may exist through which prosecutorial behavior can impact the offender's sentence. This section focuses on the impact of the plea agreement on guideline sentences, examines some of the most frequent plea bargaining scenarios, and reports the relative frequency with which they occur.

Three points should be noted at the outset. First, this analysis deals only with the impact of negotiated pleas on the guideline range and/or sentence. A non-negotiated guilty plea may have an impact by increasing the likelihood that an offender will receive a downward adjustment for acceptance of responsibility. Also, entry of a guilty plea might influence the court's decision to impose a sentence at the bottom portion of the guideline range. However, these impacts are difficult to document without a written plea or some record of an oral plea.

Second, this study examines only the final set of charges filed against an offender. Because negotiations may occur early in the process and take the form of pre-indictment pleas or superseding

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[43]This finding has been replicated elsewhere, using a different dataset and a different definition of the plea rate as the ratio of guilty pleas to all convictions (*see* the Monitoring chapter of the Commission's 1990 Annual Report).

indictments or informations, their impact may not be documented sufficiently. As a result, the impact of the negotiated plea likely will be underestimated.

Finally, it is important to keep in mind the frequency with which defendants who plead guilty receive a two-level downward adjustment for acceptance of responsibility. A review of fiscal year 1990 guideline cases with a statement of reasons available indicates that 88 percent of defendants who pleaded guilty received the two-level adjustment for acceptance, compared to 20 percent of defendants convicted at trial.

Overall, the findings indicate that plea agreements impact the sentencing process in about 17 percent of all of the guilty plea cases. Some of these plea agreements affect guideline factors, some affect sentences, and some impact on both.

B. Findings

To examine the incidence of various plea agreement types and their impact on the guideline range and/or the guideline sentence, a 25-percent random sample of all cases convicted after a guilty plea and sentenced between July 1, 1990, and September 30, 1990, was selected from the Commission's monitoring system. The final analysis includes 1,212 plea cases classified by primary offense of conviction.[44]

Files for the sample cases were reviewed and available information concerning the type of plea, plea agreement, guideline calculations, motions, and sentence were analyzed. The major findings from this nationally representative sample are presented below.

The results in Table 142 indicate that 17 percent (n=202) of all guilty plea cases indicate some form of plea impact. This percentage seems to vary considerably by offense type, with pleas generally having less impact on immigration, larceny, embezzlement, and fraud sentences, and more impact on drug violation sentences.

Among all plea cases, a written or oral plea agreement resulted in a lower guideline range in 10.5 percent (n=127) of the cases, in a reduced sentence (defined as a sentence below the minimum of the original guideline range) in 14 percent (n=170) of the cases, and in a combined impact on both guideline range and sentence in 7.8 percent (n=95) of the cases.

For cases affected by a plea agreement, the average or mean reduction in the bottom of the guideline range was 39 months (the median reduction was 21 months). A high percentage (42%) of the reductions resulted in less than 12 months off the original minimum guideline range (*see* Table 143). However, in some cases the new and old ranges overlap and provide the court with the option to sentence within this overlap and thereby eliminate the impact of the plea on the sentence. Of the 30 such cases in the sample, judges opted to sentence 12 offenders within the overlap and gave a sentence reduction (in addition to the range reduction) to the remaining 18 offenders.

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[44]A 25-percent random sample of 784 non-drug trafficking cases and a 12.5-percent random sample of 214 drug trafficking cases were reviewed for guideline cases convicted by guilty plea and sentenced between July 1, 1990, and September 30, 1990. Weighting the drug trafficking cases to constitute a 25-percent sample, the analysis is based on a final weighted size of 1,212 cases.

Table 142

Plea Impact by Primary Offense Type

	Plea Impact				
		"No"		"Yes"	
Offense Type	Total Cases[a]	Number	Percent[b]	Number	Percent[b]
Total	1212	1012	(83.3)	202	(16.7)
Homicide	3	1	(33.3)	2	(66.7)
Kidnapping	4	2	(50.0)	2	(50.0)
Robbery	56	46	(82.1)	10	(17.9)
Assault	14	12	(85.7)	2	(14.3)
Burglary/B&E	7	5	(71.4)	2	(28.6)
Larceny	91	87	(95.6)	4	(4.4)
Embezzlement	59	56	(94.9)	3	(5.1)
Tax offenses	12	10	(83.3)	2	(16.7)
Fraud	142	130	(91.6)	12	(8.5)
Drug trafficking	428	318	(74.3)	110	(25.7)
Drug possession	38	27	(71.1)	11	(29.9)
Drug communication facility	15	7	(46.7)	8	(53.3)
Auto theft	11	10	(90.9)	1	(9.1)
Forgery/Counterfeiting	44	41	(93.2)	3	(6.8)
Bribery	9	8	(88.9)	1	(11.1)
Escape	16	16	(100.0)	0	(0.0)
Firearms	94	79	(84.0)	15	(16.0)
Immigration	97	95	(97.9)	2	(2.1)
Extortion	9	5	(55.6)	4	(44.4)
Gambling/Lottery	6	5	(83.3)	1	(16.7)
Other	52	46	(88.5)	6	(11.5)
Money laundering	5	4	(80.0)	1	(20.0)

[a] Missing cases = 49.

[b] Row percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

Table 143

Reduction in Guideline Range Minimum for Cases with Plea Impact on the Guideline Range

Guideline Range Minimum Reduction (in Months)	Frequency[a]	
	Number	Percent[b]
Total	108	(100.0)
1-5	15	(13.9)
6-11	30	(27.8)
12-23	14	(13.0)
24-35	12	(11.1)
36-59	16	(14.8)
60-119	14	(13.0)
120 and above	7	(6.5)

[a] Missing cases = 19.

[b] Column percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

An examination of the 127 cases with a reduced guideline range reveals that the reasons for reducing the range included: dismissal of non-aggregable charges in 22 percent of these cases, a plea to a lesser charge in 26 percent, and stipulations to less serious facts in 33 percent.

Among the cases affected by a written or oral plea agreement, the mean sentence reduction was 40 months and the median reduction was 21 months. One-third (32.5%) of these reductions were less than one year below the original guideline range minimum (*see* Table 144). Among the affected cases, the reasons for the sentence reduction included: dismissal of mandatory minimum penalty charges that otherwise trump the guideline range (11% of the cases), dismissal of mandatory consecutive penalty charges such as 18 U.S.C. § 924(c) (6.5%), reduction to charges with a lower statutory maximum that trump the otherwise applicable guideline range (8%), binding sentencing recommendations (9%), and government recommendation for a downward departure (40.5%). Excluding from the analysis cases in which the reduction was due to substantial assistance, the mean and median reductions become 44 and 21 months, respectively, implying that the few extreme reductions are not accounted for by substantial assistance.

Thirty percent of the 202 cases affected in some way by a plea agreement were sentenced under guidelines for which multiple counts are non-aggregable.[45] The remaining 70 percent of the cases were sentenced under guidelines that involve grouping or aggregation. As indicated in Table 145 (for all cases and cases excluding substantial assistance), in non-aggregable cases reductions most often occur in both the sentence and guideline range, while in aggregable cases the reductions are most often directly in the sentence.

A breakdown of reduction patterns by reasons is presented in Table 146 for all distinct offense categories with ten or more cases. Patterns appear to vary by the type of offense. In eight of the ten robbery cases affected the reduction resulted from dismissed non-aggregable charges, while in the 110 drug trafficking cases most reductions can be attributed to government motions for substantial assistance and stipulations to lesser drug amounts.

C. Summary

The results of this study suggest that prosecutorial charge reductions and other bargaining appear to have an impact on the sentencing process in approximately 17 percent of cases resolved through a guilty plea. In 14 percent of all cases, the impact is directly on the sentence imposed. When the guilty plea leads to a reduced sentence, approximately half of these reductions are less than 21 months. Whether or not an impact of this frequency and magnitude is cause for concern must be separated, as an issue, from the question of the source of these reductions. As noted earlier in this chapter and in Chapter Three, the Commission promulgated policy statements for judicial review of plea agreements. On the basis of these data, it is difficult to determine to what extent reductions occur due to plea agreements that, for example, involve dismissal of charges, or occur due to a combination of prosecutorial behavior circumventing the guidelines and judicial acquiescence in the face of such agreements.

[45]*See* U.S.S.G. §3D1.2.

Table 144

Reduction in Sentence for Cases with Plea Impact on the Sentence

Sentence Reduction (in months)	Including Departures for Substantial Assistance		Excluding Departures for Substantial Assistance	
	Number[a]	Percent[b]	Number[a]	Percent[b]
Total	163	(100.0)	112	(100.0)
1-5	23	(14.1)	21	(18.8)
6-11	30	(18.4)	24	(21.4)
12-23	28	(17.2)	17	(15.2)
24-35	22	(13.5)	12	(10.7)
36-59	28	(17.2)	11	(9.8)
60-119	19	(11.7)	16	(14.3)
120 and above	13	(8.0)	11	(9.8)

[a] Missing cases = 9

[b] Column percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

Table 145

Type of Reduction by Aggregability of Charges Under the Guidelines

Reduction Type	Total[a]	Charges (including cases involving substantial assistance departures): Percent Non-Aggregable N	%[b]	Percent Aggregable N	%
Total	200	59	(100.0)	141	(100.0)
Guideline range reduction only	30	10	(17.0)	20	(14.2)
Sentence reduction only	75	8	(13.6)	67	(47.5)
Both Guideline range and sentence reduction	95	41	(69.5)	54	(38.3)

Type of Reduction by Aggregability of Charges Under the Guidelines

Reduction Type	Total[a]	Charges (excluding cases involving substantial assistance departures): Percent Non-Aggregable N	%[b]	Percent Aggregable N	%
Total	146	50	(100.0)	96	(100.0)
Guideline range reduction only	30	10	(20.0)	20	(20.8)
Sentence reduction only	30	1	(2.0)	29	(30.2)
Both Guideline range and sentence reduction	86	39	(78.0)	47	(49.0)

[a] Missing cases = 2

[b] Column percents appear in parentheses. Percents may sum to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files.

A Final Note

In addition to assessing the implementation and impact of the guidelines, the Commission is required by applicable statutory directive to discuss "... any problems with the system or reforms needed" in its evaluation report.

The preliminary data from the evaluation of the early phase of guideline implementation show significant reductions in disparity and the desired increases in uniformity. However, considerable resistance continues on the part of some federal judges and others involved in the sentencing process to the need for and wisdom of the statutory scheme for sentencing reform enacted by Congress in the 1984 Sentencing Reform Act.

Given the opposition of many judges to the idea of sentencing guidelines when the statute was being considered, it is encouraging that less than three years after the Supreme Court issued its opinion in Mistretta so much of the initial resistance has dissipated. Nonetheless, so long as some number of judges resist this new guideline system, the reduction of unwarranted disparity, the increased certainty and uniformity, and the end to the pockets of undue leniency identified by Congress will be less than would otherwise be achieved. This must be kept in mind when measuring the early effects of the sentencing guidelines.

To a lesser extent, a similar pattern is found among some federal prosecutors. The Commission's research suggests that in a minority of cases, federal prosecutors compromise the full potential of the guidelines to accomplish the statutorily prescribed goals by negotiating plea agreements that are not consistent with Department of Justice policies and Commission policy statements. Because these bargains are given only to some defendants, the unwarranted disparity eliminated by the uniformity of sentencing guidelines is compromised.

With respect to the matter of "reforms needed," the evaluation study identified a number of areas meriting further attention, including continued improvement of the guidelines through an iterative, selective amendment process; increased guidelines training opportunities for private defense attorneys; stepped-up monitoring of prosecutorial compliance with Department of Justice and Commission charging and plea negotiation policies; and closer collaboration between the Commission and Congress in shaping national sentencing policy. *See* Volume II of the evaluation report for a full discussion of the Commission's recommendations.

The overriding conclusion the Commission draws from this short-term evaluation, however, is that at this early juncture there is every reason for Congress to reaffirm the sentencing reforms it set in motion through passage of the Sentencing Reform Act of 1984 and no compelling justification for any significant alteration of those policies.

The Federal Sentencing Guidelines

A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining

United States Sentencing Commission

137987
2 of 3

The Federal Sentencing Guidelines:

A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining

United States Sentencing Commission

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137987
Part 2

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Chapter One

Introduction and Overview of the Report

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) established the United States Sentencing Commission and delegated to it authority to promulgate sentencing guidelines for the federal courts. After a period of intensive review and empirical study of the sentencing process, the Commission issued the initial set of guidelines; those guidelines took effect on November 1, 1987.[1]

The Sentencing Reform Act mandated that the Sentencing Commission study the implementation and impact of the guidelines. Specifically, the enabling legislation requires that the Sentencing Commission:

> submit a report to the General Accounting Office, all appropriate Courts, the Department of Justice, and Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.[2]

In order to meet this congressional mandate, the Commission adopted and submitted to Congress in June 1990 a research plan proposed by its Research Office after consultation with the Commission's Research Advisory Group.[3] The plan built upon prior research on criminal sentencing and the criminal justice system generally and outlined studies designed to address the issues specified by Congress.

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[1]Chapter Two of this report contains a detailed history of sentencing reform in the federal system, including the Commission's promulgation of guidelines for the federal courts.

[2]Pub. L. No. 98-473, § 236, 98 Stat. 1837, 2033 (1984). The statute requires the General Accounting Office to begin its own study of the operation of the sentencing guidelines four years from November 1, 1987 (*i.e.*, November 1, 1991) and the Commission to have its report to the General Accounting Office "within one month" of that date, or no later than December 1, 1991.

[3]The Commission invited a distinguished group of outside researchers to serve as advisors to the evaluation. While the Commission made all final decisions with respect to methods and final reporting, the suggestions provided by the Research Advisory Group were afforded great deference. The Commission's Research Advisory Group is chaired by Dr. Richard A. Berk (University of California Los Angeles), and has as its members Dr. Phil Cook (Duke University), Dr. Shari S. Diamond (American Bar Foundation and the University of Illinois), Mr. Joseph diGenova (private attorney), Professor Daniel Freed (Yale University), Professor Norval Morris (University of Chicago), and Ms. Julie Samuels (Department of Justice). One member, Dr. Roderick Little (University of California Los Angeles), resigned prior to completion of the evaluation due to overwhelming time commitments.

Congress intended that the evaluation focus on data for the four-year period immediately following the implementation of the first iteration of guidelines. The governing statute requiring the evaluation, however, did not anticipate two critically important developments that substantially retarded the rate at which guidelines were implemented nationally. First, it did not envision that, while guidelines might technically become law in November 1987, constitutional challenges would prevent nationwide implementation until January 1989. During this 15-month period, from November 1987 to January 1989, approximately 200 district court judges ruled the guidelines unconstitutional, while some 120 declared them constitutional.[4] Nationwide implementation of the guidelines did not occur until the Supreme Court of the United States upheld the constitutionality of the Sentencing Reform Act through its decision in Mistretta v. United States.[5] Thus, the effective date of the start of guideline implementation in all judicial districts is January 18, 1989, the date of the Mistretta decision.

Second, when Congress established the effective date for the Sentencing Reform Act, it apparently contemplated that the guidelines and other "procedural" features of the new law would apply to all sentencing proceedings occurring after the guidelines took effect.[6] After reviewing the considerable legal problems of an *ex post facto* nature that could be expected to ensue from implementation of mandatory guidelines sentencing in conjunction with the abolition of parole and sharp reduction of "good time" credits, the Department of Justice and the Sentencing Commission advised Congress that it should provide a clear "bright line" rule under which the new Act and the guidelines would only apply to offenses committed after the November 1, 1987, effective date. Congress so provided in the Sentencing Act of 1987,[7] thereby creating a more gradual, phased-in implementation scheme pursuant to which the guidelines are applied to post-effective date offenses as they are processed through the criminal justice system.

These delays in guideline implementation have significant consequences for the scope of the evaluation submitted to Congress. Most importantly, the sentencing guidelines cannot be said to have been in effect for four years. Rather, in reality, they have been in effect for a little more than two and a half years. While every effort has been made to study the operations of the courts and the impact of the guidelines, only effects that could emerge during this foreshortened period can be reported. Thus, this evaluation report only provides a preliminary examination of the short-term effects of guidelines during the few years the guidelines can be said to have been operative.

Several ancillary consequences for the evaluation are equally important to note. First, there may be a transitional period during which the full impact of the guidelines has not yet been realized. For example, the impact on incarceration will not fully be realized until all cases in the federal courts are eligible to be sentenced under the Sentencing Reform Act. In February 1989, the first full month of data collection on guidelines cases for the Commission's evaluation, only 43.2 percent of federal offenders were sentenced pursuant to the Sentencing Reform Act. By the end of August 1990, that percentage had risen to approximately 75 percent, clearly short of full guideline

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[4]United States Sentencing Comm'n Annual Report 11 (1989), (data on constitutionality rulings available at the Commission).

[5]488 U.S. 361 (1989).

[6]Pub. L. No. 98-473, § 235, 98 Stat. 1837, 2031 (1984); S. Rep. No. 225, 98th Cong., 1st Sess. 189 (1983).

[7]Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1987).

implementation. Therefore, at the writing of this initial report, it cannot be argued that full implementation has occurred.

Second, there is the transitional effect caused by the relative "newness" of the guidelines system. As judges and federal court practitioners become more familiar with guideline application and more accustomed to working within such a system, certain aspects of their jobs may become more routinized and, as a result, more consistent. In the transition interim, however, it is nearly impossible to obtain reliable and valid measures of impact. Clearly, the guidelines must be implemented fully before their true impact can be measured. Similarly, it will take some time before the body of case law builds and shapes the interpretation and application of the guidelines, although certainly some significant impacts already can be seen.

Third, the abbreviated period of implementation may be too short for certain types of effects to appear or to be measured with any precision. For example, if the guidelines have had any impact on recidivism, that impact can only be measured for very short post-release periods for offenders who received short sentences.

In sum, because of the truncated nature of guideline implementation, this report contains only a preliminary assessment of some short-term effects and should be considered as the first in a series of reports. The Commission will continue to study and evaluate the impact of the guidelines, consistent with its statutory mandate, and will submit future reports that detail the further development of the guidelines and include measures of more intermediate and long-term effects of the guidelines on the federal court system.

I. The Evaluation Studies

The Commission designed four studies in response to its statutory evaluation mandate: an implementation study that examines the operation of the guidelines, a study of the guidelines' impact on sentencing disparity, a study of the guidelines' impact on the use of incarceration, and a study of the guidelines' impact on plea bargaining and the use of prosecutorial discretion. Proposals for these studies, their focus, and their methodological designs were reviewed by the Commission's Research Advisory Group and the General Accounting Office.

A. The Implementation Study

In order to understand the operations of the federal courts under the guidelines system, the Commission designed and undertook a process evaluation. Process evaluations in general attempt to understand and describe the internal workings of legislative programs or projects such as the implementation of sentencing guidelines in the federal courts. The purpose of this process study is to determine, first and foremost, whether the reform has been implemented as intended. If the reform has not been implemented fully or properly, any assessment of impact will be premature. Put simply, there is no point in measuring the impact of a program that was not implemented fully.

By its very nature, a process evaluation is largely descriptive, aimed at explication of the key components of a program rather than the testing of hypotheses about its operations. Among the key issues process evaluations typically seek to address are:[8]

- the identification of factors or features that are part of the program;

[8]Michael Q. Patton, Qualitative Evaluation Methods 60-62 (1980).

- the strengths and weaknesses of the program; and
- the process by which clients and/or cases are brought into the program and processed through it.

The size and complexity of the federal court system, divided among 13 circuits,[9] 94 districts, and several hundred district offices, make a complete process evaluation impossible to conduct within any reasonable period of time. As a result, the Commission chose to sample from among the circuits in order to gauge the operations of the guidelines in a small but generally representative number of offices. To achieve a representative sample, the Commission visited 12 offices, at least one from each of 11 circuits (the twelfth circuit was used as a pre-test site for interviews and survey instruments). During these visits, conducted during late 1990 and early 1991, research teams interviewed and surveyed district judges, assistant U.S. attorneys, probation officers, federal defenders, and private defense attorneys about a variety of topics concerning their work and the processing of cases under the guidelines system. These topics included, but were not limited to:

- guideline training;
- guideline knowledge and application;
- the roles of judges and court practitioners;
- factors affecting the sentencing process; and
- charging and plea bargaining practices.

In addition, a national survey of judges and federal court practitioners addressed a subset of issues that emerged from the interviews in the site visits. This survey was conducted to provide background in order to better understand the extent to which issues identified in the interviews may be of more general concern.

B. The Impact Studies

Once it has been determined that the legislative program or reform effort has been implemented, as intended, it is possible to undertake an evaluation of the impact of the reform. In the context of the sentencing guidelines, because of the truncated time period in which to conduct the evaluation, the Commission did not enjoy the luxury of completing the process evaluation before designing and implementing the impact evaluation. The two had to develop simultaneously on parallel research tracks.

Consistent with the evaluation mandate set forth by Congress, three separate studies were designed to assess the impact of the guidelines on sentencing disparity, the use of incarceration, and plea bargaining and prosecutorial discretion.

1. Sentencing Disparity

The Sentencing Reform Act was prompted in large part by concern over the unwarranted disparity that characterized federal sentencing practices. Offenders with similar criminal histories convicted of similar offenses all too often were sentenced to unlike sentences. Against this backdrop, the key question for this part of the evaluation study was:

- Does the range of sentences meted out for defendants with similar criminal records convicted of similar criminal conduct narrow as a result of guideline implementation?

[9] While there are 13 federal circuit courts of appeal, only twelve have criminal jurisdiction.

To address this question, data were assembled from the U.S. Parole Commission, the Federal Bureau of Prisons, the Administrative Office of the U.S. Courts, and the Commission's own monitoring system. Merged together, these data permit an examination of variability in sentencing for similar guideline and pre-guideline offenders convicted of similar criminal behavior.

2. The Use of Incarceration

The Commission's study of the use of incarceration focuses on three primary questions:

- To what extent has the proportion of defendants sentenced to prison and/or probation changed from 1984-1990?
- How has the severity of sentences (*i.e.*, the length of the sentence) changed from 1984-1990?
- To what extent are changes in the rate of incarceration and the length of incarceration attributable to the imposition of statutory changes, mandatory minimum sentencing statutes, sentencing guidelines, or other legislative initiatives?

The same datasets used to form the basis of the sentencing disparity analysis provided the longitudinal data needed to address the incarceration issues.

3. Prosecutorial Discretion and Plea Bargaining

The Commission's study of the impact of the guidelines on prosecutorial discretion and plea bargaining addressed a variety of questions, including:

- Has the incidence of various prosecutorial outcomes, such as the filing of charges and the acceptance of guilty pleas, changed over time?
- Has the likelihood of these prosecutorial outcomes changed as a result of the guidelines?
- What impact has plea bargaining had on guideline sentences?

To address the first two questions, the Commission obtained data files from the Executive Office of U.S. Attorneys on charging and processing outcomes. These files were used to create both aggregated longitudinal datasets and individual-level files.

To address the third issue, a separate study was initiated that examines the impact of plea bargaining on guideline sentencing for a sample of approximately 600 cases. This study used data from the Executive Office of U.S. Attorneys and from the Commission's monitoring files.[10]

[10]To complement this impact analysis, the Commission authorized Commissioner Ilene Nagel, in collaboration with Professor Stephen Schulhofer of the University of Chicago, to conduct an independent study of plea bargaining practices under the sentencing guidelines. The results of the Nagel-Schulhofer study will be submitted to Congress under separate cover.

II. Contents of the Report

Chapter Two of this report contains an overview of sentencing reform and describes the major policy issues resolved by the Commission in its design of the guidelines.

Chapter Three describes the implementation study, its methodology and its findings. Data for this chapter derive from a variety of sources, but principally the twelve site visits.[11]

Chapter Four presents the issues, data, and analysis of sentencing disparity.

Chapter Five presents data and analysis of the use of incarceration.

Chapter Six presents the longitudinal analysis and the case-level analysis of prosecutorial outcomes, as well as a discussion of the impact of plea bargaining on guideline sentencing.

[11]Appendix A contains detailed descriptions of the sites visited by the Commission's research teams based upon observations, interviews, written documents, and the Commission's monitoring data.

Chapter Two

Federal Sentencing Reform

Introduction[12]

In 1984, after more than ten years of study and debate, a bipartisan Congress enacted the most far-reaching reform of federal sentencing ever experienced in this country — the Sentencing Reform Act.[13] The Act (part of the Comprehensive Crime Control Act of 1984) directed the creation of a permanent, expert, bipartisan Commission to develop and, over time, refine sentencing guidelines to further the basic purposes of criminal sentencing: deterrence, incapacitation, just punishment, and rehabilitation. These guidelines were to be designed to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[14]

The Act delegated broad authority to the Commission to review and rationalize the federal sentencing process. It contained detailed instructions as to how this determination was to be made, the most important of which directed the Commission to create categories of offense behavior and offender characteristics. The Commission was required to prescribe guideline ranges specifying an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with offender characteristic categories.

The Sentencing Reform Act reflected Congress' desire for "honesty in sentencing" by abolishing parole and by substantially reducing and restructuring good behavior adjustments.[15] This change to a determinate and "real time" sentencing system meant that the sentence the judge ordered would be the sentence the offender would serve (less a maximum of 54 days per year, after serving one year, for satisfactory behavior in prison).

The United States Sentencing Commission, organized in late 1985 as an independent agency in the Judicial Branch of government, consists of seven voting members, appointed by the President and confirmed by the Senate, and two non-voting, *ex-officio* members. Three of the seven voting Commissioners must be federal judges and no more than four Commissioners may be of the same political party.[16] The two *ex-officio* Commissioners are the Attorney General or his designee, and the Chair of the United States Parole Commission. By statute, Commissioners hold full-time

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[12]Portions of this section were extracted from the following U.S. Sentencing Commission publications: Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1987); Annual Report (1989); Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991); and Guidelines Manual (November 1, 1991).

[13]Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[14]28 U.S.C. § 991(b)(1)(B).

[15]S. Rep. No. 225, 98th Cong., 2d Sess. 54, 56, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3237, 3239; *see also* 18 U.S.C. § 3624.

[16]28 U.S.C. § 991(a).

positions until November 1, 1993, at which time all Commissioners except the Chairman switch to part-time status.[17]

Early in its deliberations, the Commission decided that it was important to develop practical sentencing guidelines using an open process that involved as many interested individuals and groups as possible. Accordingly, one of the Commission's first actions was to establish advisory and working groups with whom the Commission could consult on a regular basis as it considered sentencing issues and drafted guidelines. Prior to its submission of the initial sentencing guidelines, the Commission conducted 13 public hearings, published two drafts of guidelines for public comment, and received more than 1,000 position papers from individuals and organizations. In developing its initial set of guidelines, the Sentencing Commission analyzed more than 10,000 actual cases to determine the characteristics that judges in the past had deemed relevant at sentencing. The Commission submitted its initial sentencing guidelines and policy statements to Congress on April 13, 1987. After a six-month period for review by the Congress, the guidelines became effective on November 1, 1987, and apply to all offenses committed by individuals on or after that date.

The Sentencing Commission, by statute, may submit guideline amendments each year to the Congress between the beginning of a regular congressional session and May 1. The amendments take effect automatically 180 days after submission unless a law is enacted to the contrary. The Commission has submitted six sets of guideline amendments to Congress since the initial sentencing guidelines took effect on November 1, 1987.

Shortly after the initial implementation of the guidelines, defendants throughout the country challenged the constitutionality of the Commission and the Sentencing Reform Act, claiming improper legislative delegation and violation of the separation of powers doctrine. On January 18, 1989, the Supreme Court of the United States, in Mistretta v. United States,[18] upheld the constitutionality of the Sentencing Commission in an 8-1 decision with an opinion written by Justice Blackmun. This decision was preceded by more than a year of litigation in which similar issues were argued before hundreds of district court judges and several U.S. courts of appeals. Over the course of the litigation, approximately 120 district judges ruled that the guidelines were constitutional, while more than 200 district judges invalidated the guidelines and all or part of the Sentencing Reform Act. In the courts of appeals, the Third Circuit upheld the guidelines;[19] a divided panel of the Ninth Circuit struck them down;[20] and the Fifth Circuit, after reviewing briefs and hearing oral argument, issued a supervisory order requiring that all district courts in that circuit apply the guidelines pending the Supreme Court decision.[21]

In Mistretta, the Supreme Court rejected the constitutional challenges to the Sentencing Reform Act and the Commission. With respect to the claim of excessive legislative delegation, the Court

[17]28 U.S.C. § 992.

[18]488 U.S. 361 (1989).

[19]United States v. Frank, 864 F.2d 992 (1988).

[20]United States v. Chavez-Sanchez and Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988).

[21]United States v. White, 855 F.2d 201 (5th Cir. 1988).

held that the Sentencing Reform Act contained more than ample "intelligible principles" and legislative policy direction to the Commission to pass muster under the delegation doctrine.[22] On the first of the separation of powers issues, the Court found no fault with the placement of the Commission in the Judicial Branch because the Commission does not exercise judicial power as a court under Article III of the Constitution or otherwise aggrandize or weaken the Judicial Branch. The Court also held that the Commission's functions are clearly related to the historical work of the courts.[23]

With respect to the composition of the Commission, the Court found that the statute's requirement that three federal judges serve on the Commission did not impermissibly interfere with the functioning of the judiciary in that the nature of the Commission's work "is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch." The Court held that the Commission was "an essentially neutral endeavor...in which judicial participation is peculiarly appropriate."[24] Finally, on the issue of presidential control of Commissioners through appointment (with the advice and consent of the Senate) and removal for cause, the Court held that neither power significantly threatened judicial independence.[25] After 15 months of constitutional uncertainty, the Supreme Court's decision in Mistretta cleared the way for full nationwide implementation of the sentencing guidelines.

I. Brief History of Sentencing Reform

A. The Early Foundations

For more than a century, until the enactment of the Sentencing Reform Act, Congress had delegated virtually unfettered discretion to federal judges to determine what a sentence should be within a typically wide range prescribed by statute. The federal judge decided the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors should be combined in determining a specific sentence.

In 1910, responding to advocates of sentencing reform who urged a "flexible sentencing system" permitting correctional experts to release prisoners according to "their potential for, or actual, rehabilitation,"[26] Congress took a major step toward a "three-way" sharing of sentencing responsibility. This step involved the creation of a parole system, under which executive branch correctional personnel were given the discretionary authority to release prisoners before the expiration of the term imposed by the judge. The result was a regime of indeterminate sentences, under which Congress defined a statutory maximum, the judge imposed a sentence (which the judge

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[22]Mistretta v. U.S., 488 U.S. 361, 372-373 (1989).

[23]*See id.* at 384-397.

[24]*Id.* at 407.

[25]*Id.* at 411.

[26]United States v. Grayson, 438 U.S. 41, 46 (1978).

could suspend and replace with supervised probation), and executive branch (parole) officials eventually determined the actual length of imprisonment.[27]

The 1950s and 1960s witnessed a growing recognition of the need to bring greater rationality and consistency to penal statutes and to sentences imposed under those statutes.[28] Remedial proposals suggested during this period generally sought to accomplish three main objectives: first, to group and grade criminal offenses logically in a limited number of categories (code reform); second, to bring together all sentencing provisions in a distinct part of the criminal code that would set out all sentencing procedures and the available punishments for each category of crime; and third, to establish a proportional sentencing structure under which newly enacted penal statutes could be easily integrated. Among the reform efforts that focused, to a limited degree, on sentencing were the Model Penal Code,[29] the Model Sentencing Act,[30] the American Bar Association Task Force on Sentencing Alternatives and Procedures,[31] and the Brown Commission.[32]

At the federal level, it was the work of the Brown Commission that provided particular impetus for continuing congressional consideration of proposals to revise the federal criminal laws and sentencing provisions. Among the principal sentencing reform recommendations of the Brown Commission were a standard classification and grading of offenses, a concise listing of the authorized sentences, limits on the cumulation of punishments for multiple offenses, a parole component following longer periods of imprisonment, and limited appellate review of sentences.[33]

In the Congress, the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, under the chairmanship of Senator John L. McClellan, took the lead in considering the

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[27]*See* Williams v. New York, 337 U.S. 241, 248 (1949); United States v. Addonizio, 442 U.S. 178, 188-189 (1979).

[28]*See* Model Penal Code (1962); Model Sentencing Act (Advisory Council of Judges of the National Council on Crime and Delinquency 1963).

[29]Model Penal Code (1962).

[30]Model Sentencing Act (Advisory Council of Judges of the National Council on Crime and Delinquency 1963).

[31]A.B.A. Minimum Standards of Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (1968) (updated 1979).

[32]Nat'l Comm'n on Reform of Federal Criminal Laws, Final Report (1971). Created pursuant to Act of November 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, upon the recommendation of President Lyndon B. Johnson. The 12-member Commission was chaired by Edmund G. Brown, Sr., Governor of California.

[33]*See* Reform of the Federal Criminal Laws: Hearings before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., Part I, 104-09 (1971) [hereinafter Senate Judiciary Criminal Code Hrngs.] (testimony of Louis B. Schwartz, Director, National Commission on Reform of Federal Criminal Laws); Nat'l. Comm'n on Reform of Federal Criminal Laws, Final Report 271-318 (1971), *reprinted in* Senate Judiciary Criminal Code Hrngs., *supra*, Part I at 424-69.

Brown Commission proposals. Hearings began in that subcommittee early in the 92nd Congress on February 10, 1971, and continued throughout that Congress.[34] In the following Congress, the subcommittee continued its work, focusing on two specific legislative proposals: S. 1, the Criminal Justice Codification, Revision and Reform Act of 1973, introduced by Senators John L. McClellan, Sam J. Ervin, and Roman L. Hruska; and S. 1400, the Criminal Code Reform Act of 1973, introduced by Senators Hruska and McClellan on behalf of the Nixon Administration.[35]

Although different in a number of respects, each of these bills built upon the recommendations of the Brown Commission, both in the overall criminal code recodification and in the proposals for sentencing. Neither proposal included the concepts of sentencing guidelines or a sentencing commission, as these ideas had just begun to surface and would not be put forward as a legislative proposal until the following Congress.[36]

B. The Notion of Sentencing Guidelines

Some eleven months after publication in January 1971 of the Final Report of the Brown Commission, then U.S. District Judge Marvin E. Frankel[37] delivered a series of lectures at the University of Cincinnati Law School.[38] His critique of sentencing in the federal criminal justice system culminated in a proposal "that there be established a National Commission charged with permanent responsibility for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the results of such study may lead; and (3) the actual enactment of rules subject to congressional veto."[39] Judge Frankel's visionary thinking received considerable attention.[40] Some thought his suggestions an "overreaction" and contended that more thorough training of judges in sentencing matters, as well as education of the public about sentencing (or "the sentencing process") would be sufficient.[41]

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[34]Senate Judiciary Criminal Code Hrngs., *supra* note 23, Parts I-IV (1971 & 1972).

[35]*Id.*, Parts V-XI (1973 & 1974).

[36]*See* S. 2699, 94th Cong., 1st Sess. (1975) (initial sentencing guideline bill introduced by Sen. Edward M. Kennedy, Nov. 20, 1975). S. 1, the 94th Congress version of the criminal code recodification considered by the Senate Judiciary Committee, did not authorize a sentencing commission or sentencing guidelines.

[37]U.S. District Judge for the Southern District of New York (since retired).

[38]Marx Lectures, November 3-5, 1971, *published as* Frankel, Lawlessness in Sentencing, 41 U. Cinn. L. Rev. 1 (1972), *reprinted in* Senate Judiciary Criminal Code Hrngs., *supra* note 33, Part IV, at 3923 (1972).

[39]*Id.*, Senate Judiciary Criminal Code Hrng., *supra* note 33, Part IV, at 3973. *See also* M. Frankel, Criminal Sentences: Law Without Order 118 (1973).

[40]Sen. Edward M. Kennedy has called Judge Frankel "the father of sentencing reform." *See* 128 Cong. Rec. S12,784 (daily ed. Sept. 30, 1982).

[41]*See, e.g.*, Mattina, Sentencing: A Judge's Inherent Responsibility, 57 Judicature 96 (Oct. 1973), *reprinted in* Senate Judiciary Criminal Code Hrngs., *supra* note 33, Part XI, at 8089 (1974).

Meanwhile, the U.S. Board of Parole (now the United States Parole Commission) had implemented a system of guidelines for federal parole decisionmaking as a pilot project in 1972. The program was expanded to all parole decisions in 1974.[42] This effort represented the first actual use of a guidelines system for making decisions as to the effective length of prison terms. The Parole Commission and Reorganization Act of 1976[43] codified the requirement of guidelines to structure parole release decisions.

Subsequently, the use of guidelines in the federal parole system led to suggestions that similar guidelines be developed for use by federal trial judges in their sentencing decisions. Also, a number of state parole authorities developed guidelines systems, and several states used their experience with parole guidelines as a springboard for the development of sentencing guidelines.[44]

Another important impetus came from the workshops on federal parole and sentencing organized by a group of professors[45] at Yale Law School with financial support from the Guggenheim Foundation. This series of workshops led to a publication[46] that advocated a number of sentencing reforms, including the creation of a sentencing commission to promulgate sentencing guidelines, a mandatory statement of reasons for sentencing decisions, appellate review of sentences, and the abolition of parole.

C. Sentencing Reform Becomes Law

The work by criminal justice researchers at Yale Law School and the recommendations of Judge Frankel led Senator Edward M. Kennedy in 1975 to introduce a bill calling for a judicial commission to promulgate guidelines for federal courts as "the beginning of a concerted legislative effort to deal with sentencing disparity."[47] This bill was thereafter incorporated in successive versions of bills in the 94th through 97th Congresses to comprehensively reform the federal criminal

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[42]*See* 38 Fed. Reg., 31,942 (1973); 39 Fed. Reg., 20,028 (1974).

[43]Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976).

[44]*See* Revision of the Federal Criminal Code: Hrngs. Before the Subcommittee on Crim. Justice of the House Comm. on the Judiciary, 96th Cong. 1st Sess., Part I, at 559-77 (1979) (written statements of Don M. Gottfriedson, Dean, Rutgers Univ. Grad. School of Criminal Justice). *See also* H.R. Rep. No. 1017, 98th Cong., 2d Sess. 93 (1984).

[45]Pierce O'Donnell, graduate fellow and clinical supervising attorney; Michael J. Churgin, clinical teaching fellow and supervising attorney; and Dennis E. Curtis, lecturer and director of clinical studies.

[46]P. O'Donnell, M. Churgin, and D. Curtis, Toward a Just and Effective Sentencing System (1977).

[47]121 Cong. Rec. 37,562 (1975).

laws. The sentencing components of that legislation garnered broad, bipartisan co-sponsorship, as well as support from the Executive Branch.

Sentencing reform finally became law in the 98th Congress as part of a second generation of comprehensive crime control legislation. On March 16, 1983, Senators Strom Thurmond and Paul Laxalt introduced S. 829, the Administration's version of comprehensive crime control legislation that contained sentencing reform as Title II.[48] After hearings, the Senate Judiciary Committee broke S. 829 into a number of separate legislative proposals that were reported to the Senate. Among these reported bills was S. 1762, the Comprehensive Crime Control Act of 1983, which, like S. 829, contained a major section (Title II) entitled Sentencing Reform.[49] Also reported to the Senate was S. 668, a bill by Senator Kennedy virtually identical to Title II of S. 1762.[50] The Senate adopted and forwarded to the House both of these measures on February 2, 1984.[51]

After hearings in the House Judiciary Subcommittee on Criminal Justice, that subcommittee and the full Judiciary Committee reported sentencing legislation to the House.[52] The House did not consider the sentencing bill, however, because it was presented with a motion by Congressman Dan Lungren (in relation to H.J. Res. 648, the continuing appropriations resolution for fiscal year 1985) effectively requiring that the House vote on the comprehensive crime bill passed by the Senate earlier that year. That motion carried by vote of 243 to 166.[53] The Senate made various amendments in the crime control act provisions in the continuing appropriations bill on October 4, 1984,[54] and the legislation was signed into law by President Reagan eight days later.[55]

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[48]129 Cong. Rec. S3706 (daily ed. Mar. 16, 1983).

[49]129 Cong. Rec. S11,679 (daily ed. Aug. 4, 1983) (statement of Sen. Thurmond). Other "components" of S. 829 simultaneously reported to the Senate with S. 1762 were S. 1763, pertaining to *habeas corpus* reform; S. 1764, limiting application of the exclusionary rule; and S. 1765, pertaining to capital punishment procedures.

[50]129 Cong. Rec. S11,709 (daily ed. Aug. 4, 1983, statement of Sen. Kennedy).

[51]130 Cong. Rec. S741-834 (daily ed. Feb. 2, 1984). S. 1762 was approved by vote of 91 to 1 (Roll call vote No. 6, at S759); S. 668 by vote of 85 to 3 (Roll call vote No. 7, at S818).

[52]H.R. 6012, 98th Cong., 2d Sess. (1984) (reported from the House Comm. on the Judiciary, Sept. 13); H.R. Rep. No. 1017, *supra* note 44.

[53]130 Cong. Rec. H10,077-129 (daily ed. Sept. 25, 1984).

[54]130 Cong. Rec. S13,062-91 (daily ed. Oct. 4, 1984).

[55]Pub. L. No. 98-473, 98 Stat. 1837 (1984).

D. Major Legislative Purposes of Sentencing Reform Legislation

While the legislative history reveals markedly different views between the Senate and House toward the necessity, purposes, and content of sentencing reform legislation,[56] there was substantial commonality of purpose and approach. The principal authors of the Senate legislation that became law and the principal advocates of alternative House legislation both stressed the need for legislative policy guidance to the judiciary relating to the purposes to be achieved in sentencing, the alternative types of authorized sentences, and other relevant factors.[57]

Some advocates of sentencing guidelines saw as their main objective the elimination of undue leniency in sentencing; others were concerned about undue severity and an excessive reliance on imprisonment. The overriding, more broad-based concern with the existing system, however, was directed at the apparent unwarranted disparity and inequality of treatment in sentencing of similar defendants who had committed similar crimes.[58] That unifying theme, more than any other, endured throughout the long period of academic and legislative debate and brought together strong advocates of divergent political philosophies. The result was the creation of the United States Sentencing Commission and its subsequent promulgation of sentencing guidelines.

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[56]*See, e.g.*, various Senate and House Judiciary Comm. Hearings Reports, referenced *supra*, notes 33 & 44. *Compare* S. Rep. No. 225, 98th Cong., 1st Sess. (1983) *with* H.R. Rep. No. 1017, *supra* note 44.

[57]*See generally* statements of Sens. Thurmond, Biden, Kennedy, and Laxalt in record of Senate debate on S. 2572, 128 Cong. Rec. S12746-859 (daily ed. Sept. 30, 1982); record of Senate debate on S. 1762, 129 Cong. Rec. S11,679-712 (daily ed. Aug. 4, 1983), 130 Cong. Rec. S329-834 (daily ed. Jan. 27, 30, 31, Feb. 1,2, 1984), 130 Cong. Rec. S13,062 (daily ed. Oct. 4, 1984). *See also* 129 Cong. Rec. E5898 (daily ed. Nov. 18, 1983) (statement of Rep. Rodino), 130 Cong. Rec. E430 (daily ed. Feb. 9, 1984) (statement of Rep. Conyers); Conyers, Unresolved Issues in the Federal Sentencing Reform Act, 32 Fed. B. News and J. 68 (1985). Note however, that Mr. Conyers did not necessarily agree with the need for a sentencing commission to promulgate sentencing guidelines.

[58]A number of studies have documented the existence and extent of sentencing disparity. *See, e.g.*, Fed. Jud. Center, The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit (1974) (prepared by A. Partridge & W. Eldridge); Nagel & Hagan, The Sentencing of White-Collar Crime in Federal Courts: A Socio-legal Exploration of Disparity, 80 Mich. L. Rev. 1427 (1982); Mann, Sarat & Wheeler, Sentencing the White-Collar Offender, 17 Am. Crim. L. Rev. 479 (1980); Wheeler, Weisburd & Bode, Sentencing the White-Collar Offender: Rhetoric and Reality, 47 Am. Soc. Rev. 641 (1982); Diamond & Ziesel, Sentencing Councils: A Study of Sentence Disparity and its Reduction, 43 U. Chi. L. Rev. 109 (1975); Clancy *et al.*, Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, 72 J. Crim. L. & Criminology 524 (1981); Seymour, 1972 Sentencing Study For the Southern District of New York, 45 N.Y. St. B.J. 163 (1975). *See also* discussion and citations in H.R. Rep. No. 1017, *supra* note 44, at 31-2, 35, 93; S. Rep. No. 225, *supra* note 56, at 41-50, 52.

II. Application of the Guidelines to an Individual Case

The guidelines promulgated by the Sentencing Commission contain two primary dimensions: offense seriousness and criminal history. In applying the guidelines to an individual case, the court uses the offense of which the defendant was convicted (offense of conviction) to determine the applicable offense guideline. The court then determines an offense level from the applicable offense guideline, including offense-specific aggravating and mitigating factors, on the basis of the defendant's relevant (actual) conduct, and applies a series of adjustments addressing factors such as whether the victim was extremely vulnerable, the defendant's role in the offense, whether the defendant obstructed justice, whether there were multiple counts of conviction, and whether the defendant accepted responsibility for his/her conduct. The result is an offense level ranging from level 1 (for the least serious offenses) to level 43 (for the most serious offenses), that reflects the offense seriousness dimension of the guidelines.

The court then determines the defendant's criminal history, applying points for the length, seriousness, and recency of the defendant's prior criminal record. Six possible criminal history categories, from Category I (no prior or very minor prior record) to Category VI (very serious/extensive prior record), make up the criminal history dimension. In addition, special enhancements apply for career offenders, armed career criminals, and defendants who derive a substantial portion of their income from criminal conduct.

The applicable guideline range in months of imprisonment is located on a table at the intersection of the defendant's offense level and the defendant's criminal history category. This table has 43 rows, corresponding to the 43 levels of offense seriousness, and six columns, corresponding to the six criminal history categories. For example, in the case of a defendant with an offense level of 18 and a criminal history category of II, the guideline range set forth in this table is 30-37 months of imprisonment.

If the minimum of the applicable guideline range is zero months (*e.g.*, a guideline range of 0-6 months), the court may sentence the defendant to probation or a fine in lieu of imprisonment. If the minimum of the guideline range is at least one month but not more than six months, various combinations of alternatives to imprisonment (*e.g.*, home detention, community confinement) are authorized as a substitute for imprisonment. If the minimum of the guideline range is more than six but not more than ten months, a split sentence (imprisonment combined with community confinement or home detention) is also authorized. However, if the minimum of the guideline range is 12 months or greater, no substitutes for imprisonment are authorized by the guidelines.

Once the guideline range is determined, the court has discretion to select an appropriate sentence within the guideline range. The court may impose a sentence above or below the guideline range (as a guideline departure), but only if the court finds "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."[59]

[59] 18 U.S.C. § 3553(b).

III. The Guidelines' Resolution of Major Issues

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system that required the court to impose an indeterminate sentence of imprisonment and empowered the Parole Commission to determine how much of that sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence announced by the court. Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

The guideline-drafting process required the Commission to resolve a host of important policy questions related to these concerns that typically involved rather evenly balanced sets of competing considerations.

A. Proportionality versus Uniformity

A major goal of the Sentencing Reform Act was to increase uniformity in sentencing by narrowing the wide disparity in sentences that were being imposed by different federal courts for similar criminal conduct by similar offenders. The increase in uniformity was not, however, to be achieved through sacrificing proportionality. The guidelines were to authorize appropriately different sentences for criminal conduct of significantly different severity.[60]

While a very simple system may produce uniformity, it cannot satisfy the requirement of proportionality. To use an extreme example, the Commission ostensibly could have achieved perfect uniformity simply by specifying that every defendant was to be sentenced to two years of imprisonment. Doing so, however, plainly would have destroyed proportionality. In addition, guidelines of this kind likely would be ineffective because their unreasonableness would ensure that ways would be found to subvert them. Similarly, having only a few simple, general categories of crimes might make the guidelines uniform and easy to administer, but at the cost of lumping together offenses that are different in important respects. For example, a single category of robbery that lumped together armed and unarmed robberies, robberies with and without injuries, and robberies of a few dollars and robberies of millions, would have been far too simplistic to achieve just and effective sentences, especially given the narrowness of the legislatively required sentencing guideline ranges.[61]

A sentencing system tailored to fit every conceivable case, on the other hand, could become too complex and unworkable. Complexity can seriously compromise the certainty of punishment and

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[60]*See* 28 U.S.C. § 991(b)(1)(B).

[61]28 U.S.C. § 994(b)(2). If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

its deterrent effect. The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether each of the large number of potentially relevant sentencing factors applied. This added factfinding would impose a substantial additional burden on judicial resources. Furthermore, as the number and complexity of decisions that are required increases, the risk that different judges will apply the guidelines differently to situations that are in fact similar also increases. As a result, the very disparity that the guidelines were designed to eliminate would be re-introduced.

Even if a system that attempted to include and quantify every potentially relevant sentencing factor were administratively feasible, devising such a system probably would not be. The list of potentially relevant sentencing factors is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. Even in a sentencing system based purely on perceived seriousness or "just deserts," the appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Weapon use or possession, for example, clearly is more significant when the crime is one that involves a risk or threat of injury to a person (*e.g.*, robbery), than when the crime is one that has no such element (*e.g.*, damaging property or hunting wildlife on protected land). The same is true even when the factor represents a specific loss or harm. With good reason, sentencing courts do not treat the occurrence of a minor injury identically in all cases, regardless of whether that injury occurred in the context of a bank robbery or in the context of a breach of peace. Similarly, the destruction of $100 worth of property when the crime is vandalism is more significant in affecting the sentence than when the crime is rape. The risk that any given harm will occur differs depending upon the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense).

In addition, the relationship between punishment and multiple harms is not simply additive, but varies depending on how much other harm has occurred.[62] The introduction of crime control makes the proper interrelationship among sentencing factors even more complex.[63] The Commission's early efforts, which were directed at devising such a comprehensive guideline system, encountered serious and seemingly insurmountable problems. The guidelines were extremely complex, their application was highly uncertain, and the resulting sentences often were illogical.

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[62]Thus, research has shown that the perceived seriousness of an offense cannot be derived by adding the seriousness of its component "harms;" two or three offenses generally are not twice or three times as serious as a single offense; and the seriousness rankings do not necessarily correspond with imprisonment rankings. *See, e.g.*, Blumstein & Cohen, Sentencing of Convicted Offenders: An Analysis of the Public View, 14 Law & Soc'y Rev. 223, 236-37 (1980); Gottfredson, Young & Lawfer, Additivity and Interactions in Offense Seriousness Scales, 17 J. Res. Crime & Delinq. 26 (1980); Wagner & Pease, On Adding Up Scores of Offense Seriousness, 18 Brit. J. Criminology 175 (1978).

[63]Incapacitation, for example, calls for incarcerating offenders primarily on the basis of predictions of the likelihood that they will commit future crimes. To the extent that a sentencing system seeks to protect the public from future crimes by the defendant, the sentences that would result purely from harm rankings likely would be inappropriate; the likelihood that the defendant would commit future crimes would be paramount. Similarly, some crimes that are less harmful than others may require greater sentences to provide adequate deterrence; the appropriate sentence is heavily context dependent.

Given the impracticality and inefficacy of attempting to include in the guidelines each and every distinction that might appear relevant and significant in sentencing, it would have been tempting to retreat to the simple, broad category approach that is utilized by some states. State guidelines systems that use relatively few, simple categories, and narrow imprisonment ranges, however, are ill-suited to the breadth and diversity of federal crimes. Indeed, the bulk of serious federal crimes might well be treated as departures from the guidelines in such systems.[64] In order to permit the court to impose properly proportional sentences within the guidelines, a simple broad-category approach would require broader guideline ranges than the six-month or 25-percent width that the Sentencing Reform Act allows. The Commission considered, but ultimately rejected, employing specific factors with flexible adjustment ranges (*e.g.*, 1 to 6 levels depending on the degree of damage or injury). Because of the broad discretion that it entails, such an approach would have risked correspondingly broad disparity in sentencing; different courts would have exercised their discretionary powers in significantly different ways. Either of these approaches would have risked a return to the wide disparity that Congress established the Commission to limit.

In the end, there was no completely satisfying solution to this dilemma. Any system selected would, to a degree, enjoy the benefits and suffer from the drawbacks of each approach. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and devise a system that could most effectively meet the statutory goals.

B. Real Offense versus Charge Offense Sentencing

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he or she was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he or she was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook those harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the Parole Commission took account of the conduct in which the defendant actually engaged (as opposed to only the charged conduct), as determined in a presentence report, at the sentencing hearing, or before a Parole Commission hearing officer. The Sentencing Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy

[64]Various state guidelines, for example, have recommended departure for "major economic offenses" and "major controlled substance offenses." Both terms are broadly defined and could well encompass a majority of federally-prosecuted fraud and drug offenses.

sentencing process given the potential host of "real harm" facts that could apply in many cases. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, contains a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and other adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges the sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging the sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission determined that it would closely monitor charging and plea agreement practices and make appropriate adjustments should they become necessary.

C. Use of a Defendant's Prior Criminal History

The Commission was directed in 28 U.S.C. § 994(d) to determine the relevance of a defendant's criminal history in establishing guideline categories of defendants. The criminal history component of the guidelines addresses the statutory sentencing purposes of just punishment and the protection of the public from further crimes by the defendant.[65] Enhancing a defendant's sentence on the basis of criminal history furthers the crime control goals of general and specific deterrence as well as incapacitation. It also is consistent with public perceptions of just punishment. The use of criminal history to adjust a defendant's sentence is similarly consistent with historical sentencing practice. Analyses of past practices in different jurisdictions have consistently shown the defendant's prior criminal record to be one of the key determinants of sentences.[66]

From a just punishment perspective, a defendant with a criminal history is deemed more culpable and deserving of greater punishment than a first offender.

From a crime control perspective, a criminal history component is especially important because it is predictive of recidivism. Imposition of more restrictive sentences on those defendants who have a greater likelihood of recidivism enhances the protection of the public from further crimes by those defendants. In addition, announcing a policy that future offenses will be dealt with more severely furthers specific deterrence.

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[65] *See* 18 U.S.C. § 3553(a).

[66] *See* Blumstein, Research on Sentencing: The Search for Reform, 83-87 (1983).

The criminal history score used in the guidelines requires consideration of the frequency, seriousness, and recency of the defendant's prior criminal history. The particular elements that the Commission selected have been found empirically to be related to the likelihood of further criminal behavior and also are compatible with the purposes of just punishment. Because the elements selected are compatible both with a just punishment and crime control approach, the conflict that otherwise might exist between these two purposes of sentencing is diminished.[67]

In addition, the Commission selected the particular elements for inclusion in the criminal history score with regard for reliability in field scoring. Field scoring reliability refers to the accuracy and consistency with which decisionmakers can score actual cases, and is affected by a number of factors, including the complexity of the items and the difficulty in obtaining verified information about the items. If field scoring reliability is lacking, both predictive power and equity in decisionmaking suffer.

In selecting elements for the criminal history score, the Commission examined a number of prediction instruments, with particular attention to the four prediction instruments reviewed by the National Academy of Sciences Panel on Criminal Careers.[68] Two of these four prediction instruments, the United States Parole Commission's "Salient Factor Score" and the "Proposed Inslaw Scale for Selecting Career Criminals for Special Prosecution," were developed using data on federal offenders. Four of the five elements selected by the Commission for inclusion in the criminal history score in its initial guidelines are very similar to elements contained in the Salient Factor Score. The remaining element was derived from an element contained in the Proposed Inslaw Scale.

The indirect evidence available to the Commission strongly suggests that the criminal history score will demonstrate predictive power comparable to that of prediction instruments currently in use. Using its augmented FPSSIS (Federal Probation Sentencing and Supervision Information System) data, the Commission has verified that, as anticipated, there is a close relationship between the criminal history score used in the initial guidelines[69] and the Salient Factor Score, a prediction instrument used by the United States Parole Commission as part of its system of parole guidelines for nearly fifteen years. The predictive power and stability of the Salient Factor Score have been firmly established.

> *Since initial implementation of federal parole guidelines, the Salient Factor Score has been revised and validated prospectively on several new samples. Two measures of predictive power —point-biserial correlation, mean cost rating — show that for all versions, the score*

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[67]In support of this approach, *see* H.R. No. 1017, 98th Cong., 99-100 (1984); Moore, Purblind Justice: Normative Issues in the Use of Prediction in the Criminal Justice System, *reprinted in* 2 Criminal Careers and "Career Criminals" 314 (1986); Monahan, The Case for Prediction in the Modified Desert Model of Criminal Sentencing, 5 Int'l J.L. & Psychiatry 103 (1982).

[68]*See* 1 Criminal Careers and "Career Criminals," 178-90 (A. Blumstein, J. Cohen, J. Roth & C. Visher ed. 1986).

[69]In 1991, the Commission added an additional element to its criminal history score to reflect multiple instances of previous violent offenses that otherwise would not have received separate criminal history points (§4A1.1(f), effective November 1, 1991). This additional element will affect a small fraction of cases and is consistent with the underlying logic of the device.

and the four risk categories are at the high end of the accuracy range reported in other parole recidivism studies.[70]

The high correlation between the two instruments suggests that the criminal history score will have significant predictive power.

D. Use of Past Practice Data

The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that starts from existing sentences. In order to determine pre-guidelines sentencing practices, including which distinctions were significant in past practice, the Commission analyzed and considered the following: detailed data drawn from more than 10,000 presentence investigations; less detailed data on nearly 100,000 federal convictions during a two-year period; distinctions made in substantive criminal statutes; the United States Parole Commission's guidelines and resulting statistics; public commentary; and information from other relevant sources. After examination, the Commission accepted, modified, or rationalized the more important of these distinctions in formulating the initial set of guidelines. This approach, while criticized by some as insufficiently radical, clearly appears to be the one that the legislation contemplated.[71]

This approach provided a concrete starting point and identified a list of relevant distinctions that, although of considerable length, was sufficiently short to create a manageable set of guidelines. The categories discerned from the analysis were relatively broad and omitted distinctions that some may believe important, yet they included most of the major distinctions that statutes and data suggest tend to make a significant difference in sentencing decisions. Important distinctions that were ignored in past practice probably occurred rarely. Under the guidelines, a sentencing judge may deal with such an unusual case by departing from the guidelines. Again, this appears to be what was contemplated by the drafters of the legislation.[72]

The Commission's largely pragmatic approach does not imply that philosophical issues were ignored. Rather, the Commission attempted to reach results that were consistent with the differing philosophies. Thus, the Commission reviewed the guidelines' relative ranking of offenses to ensure that they were reasonably consistent with a "just deserts" philosophy. At the same time, specific sentences generally were viewed as acceptable from a crime control perspective. The emphasis on increased certainty of punishment primarily serves the crime control goal of deterrence but also is consistent with most views of desert, since it provides greater consistency. While the criminal history section is included primarily for crime control purposes, attention was given to the desert literature in determining what factors to include. In some instances the Commission adopted positions that favor one approach over another, but this was done on an issue-by-issue basis considering the merits of the respective arguments.

The Commission did not simply copy estimates of average past sentences as revealed through analysis of the data. Rather, it used the results of analyses of past practice as a guide, departing at different points for various reasons. The guidelines represent an approach that begins with and

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[70]1 Criminal Careers and "Career Criminals," 182 (citations omitted), *supra* note 68.

[71]*See also* H. Rep. No. 1017, 98th Cong., 2nd Sess. 100 (1984).

[72]*See* S. Rep. No. 225, 98th Cong. 1st Sess. 166, 168 (1983).

builds upon empirical data, but does not slavishly adhere to past sentencing practices. It is important to emphasize that guidelines based upon average past practice will not duplicate past practice and are not intended to do so. By constraining sentences within a fairly narrow range centered at about the average of past practice, such guidelines limit the otherwise broad range of sentences that may be imposed. That is precisely their goal.

Although the results of detailed statistical analyses usually provided the starting point for the guidelines that were adopted, in some instances these analyses were of little value in explaining or rationalizing past sentences.[73] For some violations, the Commission reviewed a selection of presentence investigation reports and consulted with judges and practitioners, synthesizing a coherent rationale that generally explains and is reasonably consistent with past sentencing practice. For example, a review of civil rights cases led the Commission to conclude that the guidelines for such offenses primarily should be tied to those for the underlying crimes, with an increase to reflect the civil rights violation as an aggravating factor.

For some offenses, such as those involving national defense, prosecutions are infrequent. Consequently, the Commission drafted guidelines based upon the statutes and anecdotal evidence regarding the nature of the cases actually prosecuted. The parole guidelines, and analyses of the less detailed but broad data bases, were helpful references for offenses that were prosecuted infrequently.

Sometimes, the Commission's review of the empirical results showed that distinguishing factors that appeared in actual practice were questionable. For example, in the area of property offenses, the empirical results showed that similar factors (primarily loss and sophistication) were the most important determinants of the sentences. However, the specific results for each crime, when compared with one another, showed considerable variation. The sentences for "white-collar" crimes, such as embezzlement, fraud, and tax evasion, were considerably lower than those for the substantially equivalent crime of larceny. In light of the legislative history supporting higher sentences for white-collar crime,[74] the Commission made a policy decision to adopt a guideline structure under which all of these crimes are treated essentially identically.

Recent legislation (for example, legislation enacting mandatory minimum sentences)[75] and expressed legislative direction[76] were also important considerations and, if clear, essentially superseded the past practice analyses.

E. Consecutive versus Concurrent Sentencing

Congress directed the Commission to determine whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively.[77] The Commission has

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[73]In some instances, for example, there simply were insufficient data to yield statistically significant results.

[74]S. Rep. No. 225, 98th Cong., 1st Sess. 76-77, 177 (1983).

[75]*E.g.*, the Anti-Drug Abuse Act of 1986.

[76]*See* S. Rep. No. 225, 98th Cong., 1st Sess. 177-78 (1983).

[77]*See* 28 U.S.C. § 994(a)(1)(D).

established guidelines to structure the court's discretion in making these determinations so that a reasonable incremental penalty is imposed for additional offenses.

F. Consideration of Individual Offender Characteristics

The Commission's authorizing legislation required it to consider whether a number of offender characteristics have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant.[78] The characteristics are:

1. age;
2. education;
3. vocational skills;
4. mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
5. physical condition, including drug dependence;
6. previous employment record;
7. family ties and responsibilities;
8. community ties;
9. role in the offense;
10. criminal history; and
11. degree of dependence upon criminal activity for a livelihood.

In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or the length of imprisonment.

After conducting a public hearing and receiving public comment on these issues, the Commission set forth as policy statements the factors that were found to be not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.[79] These factors were age, education and vocational skills, mental and emotional conditions, physical condition (including drug or alcohol dependence or abuse), employment, family ties and responsibilities, and community ties. Based upon its analysis of case law and empirical data, the Commission, in November 1991, amended the guidelines to include military, civic, charitable, or public service; employment-related contributions; and record of prior good works as factors not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, the Commission's policy statements setting forth these factors do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range.

The factors of race, sex, national origin, creed, religion, and socio-economic status were determined to be not relevant in the determination of a sentence. The defendant's role in the offense, the defendant's criminal history, and the degree to which a defendant depended upon criminal activity for a livelihood were determined to be relevant in determining the appropriate sentence and were incorporated in the guidelines themselves.

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[78] 28 U.S.C. § 994(d).

[79] *See* U.S.S.G. Ch.5, Pt.H (Specific Offender Characteristics).

G. Departures

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "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."[80] Accordingly, 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. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

The Commission adopted this departure policy for several reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. Second, the Commission believed that despite the courts' legal freedom to depart from the guidelines, they would not do so often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed. Third, the Commission recognized that the initial set of guidelines need not attempt to specify every possible departure consideration. The Commission is a permanent body, empowered by law to write and rewrite guidelines with progressive changes over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

IV. An Overview of Mandatory Minimums in the Federal Criminal Justice System

Given the relationship between the sentencing guidelines and mandatory minimum sentences, and the tension between them, it is helpful to understand the history of mandatory minimum sentences in the federal system.

Mandatory minimum sentences are not new to the federal criminal justice system. As early as 1790, mandatory penalties had been established for capital offenses.[81] In addition, at subsequent intervals throughout the 19th Century, Congress enacted provisions that required definite prison

[80]18 U.S.C. § 3553(b).

[81]*See* §3, 1 Stat. 112, 113 (1790). Many capital offenses were originally only punishable by death. In the late 19th Century, Congress provided that many of these offenses could alternatively be punished by life imprisonment. *See* §1, 29 Stat. 487.

terms, typically quite short, for a variety of other crimes.[82] Until relatively recently, however, the enactment of mandatory minimum provisions was generally an occasional phenomenon that was not comprehensively aimed at whole classes of offenses.[83]

This changed with the passage of the Narcotic Control Act of 1956,[84] which mandated minimum sentences of considerable length for most drug importation and distribution offenses. As with all mandatory minimums, the sentence imposed could not be suspended or reduced. Furthermore, the legislation prohibited the applicability of parole for covered offenses.[85]

In 1970, Congress reconsidered the application of mandatory minimum provisions to drug crimes. Finding that increases in sentence length "had not shown the expected overall reduction in drug law violations,"[86] Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970[87] that repealed virtually all mandatory penalties for drug violations. While sponsors of the legislation indicated a particular concern that mandatory minimum sentences were exacerbating the "problem of alienation of youth from the general society,"[88] other factors contributed to the general concern. Some argued that mandatory penalties hampered the "process of rehabilitation of offenders" and infringed "on the judicial function by not allowing the judge to use his discretion in individual cases."[89] Others argued that mandatory minimum sentences reduced the deterrent effect of the drug laws in part because even prosecutors viewed them as overly severe:

> *The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offenses. In addition, severe penalties, which do not take into account individual*

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[82]Approximately a dozen provisions that date back to the 1800s remain on the books today. These provisions generally require mandatory prison terms of three months or less for an assortment of offenses ranging from refusing to testify before Congress, *see* 2 U.S.C. § 192, to the failure to report seaboard saloon purchases. *See* 19 U.S.C. § 283.

[83]Throughout the first half of this century, Congress continued to adopt mandatory minimum provisions in a piecemeal fashion. During this period, for example, short prison terms were made mandatory for disobeying various orders, *see*, *e.g.*, 7 U.S.C. §§ 13a, 13b, 195, and somewhat longer sentences (one to two years) were made applicable to a smattering of economic crimes such as commodities price fixing, *see* 12 U.S.C. § 617, and bank embezzlement. *See* 12 U.S.C. § 630.

[84]Pub. L. No. 84-728, 70 Stat. 651 (1956).

[85]Narcotic Control Act of 1956, Pub. L. No. 84-728, Title I, Sec. 103. 70 Stat. 651, 653-55 (1956).

[86]S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969).

[87]Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[88]*Id.*

[89]*Id.*

> *circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make conviction somewhat more difficult to obtain.*[90]

In any case, the main thrust of the change in the penalty provisions of the 1970 Act was "to eliminate all mandatory minimum sentences for drug law violations except for a special class of professional criminals."[91]

For the next decade, the sentencing reform effort at the federal level consisted of two distinguishable endeavors: (1) an effort to make the federal penalty structure more consistent and rational by recodification[92] and (2) an effort to reduce unwarranted disparity in sentencing through the development of sentencing guidelines, a system that would set forth the appropriate factors to be considered in sentencing and structure the sentencing judge's discretion, but allow for departures from the guidelines where there were aggravating or mitigating factors unique to the particular case. In 1984, after nearly a decade of bipartisan effort, Congress enacted the Sentencing Reform Act of 1984, establishing the Sentencing Commission and directing it to develop federal sentencing guidelines.[93] The drafters of the sentencing guideline legislation saw the guidelines as a preferable alternative to, and generally incompatible with, mandatory (statutory) minimum sentences:

> *The Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws. The Committee believes that for most offenses the sentencing guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation.*[94]

At the same time, on the state level, there was renewed support for mandatory minimum penalties. This trend began in New York in 1973, with California and Massachusetts following soon thereafter. While the trend toward mandatory minimums in the states was gradual, by 1983 49 states had passed such provisions.[95] Most states added mandatory minimum provisions to their criminal codes piecemeal, with only a few states making comprehensive statutory changes. Nevertheless, the shift reflected frustration with the problems of crime and a national disillusionment with indeterminate sentencing schemes.[96]

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[90]H. Rep. No. 1444, 91st Cong., 2nd Sess. 11 (1970).

[91]S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969). Mandatory penalty provisions for the Continuing Criminal Enterprise offenses, *see* 21 U.S.C. § 848, were in fact strengthened in the 1970 Act.

[92]*See, e.g.*, S. Rep. No. 605, 95th Cong., 1st Sess. (1977); S. Rep. No. 553, 96th Cong., 2nd Sess. (1980); S. Rep. No. 307, 97th Cong., 1st Sess. (1981).

[93]Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[94]S. Rep. No. 225, 98th Cong., 1st Sess. 89 N. 194 (1983).

[95]Tonry, Sentencing Reform Impacts, Issues and Practices in Criminal Justice 24 (1987).

[96]An Overview of Mandatory Sentences, Maryland Criminal Justice Coordinating Council, Statistical Analysis Center Bulletin 1 (1983).

On the federal level, the enactment of mandatory minimum sentences began again in 1984. In the same year Congress passed the Sentencing Reform Act with its call for an expert commission to study sentencing practices and create sentencing guidelines, Congress established a number of mandatory minimum sentences, including those for drug offenses committed near schools,[97] mandatory sentencing enhancements for the possession of especially dangerous ammunition during drug and violent crimes,[98] and mandatory minimum enhancements for the use or carrying of a firearm during a broadly defined crime of violence.[99]

The trend toward mandatory minimum sentences continued with the Firearm Owners' Protection Act[100] and the Anti-Drug Abuse Act of 1986.[101] The five-year enhancement under 18 U.S.C. § 924(c) for the use or carrying of a firearm during an offense was extended to apply when the underlying offense was a drug crime.[102] The 1986 Anti-Drug Abuse Act also contained mandatory minimum provisions that stiffened penalties for defendants who sold drugs to a person under age 21,[103] who employed a person under age 18 in a drug offense,[104] and who possessed certain weapons.[105]

Most significantly, the 1986 Anti-Drug Abuse Act set up a new regime of mandatory minimum sentences for drug trafficking offenses that tied the minimum penalty to the amount of drugs involved in the offense. The Act sought to subject larger drug dealers to a ten-year mandatory minimum for a first offense and a 20-year sentence for a subsequent, similar conviction. Thus, for example, one kilogram or more of a mixture or substance containing a detectable amount of heroin

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[97]*See* Pub. L. No. 98-473, § 503(a), 98 Stat. 1837, 2069 (1984), amending 21 U.S.C. § 860 (formerly § 845a).

[98]*See* Pub. L. No. 98-473, § 1006(a), 98 Stat. 1837, 2139 (1984), adding 18 U.S.C. § 929.

[99]*See* Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138 (1984).

[100]Pub. L. No. 99-308, 100 Stat. 449 (1986).

[101]Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[102]*See* Pub. L. No. 99-308, § 104(a)(2)(A-E), 100 Stat. 449, 456 (1986), amending 18 U.S.C. § 924(c); Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207-39 (1986), amending 18 U.S.C. § 924(e)(1).

[103]*See* Pub. L. No. 99-570, § 1105(a), 100 Stat. 3207-11 (1986), amending 21 U.S.C. § 859 (formerly § 845).

[104]*See* Pub. L. No. 99-570, § 1102, 100 Stat. 3207-11 (1986), amending 21 U.S.C. § 861 (formerly § 845b).

[105]*See* Pub. L. No. 99-570, § 10002, 100 Stat. 3207-167 (1986), amending 15 U.S.C. § 1245. *See also* Pub. L. No. 99-308, § 104(a)(4), 100 Stat. 449, 458 (1986), (amending 18 U.S.C. § 924(e)(1) to provide increased penalties for certain felons and others in possession of a firearm).

triggered the ten-year mandatory minimum, as did five kilograms or more of a mixture or substance containing cocaine.[106]

The 1986 Anti-Drug Abuse Act sought to cover mid-level players in the drug distribution chain by providing a mandatory minimum penalty of five years. Weights such as 100 grams or more of a mixture or substance containing heroin, and 500 grams or more of a mixture or substance containing cocaine triggered the Act's five-year mandatory minimum. A second conviction for these offenses carried a ten-year minimum sentence.

In the Omnibus Anti-Drug Abuse Act of 1988, Congress continued to target different aspects of drug crime. At one end of the drug distribution chain, Congress amended 21 U.S.C. § 844 to provide a mandatory minimum of five years for simple possession of more than five grams of "crack" cocaine. At the other end, Congress doubled the existing ten-year mandatory minimum under 21 U.S.C. § 848(a) for an offender who engaged in a continuing drug enterprise, requiring a minimum 20-year sentence in such cases.

Perhaps the most far-reaching provision of the 1988 Act, however, was a change in the drug conspiracy penalties. This change made the mandatory minimum penalties previously applicable to substantive distribution and importation/exportation offenses also applicable to conspiracies to commit these substantive offenses.[107] Since co-conspirators in drug trafficking conspiracies have different levels of involvement, this change increased the potential that the applicable penalties could apply equally to the major dealer and the mid- or low-level participant.

Although early versions of the 1990 Omnibus Crime Bill contained a substantial number of mandatory minimum provisions relating to drugs and guns, Congress ultimately limited enactment of mandatory minimums in the legislation to a ten-year mandatory sentence for organizing, managing, or supervising a continuing financial crimes enterprise.[108] However, it is unclear whether this represents new evidence of a changing mandatory minimum pattern.

The Violent Crime Control Act of 1991,[109] which passed the Senate on July 11, 1991, provides for a substantial number of new or increased mandatory minimum provisions. The Omnibus Crime Control Act of 1991, which passed the House on October 22, 1991, also contains a number of similar provisions.[110] In addition to the nearly two dozen new mandatory minimum provisions in the omnibus crime bills generally aimed at firearms and drug offenses, there are presently about 30 bills containing mandatory minimum sentencing provisions pending before Congress. These bills would mandate penalties ranging from six months for certain labor violations to life imprisonment for certain money-laundering violations.

[106]*See* 21 U.S.C. § 841(b)(1)(A).

[107]*See* Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (1988).

[108]*See* 18 U.S.C. § 225.

[109]S. 1241, 102d Cong., 1st Sess., 137 Cong. Rec. S59982 (daily ed. July 15, 1991).

[110]H.R. 3371, 102d Cong., 1st Sess. (1991).

V. Impact of Mandatory Minimums on the Drafting of Sentencing Guidelines

The enactment of mandatory minimum sentences poses a substantial challenge to the drafting of sentencing guidelines. The guidelines, by definition, employ a "heartland concept," setting forth the appropriate penalty for the typical case, considering among other things, the nature of the offense and the role and criminal history of the defendant.

The drafting of guidelines for offenses having a mandatory minimum sentence requires a determination as to the intended "heartland" covered by the mandatory minimum statute. For example, in the case of a ten-year mandatory minimum sentence applicable to any offense involving importing, exporting, distribution, or possession with intent to distribute 1,000 kilograms of marijuana, Congress may have intended for the mandatory minimum to apply to the "large scale importer or dealer." Or, the intent might have been that the mandatory minimum be rigorously applied to any defendant who literally qualified under the statute, *e.g.*, defendants involved as off-loaders, deck-hands, truck drivers, or lookouts who traditionally have been seen as having lesser roles than the importers, dealers, or financiers who have a proprietary or managerial interest.

If the "heartland" of the conduct covered by the ten-year mandatory minimum is viewed as applying to the more culpable defendants, and the guidelines are drafted in accord with this view, the question arises as to how the guidelines should address less culpable defendants. If lower guidelines are drafted to cover defendants with lesser roles, guidelines technically will be incompatible with the mandatory minimum sentences that literally apply to such conduct. In such a case, if the prosecution charges the offense in a way that implicates a mandatory minimum statute, the mandatory minimum sentence will "trump" the guideline. If the prosecutor exercises discretion to charge the offense in a way that the mandatory minimum does not apply, the guidelines will control. To the extent that this occurs, however, sentencing discretion has been rather starkly transferred from the court to the prosecutor's office, a result that seems incompatible with the purposes of the Sentencing Reform Act of 1984 and the development of sentencing guidelines.[111]

If, on the other hand, the guidelines are drafted so that the guideline range associated with the mandatory minimum sentence is set for the least culpable first offender who could be prosecuted under the statute, the concern for proportionality can only be met by substantially escalating the penalties for more culpable defendants, defendants with larger drug quantities, and defendants having prior criminal histories. If, however, such a structure is perceived by the judges and prosecutors to be overly harsh, manipulation of both the sentencing guidelines and mandatory minimum statutes will tend to occur, leading not only to unwarranted disparity, but to the "detrimental circumvention of the laws" noted by the drafters of the Sentencing Reform Act of 1984 with respect to the similar, previously repealed mandatory minimum sentencing statutes.[112]

Cognizant of these issues, the Congress in 1990 formally directed the Sentencing Commission to respond to a series of questions concerning the compatibility between guidelines and mandatory minimums, the effect of mandatory minimums, and options for Congress to exercise its power to direct sentencing policy through mechanisms other than mandatory minimums. In response to this

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[111]*See generally* S. Rep. No. 225, 98th Cong. 1st Sess. 167 (1983) (discussion concerning prosecutorial discretion).

[112]S. Rep. No. 225, 98th Cong., 1st Sess. 89 N. 194 (1983).

directive, the Commission reported to the Congress in August 1991 (Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System).[113]

VI. Impact of Mandatory Minimums on the Evaluation of Sentencing Guidelines

The enactment of mandatory minimum sentences has a significant impact upon the evaluation of the guidelines. First, in assessing the impact of the guidelines on the use of imprisonment, it becomes difficult to disentangle the effects of the mandatory minimums from the effects of the guidelines for those offenses to which mandatory minimums apply, particularly because the existence of mandatory minimum sentences had to be considered in drafting the guidelines for the offenses covered. Second, in terms of practitioners' perceptions of the guidelines, it is frequently difficult to disentangle a perception based upon the guidelines system, a mandatory minimum sentence, or a guideline that had to be drafted in a particular fashion to accommodate a mandatory minimum statute. Third, in the measurement of the impact of the guidelines on unwarranted disparity, the existence of mandatory minimums poses similar complicating factors. These issues are discussed in greater detail in subsequent sections of this evaluation report.

[113]The report is available on request from the Commission.

Chapter Three

The Implementation and Operations of the Federal Sentencing Guidelines

Part A
Introduction, Methodology, and Summary of Findings

I. Introduction to the Implementation Study

Congress had three overriding objectives in enacting the Sentencing Reform Act of 1984 (*see* Chapter Two, Part III). It wanted to enhance the effectiveness and fairness of the federal criminal justice system by making the system more "honest": in general, the sentence imposed by the court should be the sentence served by the offender. Second, Congress sought reasonable uniformity in sentencing so that like offenders would generally receive like sentences. Third, Congress sought a predictable proportionality in sentencing so that appropriately different punishments would be imposed for criminal conduct involving different degrees of seriousness. The principal method by which Congress sought to achieve these ends was by creating the United States Sentencing Commission to prescribe sentencing policy, consistent with legislative direction, through a detailed guidelines system.

Congress was well aware that the implementation of mandatory sentencing guidelines, as promulgated by the Sentencing Commission, would reduce much of the sentencing discretion previously vested in the federal judiciary. Furthermore, Congress was mindful of the fact that subjecting judicial discretion to mandatory sentencing guidelines would cause dramatic change in the entire system of sentencing. The Sentencing Reform Act and its legislative history make clear that Congress intended a number of important shifts in federal sentencing: from an approach that tended to favor rehabilitation over other purposes of sentencing to one that recognizes the importance of just punishment, incapacitation, and deterrence; from an indeterminate sentencing system to one that is determinate; from a highly discretionary system to one in which judicial discretion is carefully structured; and from a focus primarily on the offender to a focus primarily on the offense and certain salient offender characteristics, notably the offender's prior criminal history. Given these significant changes in philosophy, values, and approach to the formulation and application of sentencing policy, it was quite clear that implementation would be resisted in some quarters and that the transition to sentencing reform would not be accomplished without difficulty.

While every reform effort has both supporters and detractors, the Sentencing Reform Act was unique in that it cast all three branches of government in a tug-of-war over the question of who should determine the appropriate sentence for convicted offenders. Moreover, while the Constitution clearly assigns to Congress the power to control or delegate sentencing policy largely as it sees fit,[114] the fact that for so long that power had been shared and, in many ways, dominated by the judiciary made it a practical certainty that there would be substantial resistance to full implementation by many judges.

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[114]Mistretta v. U.S., 488 U.S. 361 (1989).

This is not to suggest that the entire federal judiciary was opposed or continues to resist implementation of the letter and spirit of sentencing reform. Indeed, as this report will make clear, there has been a growing cooperative attitude and responsiveness by members of the judiciary in many respects, and an effort by many judges to work with the Sentencing Commission to improve the guidelines system as initially implemented. On the other hand, it cannot be said that resistance to guideline sentencing among judges has ceased. Certainly, there have been continuing efforts by some members of the judiciary, whether through attempts to shape legislation, pronouncements in case law, or other means, to return to the former system of largely unfettered judicial control over the sentencing process.

Resistance to the Sentencing Reform Act cannot be laid solely at the feet of those judges who prefer the former system. In fact, representatives of the defense bar have been among the most vociferous critics of the guidelines. In some cases, line prosecutors have greeted sentencing guidelines more as a burden and intrusion on their traditional role than as the critical system reform and crime control tool that Congress and four successive presidential administrations advocated. In fact, among the primary groups that together function within the federal criminal justice system, the group that most readily embraced the new sentencing system and committed its efforts to making it work has been probation officers. Throughout this initial period of guideline implementation, probation officers have continued to lead the way in developing guideline application expertise and in consistently seeking to have the guidelines applied as Congress and the Commission intended.

Accordingly, an evaluation of the impact of the guidelines could not ignore the likelihood of antagonism from two of the four principal players in the sentencing system — trial court judges and defense attorneys — at least during the initial stages of implementation and until the constitutional issues were settled. Any effort to examine the potential shift in discretion and to evaluate the impact of the guidelines on changes in sentence severity, disparity, or like attributes necessarily must be preceded by an evaluation of whether and to what degree the guidelines system has been implemented as intended.

Perhaps the easiest way to underscore the importance of a process or implementation study is to repeat a familiar tale from the annals of evaluation research. When it was first discovered that smoking could cause cancer, several state and federal programs were initiated to decrease the commencement of smoking among the youth of America. One midwestern state funded a smoking reform program by commissioning a poster picturing the negative effects of smoking. The program required that the poster be distributed widely on the state's flagship university campus. Subsequently, the state undertook an evaluation to measure the degree to which the anti-smoking poster campaign reduced the number of undergraduate and graduate students who began smoking. The evaluation researchers measured the number of new smokers prior to the date when the posters were to be distributed and compared that rate to the rate of new smokers at a fixed date subsequent to that time. The evaluation concluded that the poster program had not succeeded in decreasing the number of new smokers, and the program was abandoned. Several months later, officials discovered that, despite the fact that program sponsors had paid students to distribute the anti-smoking posters, the vast majority of the posters had been tossed in a closet where they remained. In evaluation terms, the program had never been implemented. Thus, the conclusion of the evaluation researchers that the anti-smoking poster campaign had failed was in error. The program had not failed; it had never been implemented.

The purpose of recounting this tale is to highlight the importance of determining whether, and to what degree, the sentencing reform effort has been implemented. To the extent that the sentencing guidelines system has not been implemented fully, or is subject to resistance or efforts at circumvention, meaningful evaluations of the impact of the guidelines system are premature. A

prerequisite to evaluating the impact of the guidelines is an evaluation of the implementation process.

In addition to the question of implementation, this process evaluation examines some of the difficult issues surrounding guideline implementation that generally are not suited to numeric interpretation. For example, attempting to understand the plea negotiation process under the guidelines system requires examining features that are often informal and generally subjective and individualistic. The interviews conducted with judges and federal court practitioners attempt to bring these "behind the scenes" practices to light. Additionally, to get a sense of judges' and practitioners' perceptions of the new system requires talking to these people and exploring at some length various features of the system. This portion of the evaluation examines these issues and attempts to make sense of the many processes operating within the federal court system.

Before turning to a description of the implementation/process study and its results, one point must be emphasized. As Chapter Two makes clear, no sooner had Congress effectively directed the implementation of the guidelines in November 1987 than hundreds of constitutional challenges to the composition of the Commission and to Congress' plan for sentencing reform were filed. While Congress intended four years of nationwide guideline implementation to precede the impact evaluation, nationwide implementation did not begin until the Supreme Court of the United States issued its opinion in Mistretta v. United States in January 1989. The result is much less than a four-year period to collect data and measure the effects of the new system.

Moreover, between enactment of the sentencing reform legislation calling for a four-year evaluation report and the actual implementation of the guidelines, Congress decided that the Act and the guidelines should be applied only prospectively to offenses occurring after the November 1, 1987, effective date. This decision resulted in a much more gradual implementation than originally contemplated. In fact, full guideline implementation had not yet occurred at the end of August 1990, when 25 percent of defendants were still being sentenced under pre-guidelines law.

This truncated period of time is significant, not only because it results in an inadequate number of cases to study, but also because any major reform requires a period of settling down and adjustment. A premature evaluation of the impact of a program can lead to erroneous conclusions due to the bias of the settling down or adjustment period effects. This problem is exacerbated when there is substantial resistance to change, a characteristic unquestionably present in the implementation of the sentencing guidelines.

For these reasons, the evaluative measures included here should be used primarily as potential sources of sentencing policy development, rather than as definitive judgments about guideline success or failure. Judgments about success or failure based on impact measures can be made reliably only after an appropriate interval of time has passed, after the resistance to guidelines has diminished, after the common law of guideline application and interpretation has been more fully developed and settled, and when short-term and intermediate effects can be measured robustly.

II. Methodology

The number and magnitude of changes resulting from the Sentencing Reform Act and its impact on the federal courts were not only anticipated by Congress, but desired. Any evaluation of the Act and the sentencing guidelines on the daily operation of the federal courts should employ both qualitative and quantitative research methods. In addition, the evaluation should address both the process of implementation, as well as the impact of the change. Indeed, in

specifically requiring a report that details the operations of the sentencing guidelines, the enabling legislation anticipated the need for a process component in the evaluation. This process component examines the degree to which the intervention (*i.e.*, the sentencing guidelines system) was implemented as intended.

A. Site Methodology

To understand the consequences of a change as dramatic as the Sentencing Reform Act requires an examination of how that change has been implemented on a day-to-day basis. Any study of the implementation of the guidelines is complicated by the fact that the federal criminal trial court system is not a monolithic entity, but rather consists of hundreds of judges within 94 separate districts, located in 12 judicial circuits. Each district represents a separate and distinct social organization and, therefore, it is only at this level that the implementation of the sentencing guidelines can reasonably be assessed.

Prior to passage of the Sentencing Reform Act and introduction of the sentencing guidelines, each judicial district operated as a distinct and fairly autonomous organization. Given these preexisting conditions, it was anticipated that implementation of the guidelines would progress at different rates among the various districts and thus, as far as the process evaluation was concerned, each district might be observed at different stages in the implementation process. The brevity of the period under evaluation, due principally to numerous constitutional challenges, may exacerbate the problem of differential rates of implementation within districts, but will undoubtedly reflect a system in transition.

Data required for the process evaluation were obtained primarily through structured interviews with federal judges and court practitioners in selected sites. Given the diversity of federal districts and the prospect of differential rates of implementation, visiting several districts was imperative to obtain information regarding the implementation process. In fact, one of the necessary empirical questions for the implementation study was whether and to what extent judicial districts differ, as some would argue, and whether and to what extent they were similar.

1. The Pre-Guidelines Study

The new system of sentencing engendered by the Sentencing Reform Act altered some of the ways in which district judges, probation officers, prosecutors, and defense attorneys performed their jobs and interacted with one another. This created the potential for a fundamental change in the processing of criminal cases in federal district courts.

To assess the impact of the guidelines on the operations of the federal courts, the Commission conducted an initial study of court operations before the guidelines were fully implemented, with special emphasis on charging and plea bargaining (hereafter referred to as the Pre-Guidelines Study). This study attempted to capture federal court practices and case processing before the guidelines, and provide a general picture of sentencing practices prior to guideline implementation. While initially conceived as a pre-test for the four-year evaluation, it became readily apparent through the interview process that, given the dynamic nature of the federal criminal justice system, it seemed unlikely that this study could serve, strictly speaking, as a pre-test measure against which guideline practices could be measured. However, general, broad

conclusions referencing the nature of the sentencing process, pre-guidelines, are referenced as appropriate in the analyses that follow.[115]

2. The Post-Mistretta Study

To understand the nature of the federal court system under the sentencing guidelines, the Commission conducted a study after the Mistretta decision and after the majority of cases processed in federal courts became eligible for sentencing under the guidelines. This study involved visits to several judicial districts and focused upon a wide variety of issues, including:

- the roles of judges and various court practitioners under the guidelines system;
- the resolution of disputes over the content of the presentence report;
- charging and plea bargaining practices;
- knowledge of guideline application;
- departures by sentencing judges, including departures for substantial assistance by the offender; and
- appeals of sentencing decisions by the government and by offenders, including content and outcomes of appeals.

The following section discusses the sample of districts and the process by which they were selected.

B. Sample Selection

Given the complexities inherent in assessing a major intervention, such as the implementation of the sentencing guidelines, within a dynamic system, such as the federal criminal justice system, a number of alternative methods of gathering field data (*e.g.*, mail surveys, telephone interviews) were considered. The Commission, in consultation with its Research Advisory Group, determined that visits to selected districts, including interviews with judges and all key court practitioners, would be the most effective method of collecting the necessary information.

Before selecting sites to visit, a variety of potential site selection criteria were considered (*e.g.*, number of guideline cases sentenced per year, number of cases filed per year, geographic location, and circuit representation). Upon review, circuit representation emerged as the principal criterion for selection for several reasons.[116] Perhaps the most important reason for selecting by circuit relates to emerging case law. Because case law develops fundamentally at the circuit level, each circuit's potentially distinct case law can be controlled. Furthermore, since individual circuits reflect a degree of geographic variation, circuit representation yields a form of geographic representation.

[115]Results from the Pre-Guidelines Study are reported in Appendix B.

[116]This report does not draw explicit generalizations about the country as a whole based upon data collected in interviews during the site visits. Attempting to generalize from the interview data is beyond the scope of this evaluation; therefore, selecting by circuits should not be viewed as a precursor to discussing national results.

The sampling strategy for the selection of sites consisted of choosing one district at random from each of 11 circuits.[117] Each district's probability of selection was the proportion of the circuit's criminal cases filed in that district during 1989. Within each of the selected districts, one office was chosen at random, without regard to size.

This strategy served several purposes. First, it provided a neutral selection procedure within each circuit. Weighting by number of criminal cases filed increased the likelihood that the larger districts (size measured by cases filed during 1989) would be represented in the sample. Since large districts are few in number, an unweighted selection procedure could easily yield a sample limited to the smallest districts. While these small districts represent the "heartland" of districts, the larger districts tend to be productive and visible enclaves that many point to as sources of various conditions and/or problems. To exclude these districts entirely, or to have given their selection no more consideration than the smallest districts, would possibly risk a loss of valuable data for the study results.

After the initial selection of districts was made, an examination of their characteristics indicated two deficiencies: one region of the country was not represented, and none of the largest districts in the nation were selected. Consequently, a twelfth district was added to the existing sample. This non-random district is among the largest in the country in terms of criminal caseload, and has one of the highest departure rates in the federal system. While this site is in many respects an outlier, an important goal of the evaluation is to capture the variation among districts in the implementation process. Therefore, this site was explicitly included in the sample with the knowledge that the process of guideline implementation observed in this district represents, in many respects, one extreme.

Following the addition of the twelfth site, the resulting sample consisted of three large, two medium-to-large, one average, and six small districts.[118] Nine of the twelve sites had federal defender offices. The number of annual criminal case filings per district ranged from approximately 250 to more than 2,500. Five of the districts visited reported criminal case filings in excess of 700, while seven districts had fewer than 700.

The number of respondents interviewed totaled 258. The breakdown by professional category included 49 district judges and 1 magistrate judge; 19 U.S. attorneys or supervisory U.S. attorneys; 56 line prosecutors; 7 federal defenders or supervisory federal defenders; 10 line defenders; 38 private defense attorneys; 19 chief probation officers or supervisory probation officers; 47 line officers; and 12 clerks of court.

C. Site Visits and the Interview Process

The primary focus of the site visits was structured interviews with judges, supervising and line assistant U.S. attorneys, private and public defense attorneys, and supervising and line

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[117]The twelfth circuit, the District of Columbia Circuit, was excluded because it served as a resource for pretests of the interview and survey instruments.

[118]Small, medium-to-large, and similar terms are labels assigned for the purpose of description and comparison of districts. Large consists of 50 or more assistant U.S. attorneys and at least 10 judges; medium-to-large is somewhat greater than the average numbers of 25 assistant U.S. attorneys and 8 judges; and small denotes fewer than the average number of prosecutors and judges.

probation officers. The majority of interview questions were open-ended, allowing respondents to provide a rich, detailed description of court operations, interactions with other court practitioners, and perspectives on the implementation of the guidelines. Other sources of information from the site visits included documents, such as local court rules, policy directives, and internal office memoranda. Through face-to-face interviews and observation, the Commission sought information related to several subjects:

- similarities and dissimilarities among the sites visited;
- day-to-day operations, problems, and successes that individual districts with different characteristics experience in implementing the guidelines;
- perceptions, attitudes, and information pertaining to the substantive topics of charging and plea bargaining, dispute resolution, knowledge and practice of guideline application, departures, and appeals;
- roles and interactions of judges, attorneys, and probation officers; and
- information that supports or explains findings in the large aggregated databases, thus providing a link between the districts and the national data.

Each site interview team consisted of a researcher and a guideline expert. Typically, two pairs were sent to each site, accompanied by a research assistant. Two types of data collection instruments were used at each site: a structured interview and a self-administered questionnaire. Where possible, all judges, probation officers performing investigative work for presentence reports, all assistant U.S. attorneys, all federal defenders, and several private defense attorneys were interviewed. Private attorneys were typically selected on the recommendation of probation officers and/or assistant U.S. attorneys.[119] When the number of respondents in a given office exceeded the capabilities of the research team, a random sample[120] of individuals was selected from that office. On average, approximately 18 interviews were conducted at each site. With one exception, no requests of judges and practitioners for interviews were declined.[121] Occasionally, when the office sampled within a site was not the primary office in that district, supervising practitioners from the primary office asked to be interviewed. In addition, in a few cases judges and court practitioners from the sites but not part of the random selection process requested an interview. In all cases, these interviews were granted.

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[119]These recommendations were solicited because of the difficulty in locating private attorneys with extensive federal guideline knowledge.

[120]The Commission made every effort to adhere to the random selection; however, in some sites, individuals randomly selected were unavailable during site visits. In such instances, substitutes in the same respondent type were interviewed instead.

[121]The federal defender at one site declined to participate and, consequently, none of his staff were interviewed. Instead, additional private attorneys were contacted and interviewed.

D. Data Sources

1. Personal Interviews

Judges and supervisory officers (*e.g.*, chief and supervising probation officers) were administered only face-to-face interviews.[122] In addition to the personal interviews, line attorneys, probation officers, and private defense attorneys were asked to complete a brief survey questionnaire that elicited additional information on the sentencing process.

The instruments were customized for each respondent type (*e.g.*, most questions related to the presentence report were asked only of probation officers), but in general were designed to collect information on practices, procedures, and policies relevant to the sentencing process. All respondents were asked questions on guideline application, resolution of disputes related to sentencing, roles and influence of the judges and federal court practitioners, views on how knowledgeable practitioners were about the guidelines, case processing in the court system (particularly with reference to investigations and the presentence investigation report), and the general impact of the guidelines on the criminal justice system.

Specific groups of questions pertaining to certain critical issues were asked of all respondents. This served several purposes, the most obvious being to provide complete information on the issue from the perspective of all judges and court practitioners. A more subtle, but nonetheless important, purpose served as a check on the potential respondent bias of particular questions; *i.e.*, respondents naturally will be motivated to answer in a manner that is favorable to their offices. However, their actual behavior may be quite different. When possible, the responses of one group are used as a check on the responses of another in circumstances where biases of this nature are suspected.[123]

Following the site visits, researchers wrote descriptions of each of the 12 offices.[124] The purpose of these site descriptions is to present profiles of local court practices and policies, the processes by which sentencing is accomplished, and the interaction of the judges and various court practitioners. The intent is to describe the setting, characters, and the actions with respect to guideline implementation in each site. The site descriptions and brief overview are contained in Appendix A.

2. Supplemental Survey

The site visit interviews, although the primary data source for addressing the implementation process, served as only one resource. Supplemental surveys, administered during the site visits collected additional individual demographic information and general, more

[122]The instruments used in the implementation study site visits are available for inspection at the Commission's offices.

[123]Appropriate checks are not always possible, and therefore self-reports of behavior that may be affected by these biases must be interpreted with caution.

[124]In addition to interviewers' notes and site survey data, various sources were used to write the site descriptions, including documents collected from local courts, the Commission's Annual Report (1990) and monitoring database, and the 1990 Judicial Staff Directory (Staff Directories, Ltd.).

quantifiable information such as respondent's level of guideline experience, charging and plea negotiation practices, and relationships with judges and other court practitioners. The data from the supplemental surveys are incorporated within the discussion of the implementation process where appropriate (*see* Table 1 for the distribution of respondents for the supplemental survey).

3. The National Survey

A national survey of judges and court practitioners was developed in response to potentially important issues raised during the site visits, and was intended to supplement the information obtained in the more extensive site visit interviews. Based on preliminary analysis of the interview data, several issues consistently emerged as potential topics for further study: impact of the plea agreement, departures by the court, mandatory minimums, and the general issue of unwarranted sentencing disparity.[125] These topics served as the basis for the National Survey.

The national mail survey sample (*see* Table 2) consisted of all federal district judges (n=745), all federal public defenders (n=278), and a random sample of assistant U.S. attorneys engaged in criminal work (n=750), federal panel attorneys (n=475), and probation officers preparing presentence reports or doing the investigation for those reports (n=750). The number of completed surveys returned increased from about 45 percent after the first mailing to 60 percent after a follow-up mailing. A total of 1,802 respondents[126] returned a completed survey, out of 2,998 sampled, for a completion rate of 60 percent. As shown in Table 2, probation officers had the highest completion rate at 76 percent.

While the completion rate for this survey is high compared to previous survey studies of judges and court practitioners, a non-completion rate of 40 percent is sufficiently large to recommend extreme caution in interpreting the results.[127] For example, the distribution of responses could change significantly if the views of those who declined to participate were included.

4. Appeals Data

Given that appellate review of sentences was one of the critical changes introduced by the Sentencing Reform Act, the Commission obtained additional information on appeals in order to examine the process more thoroughly. The primary source of information used to assess the general dimensions of the appeals process comes from data obtained from the Administrative Office of the U.S. Courts. In addition to aggregate statistics based on these data, a supplemental

[125]Questions for which a large number of respondents declined to answer are not included in the analysis; open-ended questions resulting in no discernable pattern are excluded as well; no statistical tests of significance among groups are computed. Results from the National Survey pertaining to mandatory minimums were included in the Commission's recent report to Congress on Mandatory Minimums.

[126]*See* Table 3 for respondents' professional experience and experience under the guidelines.

[127]It should be emphasized that the site interview and National survey data represent perceptions only, and that behavioral indicators might well counter any assertions.

Table 1

Respondents in Implementation Study

Respondent Type	N in study	N (Site Surveys)
Judges	49	N/A
Magistrate	1	N/A[a]
Assistant U.S. attorneys	56	57[b]
Probation officers	47	46
Federal defenders	10	11
Private defense attorneys	38	32
Total non-supervisory	201	146
	Supervisory	
U.S. attorney	19[c]	
Federal defender	7	
Probation officer	19	
Total supervisory	45	
Total	246[d]	

[a] While this study did not attempt to include U.S. magistrate judges, one magistrate judge was interviewed at one site.

[b] Supervisory staff who had a caseload also completed surveys.

[c] Of the 45 supervisors who were interviewed, nine were administered an abbreviated interview that covered only the general questions on impact of the guidelines on the criminal justice system. This more abbreviated instrument was used in order to avoid asking the same questions on matters of policy, practice, and procedure common to the entire office or district.

[d] This total does not include 12 clerks of court interviewed about court procedures.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 2

National Survey

	Respondent Type					
	Judge	AUSA	Federal Defender	Private Attorney	Probation Officer	Total
Population	745	1,692	278	8,205	1,746	—
Sample	745	750	278	475	750	2,998
Completed	415	436	140	240	571	1,802
Percent completed	56%	58%	50%	51%	76%	60%

Table 3

National Survey Background Questions

	Respondent Type				
Response	Judge (N=415)	AUSA (N=436)	Federal Defender (N=140)	Private Attorney (N=240)	Probation Officer (N=571)
Median months in current position	114	36	54	120	66
Median months in district	126	36	54	120	60
Median number of guideline cases handled in the last year	53	20	50	3	25
Median number of guideline cases gone to trial in the last year	10	4	5	0	4

SOURCE: U.S. Sentencing Commission, 1991 National Survey.

study using a randomly selected sample of 200 cases was undertaken to address the substantive bases for appeal.

5. Monitoring Data

The Commission, in fulfilling its congressionally mandated obligation to "monitor the effectiveness of the sentencing practices and policies in the federal criminal justice system,"[128] collects extensive information on all guideline cases. This information provides data for the Commission's annual reports, special research efforts (*e.g.*, the mandatory minimum study recently mandated by Congress), and the annual amendment process. In this report, various aspects of the monitoring data are used to address issues of relevance to the overall evaluation. Specifically, general information on the profile of federal offenders sentenced during the post-Mistretta period, use of substantial assistance, and departures were obtained from monitoring files. In addition, findings from a special investigation of a sample of substantial assistance cases was incorporated into the evaluation analysis where appropriate.

E. Caveats to Interpreting Results of the Implementation Study

1. Weaknesses in the Probability Sample

The initial methodology for selecting districts for site visits was based on a strict probability sampling technique. However, two complicating factors intervened. First, because very large districts and one region of the country were not represented, the sample appeared deficient. Therefore, a large district from that region was selected. Had the district been selected at random from among large districts in that region, the probability sample would have remained intact. However, the district eventually chosen was selected expressly because it had one of the highest departure rates in the country. In an effort to counteract the negative impact to the sampling technique resulting from non-random selection of this site, findings influenced principally by this site are reported separately. However, the reader should be cautioned that all aggregate numbers or percentages reported from the site visits might reflect bias due to the non-random selection of this large site.

Second, the random selection of an office within a district or respondents among a larger pool of potential respondents is compromised when other judges or court practitioners request to be interviewed. The Commission was unwilling to deny interviews for the sake of adhering to a random selection process. Therefore, after explaining to requesting judges and practitioners why they were not approached initially for an interview, if the requesting party remained interested in being interviewed, the Commission agreed to the interview. While these additional interviews happened infrequently, they call into question the randomness of the sample. Consequently, caution should be taken regarding the generalizability of findings.

2. Problems with Small Sample Size

In general, the site visit interviews represent a very small percentage of the total number of judges and court practitioners in the federal system.[129] While the site visits attempted to

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[128]Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984).

[129]*See* Overview of the Site Descriptions in Appendix A for comparisons among number of judges and court practitioners interviewed to national figures within each group.

characterize a representative sample of districts, the numbers of respondents are too small to be generalized to the system as a whole. And, while percentages have been provided to ease in understanding the process dynamics, the reader should note with care the number of cases associated with each percentage. For example, 75 percent of respondents stating a particular belief may not mean much when the associated numbers are three out of four respondents. Percentages should not be considered in isolation from the associated numbers, primarily because the numbers are quite small.

3. Pre-Guidelines and Post-Mistretta Comparisons

There will be a great temptation on the part of readers of this study to compare the findings related to the post-Mistretta period to the descriptions (or personal knowledge) of the pre-guideline period. This should be avoided. The contexts upon which decisions were made in either system vary widely. The federal criminal justice system, like other dynamic systems, changes regularly; therefore, attempting to attribute outcomes to a particular change, such as the implementation of sentencing guidelines, should be done with extreme care. The implementation study has attempted to describe the system both pre-guideline and post-Mistretta. These descriptions should not be used as comparisons; rather, they should provide a snapshot of a system at two points in time.

III. Summary of Findings from the Implementation Study

Parts B through I of Chapter Three describe in greater detail various aspects of the implementation study. This section provides an overview of several of the study's more important findings.

Two primary factors must be kept in mind before attempting to assess findings regarding guideline implementation. First, this evaluation necessarily constitutes only an early, short-term look at the multifaceted system created by the Sentencing Reform Act due to the delay in nationwide guideline implementation that resulted from constitutional litigation and the gradually increasing nature of the Act's application to post-November 1, 1987, offenses. Second, the magnitude of the changes brought about by the Act are revolutionary because of the number and degree of modifications in roles and procedures and because the new system replaced the system that had been used in this country for the better part of two centuries. Thus, even without delays in implementation, one would reasonably expect that considerable time would be needed for the massive changes mandated by the statute to be effected.

Keeping these caveats in mind, the preliminary findings set forth in this chapter make clear that the process of guideline implementation is moving steadily forward, not without occasional difficulties and unevenness among jurisdictions, but with clear indications of increasing acceptance and success. Guideline sentencing is now the norm in federal courts, with more than three-fourths of the fiscal year 1990 cases subject to the new law. The system, however, is clearly still in transition, with districts evidencing varying degrees of adjustment.

Training: From the outset, the Commission recognized and emphasized adequate training of all criminal justice participants in the application of guidelines and related sentencing procedures. The Commission has worked closely with the Federal Judicial Center, the Administrative Office of the U.S. Courts, the Department of Justice, and a variety of private sponsors to provide programs, materials, and faculty in the training of thousands of individuals. The implementation study found that nearly all judges and criminal justice practitioners have

received guidelines training, that probation officers generally lead all groups in degree of guideline expertise, and that private defense attorneys are generally less well-versed in guideline application than all other groups.

General Impressions of the Guidelines: The perception of guideline effectiveness in meeting the congressionally-established purposes of sentencing is generally favorable among a sizable majority of judges, probation officers, and prosecutors. As expected, defense attorneys are generally negative in their assessment, perhaps because of their belief that the guidelines do not sufficiently mitigate for individual characteristics and produce sentences that are too harsh. A number of system participants, mostly judges and defense attorneys, criticize the guidelines for being inflexible and/or overly complex -- criticisms that to some extent should be expected of a system that significantly constrains discretion and attempts to provide sufficient detail to achieve reasonable proportionality in sentencing for dissimilar defendants.

Roles and Influences of Judges and Court Practitioners: As envisioned by the enabling legislation, guideline sentencing has significantly modified the roles, activities, and relative influences of judges, probation officers, and attorneys in the sentencing process. Judges have had their virtually unfettered sentencing discretion reduced. At the same time, guideline sentencing has resulted in enhanced judicial responsibilities in the areas of reviewing plea agreements, resolving disputed sentencing factors, determining whether a departure sentence is warranted, and managing the new system of sentencing to ensure that it is functioning as intended. Probation officers have been thrust squarely into the center of the new system, fulfilling their critical role for the court of preparing presentence reports that recommend an applicable guideline range and detail disputed issues remaining unresolved by the parties. On the whole, probation officers have adapted well to their enhanced duties. Despite this, some frustration is reported in jurisdictions where there is a greater prevalence of court acceptance of plea agreements that probation officers feel do not adequately reflect the seriousness of the actual offense conduct. Prosecuting and defense attorneys under the guidelines now find themselves negotiating and, when necessary, litigating both charges and specific guideline factors or circumstances warranting departure from the guideline range.

Charging and Plea Practices: Prosecutorial charging practices and plea negotiations play a more visible and in some ways enhanced role under the guidelines. Department of Justice policies prescribe strict standards for plea negotiations, and Sentencing Commission policies set forth definite standards for court acceptance of plea agreements. The implementation study found evidence, in at least one jurisdiction, indicating some prosecutorial circumvention of guideline policies, circumvention that went largely unchecked by judges who were generally opposed to the guidelines or the resulting guideline range.

The guidelines, in response to statutory instruction, have formalized the means of rewarding a defendant's assistance in the investigation of other crimes. In an effort to ensure that cooperation yields a sentence benefit, plea negotiations apparently sometimes extend beyond the formal avenues provided by the guidelines to include charge reductions and agreements with respect to application of guideline factors. The issue of substantial assistance departures and related plea negotiations is an area that warrants continued careful monitoring by the Commission and the Department of Justice.

Statements of Reasons: One new important requirement provided by the Sentencing Reform Act mandates that judges state on the record, in open court, their reasons for imposing a particular sentence. As with other changes in the system, judges are in varying stages of adjustment to this change. Early indications from the case law suggest that district judges are

becoming more adept at identifying and stating reasons that are acceptable to the courts of appeal. The rate of submission to the Commission of these important court documents has improved steadily, thereby enhancing the capabilities of the Commission to understand the imposition of sentence in particular cases and use that information to improve the guidelines.

Departures: Judges sentence within the applicable guideline range in a very high percentage of cases, leaving departures for the more atypical cases, as Congress and the Commission intended. The Commission closely tracks departure sentences to assist in its ongoing effort to improve the guidelines. The appellate courts have developed sophisticated, fairly uniform, criteria for evaluating whether appealed departures are warranted and reasonable.

Appellate Review: The innovation of sentence appellate review, while no doubt imposing additional burdens on court resources, apparently has functioned well to date. Defendants have appealed sentences frequently, although with a low overall success rate; the government has experienced moderate success in appealing many fewer guideline issues. A body of sentencing law, notably similar among circuits in most respects, has quickly developed. The Commission has benefitted from this evolving body of appellate law and has begun to address significant inter-circuit conflicts in guideline interpretation on a selective basis.

On the whole, the implementation study provides a snapshot of a system that is making definite, substantial progress toward successful guideline implementation at this still early stage. The rate and level of that progress is slower and more uneven in some jurisdictions, perhaps because of greater degrees of initial guideline resistance, case processing pressures, uniqueness, or other reasons. Yet, even in what some might describe as "problem" jurisdictions, there are many positive indications that the "settling-down" process is occurring. In many other jurisdictions where the guidelines were more readily accepted, one can see that, on the whole, the guidelines system is operating relatively smoothly. While sentencing-related aspects of the federal criminal justice system clearly remain in an adjustment stage at this time, the early picture described by the implementation study holds promise that, with time, the sentencing guidelines system will be able to achieve the ambitious goals Congress had in mind.

IV. Remaining Sections in Chapter Three

The implementation study focuses on an operational assessment of the guideline implementation process. The analyses that follow contain a comprehensive overview of how the guidelines operate in the field, as well as a summary of the major effects of the implementation of the sentencing system brought about by the Sentencing Reform Act. A brief summary of the findings from the implementation study follows.

Chapter Three consists of several major sections designed to describe important processes operating in the federal criminal justice system. Part B reports on the general characteristics of offenses and offenders sentenced in the federal system. Part C outlines the training programs that introduced the guidelines system and assess application skills of judges and court practitioners. Part D provides a general overview of perceptions of judges and court practitioners who work with and apply the guidelines, describing the benefits and problems of the guidelines system. Part E describes the roles and influences of various court actors under the guidelines system and focuses on fact-gathering and dispute resolution in the new system. Part F provides a general picture of the plea process, including the initiation of the plea process and how decisions regarding charging are made. Part G discusses the importance of the court's statement of reasons for sentences imposed, and describes how these statements are used.

Part H describes departures from the guidelines and the important role they play in guideline improvement. The section looks at the numbers and kinds of departures, as well as the evolving departure case law. The final section in this chapter, Part I, describes the expanded role appeals play in the new sentencing system, the nature of appeals brought, and case law emerging from this appeals process.

Part B
Defendants Sentenced Under the Guidelines

The Sentencing Reform Act, as amended by the Sentencing Act of 1987, requires defendants to be sentenced under the guidelines if their offense occurred on or after November 1, 1987. The prospective nature of the Act, coupled with numerous constitutional challenges to the guidelines and the Act itself, resulted in only 17.9 percent of all federal criminal defendants sentenced in 1988 being sentenced under the guidelines. The following year, 54.5 percent of all federal criminal defendants were sentenced pursuant to the Sentencing Reform Act (SRA). In 1990 the percentage of defendants sentenced under the Act rose to 70.0 percent.[130] Figure 1 depicts the proportion of defendants sentenced monthly under guideline and pre-guideline law since implementation of the guidelines. Statistics from the last month in this study, August 1990, report approximately 75 percent of all federal defendants sentenced under the SRA.

A. District and Circuit

The data reported in this section reflect defendants sentenced under the SRA beginning post-Mistretta, *i.e.*, January 19, 1989, through September 30, 1990. During this approximately 18-month period, 46,167 defendants were sentenced pursuant to the SRA.[131] Defendants sentenced in five districts constituted approximately 25 percent of the total: Southern Texas, Western Texas, Central California, Southern California, and Southern Florida. The Fifth and Ninth Circuits accounted for 36.5 percent of all guideline defendants. Table 4 depicts the distribution of guideline defendants across the 94 judicial districts and 12 judicial circuits.

B. Primary Offense Type

During the period January 19, 1989, through September 30, 1990, 47.7 percent of all defendants sentenced under the SRA were convicted of drug offenses. Fraud represented the next highest category with 9.5 percent of defendants. Other frequently occurring offense types included larceny (6.6%), immigration (6.3%), firearms (6.2%), embezzlement (4.3%), robbery (4.2%), and forgery and counterfeiting (3.6%). Offenses that typically take extended time to detect, investigate, and prosecute (*e.g.*, tax offenses, money laundering) are undoubtedly underrepresented in the guideline distribution for this time period. Figure 2 illustrates the distribution and frequency of guideline defendants across primary offense categories.

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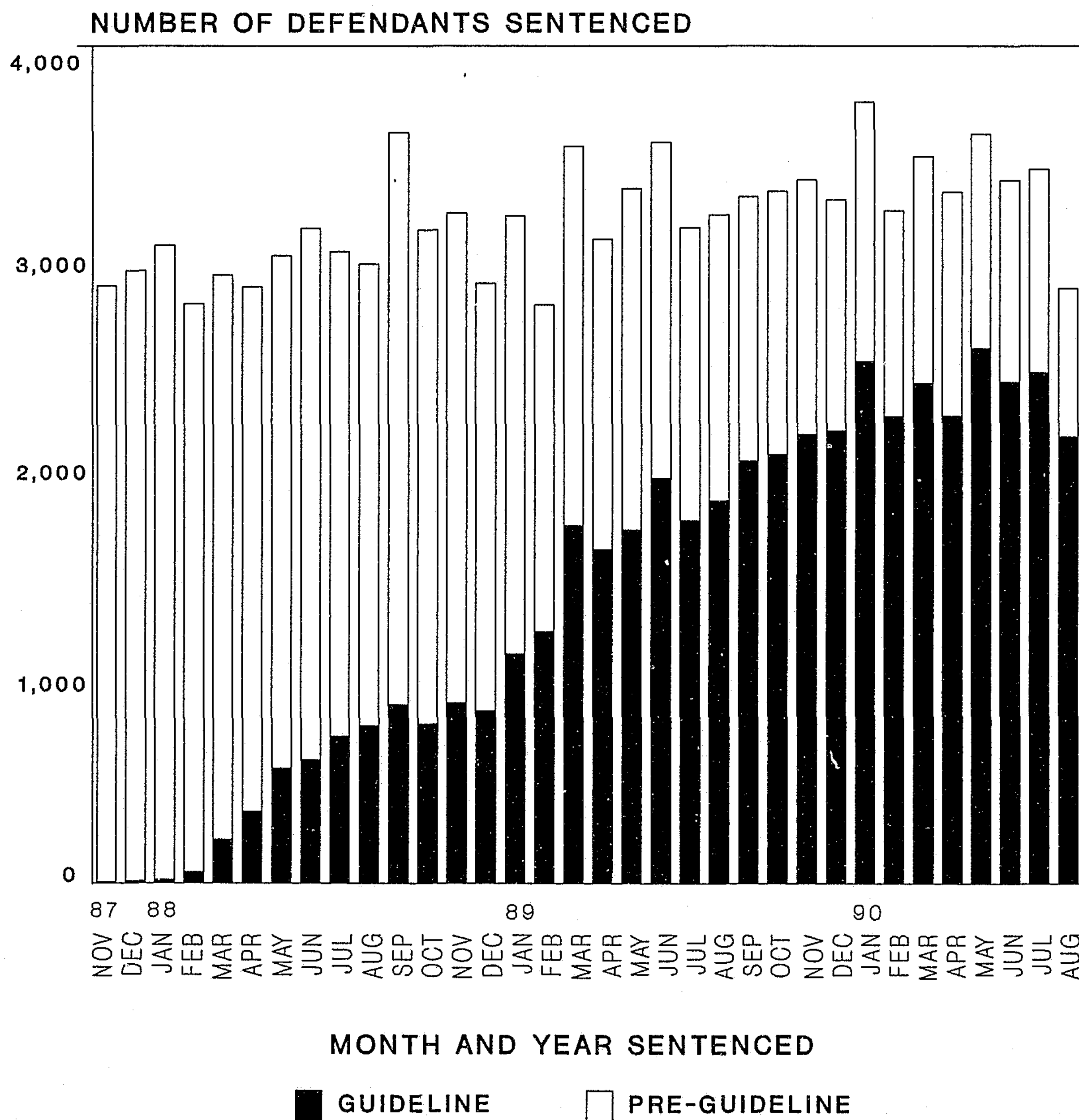
[130]The percentage for 1990 guideline and pre-guideline cases includes only cases sentenced between October 1, 1989, and August 31, 1990. Due to the termination of the Administrative Office's FPSSIS data collection for sentencing indicators in August 1990, the information necessary to make guideline/pre-guideline comparisons no longer exists.

[131]The Commission only receives data related to defendants sentenced under the SRA. Information reported in this section reflects data reported to the Commission through submission of the following documents: presentence report, judgment and commitment order, report on the sentencing hearing, written plea agreement, and guideline worksheets. Consequently, a district's failure to report sentencing information to the Commission will preclude analysis of this information in this report. Nationally, 79 of the 94 districts report at rates higher than 90 percent. Thirteen districts have rates lower than 90 percent, with seven of these reporting less than 80 percent of the time. Reporting artifacts, therefore, more likely affect individual district information than national figures (*see* Sentencing Commission's 1990 Annual Report for discussion, pp. 29-30).

Figure 1

GUIDELINE VS. PRE-GUIDELINE DEFENDANTS SENTENCED*
(November 1987 through August 1990)



*Multiple count cases involving both guideline and pre-guideline counts have been included in the "Guideline" category.

SOURCE: Administrative Office of the U.S. Courts, FPSSIS 1987-1990 Data File, excluding cases involving solely petty offenses, corporate offenders or diversionary sentences.

Table 4

GUIDELINE DEFENDANTS BY CIRCUIT AND DISTRICT
(January 19, 1989 through September 30, 1990)

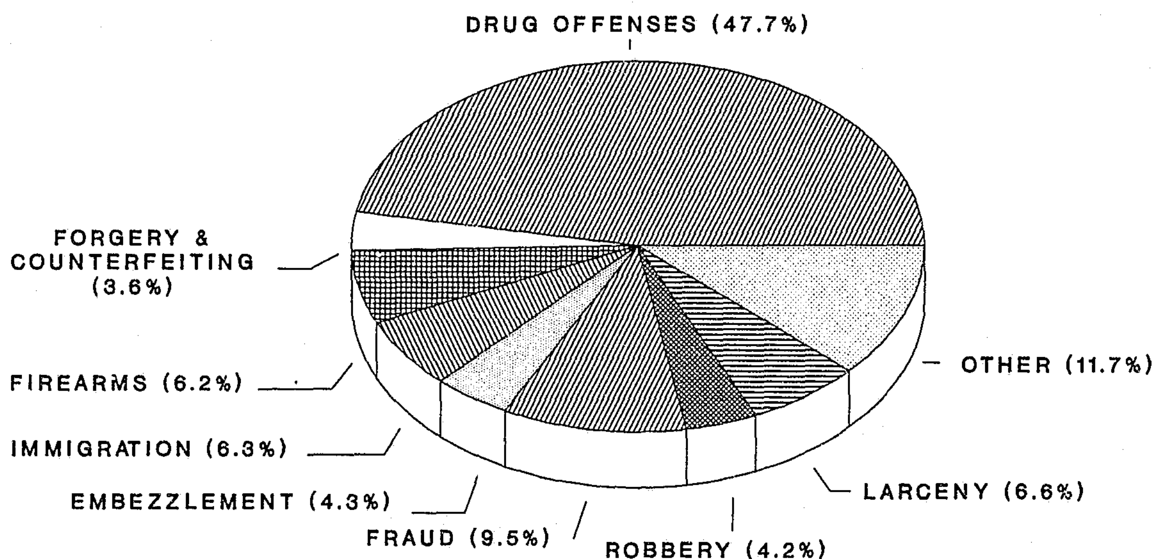
CIRCUIT District	Number	Percent
TOTAL	**46,167**	**100.0**
D.C. CIRCUIT	**769**	**1.7**
District of Columbia	769	1.7
FIRST CIRCUIT	**971**	**2.1**
Maine	170	0.4
Massachusetts	351	0.8
New Hampshire	88	0.2
Puerto Rico	265	0.6
Rhode Island	97	0.2
SECOND CIRCUIT	**3,524**	**7.6**
Connecticut	287	0.6
New York		
Eastern	1,139	2.5
Northern	348	0.8
Southern	1,347	2.9
Western	253	0.6
Vermont	150	0.3
THIRD CIRCUIT	**1,776**	**3.9**
Delaware	163	0.4
New Jersey	661	1.4
Pennsylvania		
Eastern	371	0.8
Middle	241	0.5
Western	230	0.5
Virgin Islands	110	0.2
FOURTH CIRCUIT	**4,807**	**10.4**
Maryland	785	1.7
North Carolina		
Eastern	338	0.7
Middle	470	1.0
Western	554	1.2
South Carolina	572	1.2
Virginia		
Eastern	1,096	2.4
Western	266	0.6
West Virginia		
Northern	239	0.5
Southern	487	1.1
FIFTH CIRCUIT	**8,648**	**18.7**
Louisiana		
Eastern	672	1.5
Middle	40	0.1
Western	189	0.4
Mississippi		
Northern	143	0.3
Southern	220	0.5
Texas		
Eastern	296	0.6
Northern	898	2.0
Southern	3,609	7.8
Western	2,581	5.6
SIXTH CIRCUIT	**4,106**	**9.1**
Kentucky		
Eastern	315	0.7
Western	473	1.0
Michigan		
Eastern	708	1.6
Western	163	0.4
Ohio		
Northern	633	1.4
Southern	666	1.4
Tennessee		
Eastern	346	0.8
Middle	327	0.7
Western	475	1.0
SEVENTH CIRCUIT	**2,276**	**4.9**
Illinois		
Central	263	0.6
Northern	811	1.8
Southern	234	0.5
Indiana		
Northern	224	0.5
Southern	233	0.5
Wisconsin		
Eastern	346	0.8
Western	165	0.4

CIRCUIT District	Number	Percent	CIRCUIT District	Number	Percent
EIGHTH CIRCUIT	**2,665**	**5.8**	**TENTH CIRCUIT**	**2,594**	**5.6**
Arkansas			Colorado	502	1.1
Eastern	254	0.6	Kansas	319	0.7
Western	106	0.2	New Mexico	700	1.5
Iowa			Oklahoma		
Northern	137	0.3	Eastern	76	0.2
Southern	172	0.4	Northern	204	0.4
Minnesota	513	1.1	Western	330	0.7
Missouri			Utah	302	0.7
Eastern	372	0.8	Wyoming	161	0.4
Western	451	1.0			
Nebraska	177	0.4	**ELEVENTH CIRCUIT**	**5,807**	**12.6**
North Dakota	221	0.5	Alabama		
South Dakota	262	0.6	Middle	264	0.6
			Northern	357	0.8
NINTH CIRCUIT	**8,224**	**17.8**	Southern	311	0.7
Alaska	120	0.3	Florida		
Arizona	1,054	2.3	Middle	1,175	2.6
California			Northern	379	0.8
Central	1,621	3.5	Southern	1,957	4.2
Eastern	789	1.7	Georgia		
Northern	459	1.0	Middle	337	0.7
Southern	1,662	3.6	Northern	745	1.6
Guam	0	0.0	Southern	282	0.6
Hawaii	337	0.7			
Idaho	96	0.2			
Montana	193	0.4			
Nevada	362	0.8			
Northern Mariana Islands	0	0.0			
Oregon	557	1.2			
Washington					
Eastern	387	0.8			
Western	587	1.3			

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Figure 2

DISTRIBUTION OF GUIDELINE DEFENDANTS SENTENCED BY PRIMARY OFFENSE CATEGORY*
(January 19, 1989 through September 30, 1990)



Primary Offense Category	Frequency	Percent
Homicide	156	0.4
Kidnapping	73	0.2
Robbery	1,748	4.2
Assault	384	0.9
Burglary/Breaking & Entering	158	0.4
Larceny	2,764	6.6
Embezzlement	1,794	4.3
Tax Offenses	122	0.3
Fraud	3,983	9.5
Drug Importation & Distribution	18,210	43.5
Drug Simple Possession	1,336	3.2
Drug Communication Facility	434	1.0
Auto Theft	256	0.6
Forgery & Counterfeiting	1,497	3.6
Sex Offenses	276	0.7
Bribery	172	0.4
Escape	623	1.5
Firearms	2,583	6.2
Immigration	2,657	6.3
Extortion & Racketeering	425	1.0
Gambling & Lottery	180	0.4
Money Laundering	132	0.3
Other	1,932	4.6
Total	41,895	100.0

*Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 3,759 cases were excluded due to missing information on primary offense category.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

C. Sentences Imposed Under the Guidelines

Between January 19, 1989, and September 30, 1990, 77.4 percent of sentenced defendants received some form of incarcerative sentence (*i.e.*, imprisonment only, imprisonment plus some form of alternative supervision, or imprisonment plus a period of supervised release following imprisonment). Approximately 15.3 percent of sentenced defendants received probation only; another 6.7 percent received probation with a condition of community confinement, intermittent confinement, or home detention. For the remaining sentenced defendants (0.5%), a sentence involving no supervision was imposed (*e.g.*, fine or community service). Figure 3 displays guideline sentences received during this time period.

A review of guideline sentences imposed by primary offense categories during this same time period shows that[132] defendants convicted of drug-related offenses or violent crimes most often received some form of incarcerative sentence (*i.e.*, 95.3% of drug distribution defendants, 95.4% homicide, 98.6% kidnapping, 98.0% robbery, 98.1% burglary, 94.5% escape, and 91.6% money laundering) (*see* Table 5). Larceny (42.6%), embezzlement (25.9%), and simple drug possession (41.8%) represent offense categories that include defendants whose sentences involved some form of incarceration less than 50 percent of the time. Fifty percent of embezzlement defendants received straight probation sentences, while larceny (55.4%) and simple drug possession (56.7%) represented offense categories in which more than 50 percent of the defendants received straight probation or probation plus some form of confinement condition.

D. Mode of Conviction

For guideline defendants sentenced between January 19, 1989, and August 31, 1990, 88.1 percent were sentenced pursuant to a plea of guilty or nolo contendere, while 11.9 percent were sentenced after conviction by jury or bench trial (*see* Table 6). In general, the plea rate for guideline defendants represents very little change from national rates over the past few years, with national plea rates of 88.6 percent in 1988 and 88.9 percent in 1989 (*see* Commission's 1990 Annual Report for discussion, p. 47). Again, there is considerable variation among districts as to rates of plea versus trial, ranging from a high of 100 percent sentenced pursuant to a plea of guilty or *nolo contendere* (*e.g.*, Eastern Louisiana and Guam) to a low of 74.7 percent in Eastern Missouri. Circuits with the highest numbers of guideline defendants represent circuits with the highest rate of pleas (Fifth Circuit with a plea rate of 92.7% and Ninth Circuit with a plea rate of 90.3%).

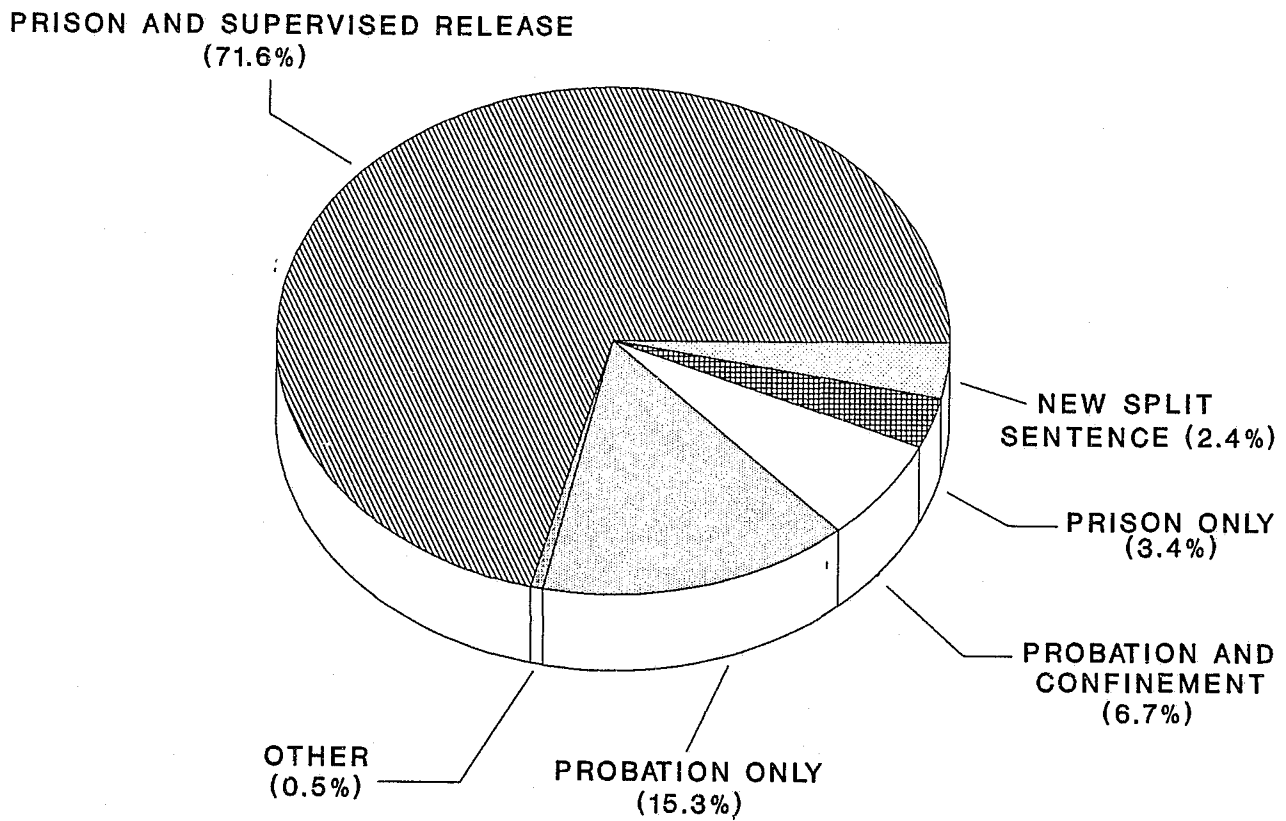
E. Gender

Males represented 84.2 percent of the guideline defendants sentenced between January 19, 1989, and September 30, 1990, while females represented 15.9 percent. A somewhat different picture emerges when looking at gender within primary offense type. Women exceeded men for only one offense type, embezzlement (54.3% female). However, women approached 30 percent of the guideline defendant population in larceny convictions and in convictions for use of a communication facility for drug offenses. Table 7 illustrates the distribution of gender across primary offense type.

[132]Percentages reported in Figure 3 and Table 5 differ slightly due to missing information on primary offense type for some cases.

Figure 3

TYPE OF GUIDELINE SENTENCES IMPOSED*
(January 19, 1989 through September 30, 1990)



*Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 576 cases were excluded due to missing sentencing information.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 5

TYPE OF SENTENCE IMPOSED FOR PRIMARY OFFENSE CATEGORIES*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL CASES	IMPRISONMENT							PROBATION					OTHER CASES	
		Total Receiving Imprisonment	Prison and Supervised Release		Prison Only		New Split Sentence		Total Receiving Probation	Probation Only		Probation and Confinement			
			Number	Percent	Number	Percent	Number	Percent		Number	Percent	Number	Percent	Number	Percent
TOTAL	41,467	32,137	29,842	72.0	1,339	3.2	956	2.3	9,181	6,318	15.2	2,863	6.9	149	0.4
Homicide	152	145	134	88.2	4	2.6	7	4.6	7	4	2.6	3	2.0	0	0.0
Kidnapping	72	71	68	94.4	3	4.2	0	0.0	1	1	1.4	0	0.0	0	0.0
Robbery	1,739	1,720	1,661	95.5	27	1.6	32	1.8	18	11	0.6	7	0.4	1	0.1
Assault	383	316	279	72.9	18	4.7	19	5.0	67	42	11.0	25	6.5	0	0.0
Burglary/B&E	158	155	133	84.2	5	3.2	17	10.8	3	0	0.0	3	1.9	0	0.0
Larceny	2,709	1,154	985	36.4	109	4.0	60	2.2	1,501	1,189	43.9	312	11.5	54	2.0
Embezzlement	1,774	460	376	21.2	14	0.8	70	4.0	1,309	888	50.1	421	23.7	5	0.3
Tax Offenses	114	63	61	53.5	1	0.9	1	0.9	49	34	29.8	15	13.2	2	1.8
Fraud	3,939	2,210	1,856	47.1	193	4.9	161	4.1	1,706	1,143	29.0	563	14.3	23	0.6
Drug Importation & Distribution	18,092	17,250	16,803	92.9	170	0.9	277	1.5	831	462	2.6	369	2.0	11	0.1
Drug Simple Possession	1,278	535	407	31.9	114	8.9	14	1.1	725	635	49.7	90	7.0	18	1.4
Drug Communication Facility	430	288	265	61.6	10	2.3	13	3.0	142	63	14.7	79	18.4	0	0.0
Auto Theft	253	205	181	71.5	6	2.4	18	7.1	48	26	10.3	22	8.7	0	0.0
Forgery/Counterfeiting	1,481	878	770	52.0	68	4.6	40	2.7	601	358	24.2	243	16.4	2	0.1
Sex Offenses	274	224	200	73.0	3	1.1	21	7.7	50	36	13.1	14	5.1	0	0.0
Bribery	169	94	81	47.9	7	4.1	6	3.6	73	48	28.4	25	14.8	2	1.2
Escape	617	583	513	83.1	49	7.9	21	3.4	33	27	4.4	6	1.0	1	0.2
Firearms	2,563	2,090	1,888	73.7	121	4.7	81	3.2	470	273	10.7	197	7.7	3	0.1
Immigration	2,637	2,170	1,838	69.7	314	11.9	18	0.7	462	265	10.1	197	7.5	5	0.2
Extortion/Racketeering	423	367	355	83.9	5	1.2	7	1.7	56	35	8.3	21	5.0	0	0.0
Gambling/Lottery	179	98	66	36.9	4	2.2	28	15.6	80	28	15.6	52	29.1	1	0.6
Money Laundering	131	120	117	89.3	3	2.3	0	0.0	11	8	6.1	3	2.3	0	0.0
Other	1,900	941	805	42.4	91	4.8	45	2.4	938	742	39.1	196	10.3	21	1.1

*Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 4,187 cases were excluded due to one or both of the following conditions: missing primary offense category (3,611) or missing sentencing information (576).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 6

MODE OF CONVICTION BY CIRCUIT AND DISTRICT GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED*

(January 19, 1989 through August 31, 1990)

CIRCUIT / District	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		Number	Percent	Number	Percent		Number	Percent	Number	Percent
TOTAL	**41,936**	**36,946**	**88.1**	**4,990**	**11.9**	**25,458**	**22,862**	**89.8**	**2,596**	**10.2**
D.C. CIRCUIT	**600**	**493**	**82.2**	**107**	**17.8**	**206**	**200**	**97.1**	**6**	**2.9**
District of Columbia	600	493	82.2	107	17.8	206	200	97.1	6	2.9
FIRST CIRCUIT	**892**	**741**	**83.1**	**151**	**16.9**	**923**	**863**	**93.5**	**60**	**6.5**
Maine	141	127	90.1	14	9.9	76	71	93.4	5	6.6
Massachusetts	292	234	80.1	58	19.9	304	273	89.8	31	10.2
New Hampshire	72	58	80.6	14	19.4	54	48	88.9	6	11.1
Puerto Rico	266	217	81.6	49	18.4	448	437	97.5	11	2.5
Rhode Island	121	105	86.8	16	13.2	41	34	82.9	7	17.1
SECOND CIRCUIT	**3,450**	**3,099**	**89.8**	**351**	**10.2**	**1,580**	**1,421**	**89.9**	**159**	**10.1**
Connecticut	262	254	97.0	8	3.1	178	168	94.4	10	5.6
New York	0					0				
Eastern	1,256	1,140	90.8	116	9.2	485	424	87.4	61	12.6
Northern	263	227	86.3	36	13.7	138	114	82.6	24	17.4
Southern	1,277	1,113	87.2	164	12.8	530	482	90.9	48	9.1
Western	264	249	94.3	15	5.7	219	205	93.6	14	6.4
Vermont	128	116	90.6	12	9.4	30	28	93.3	2	6.7
THIRD CIRCUIT	**1,533**	**1,373**	**89.6**	**160**	**10.4**	**1,539**	**1,382**	**89.8**	**157**	**10.2**
Delaware	156	132	84.6	24	15.4	35	32	91.4	3	8.6
New Jersey	394	367	93.2	27	6.9	343	327	95.3	16	4.7
Pennsylvania										
Eastern	471	440	93.4	31	6.6	621	562	90.5	59	9.5
Middle	237	211	89.0	26	11.0	154	127	82.5	27	17.5
Western	221	178	80.5	43	19.5	185	162	87.6	23	12.4
Virgin Islands	54	45	83.3	9	16.7	201	172	85.6	29	14.4
FOURTH CIRCUIT	**4,160**	**3,655**	**87.9**	**505**	**12.1**	**3,797**	**3,241**	**85.4**	**556**	**14.6**
Maryland	701	618	88.2	83	11.8	754	708	93.9	46	6.1
North Carolina										
Eastern	313	269	85.9	44	14.1	541	526	97.2	15	2.8
Middle	512	441	86.1	71	13.9	97	92	94.9	5	5.2
Western	459	424	92.4	35	7.6	263	249	94.7	14	5.3
South Carolina	418	386	92.3	32	7.7	224	217	96.9	7	3.1
Virginia										
Eastern	967	803	83.0	164	17.0	1,544	1,103	71.4	441	28.6
Western	246	218	88.6	28	11.4	103	98	95.2	5	4.9
West Virginia										
Northern	124	120	96.8	4	3.2	113	109	96.5	4	3.5
Southern	420	376	89.5	44	10.5	158	139	88.0	19	12.0

CIRCUIT District	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		Number	Percent	Number	Percent		Number	Percent	Number	Percent
FIFTH CIRCUIT	**8,155**	**7,560**	**92.7**	**595**	**7.3**	**2,487**	**2,333**	**93.8**	**154**	**6.2**
Louisiana										
Eastern	681	681	100.0	0	0.0	152	152	100.0	0	0.0
Middle	37	36	97.3	1	2.7	44	42	95.5	2	4.6
Western	108	103	95.4	5	4.6	387	378	97.7	9	2.3
Mississippi										
Northern	101	88	87.1	13	12.9	68	64	94.1	4	5.9
Southern	185	171	92.4	14	7.6	203	195	96.1	8	3.9
Texas										
Eastern	299	257	86.0	42	14.1	179	163	91.1	16	8.9
Northern	764	699	91.5	65	8.5	336	313	93.2	23	6.9
Southern	3,534	3,379	95.6	155	4.4	539	513	95.2	26	4.8
Western	2,446	2,146	87.7	300	12.3	579	513	88.6	66	11.4
SIXTH CIRCUIT	**3,513**	**3,110**	**88.5**	**403**	**11.5**	**2,337**	**2,150**	**92.0**	**187**	**8.0**
Kentucky										
Eastern	279	236	84.6	43	15.4	81	56	69.1	25	30.9
Western	440	417	94.8	23	5.2	170	157	92.4	13	7.7
Michigan										
Eastern	618	503	81.4	115	18.6	605	559	92.4	46	7.6
Western	164	142	86.6	22	13.4	148	133	89.9	15	10.1
Ohio										
Northern	466	449	96.4	17	3.7	330	318	96.4	12	3.6
Southern	584	522	89.4	62	10.6	224	211	94.2	13	5.8
Tennessee										
Eastern	355	309	87.0	46	13.0	261	249	95.4	12	4.6
Middle	308	288	93.5	20	6.5	169	157	92.9	12	7.1
Western	299	244	81.6	55	18.4	349	310	88.8	39	11.2
SEVENTH CIRCUIT	**2,168**	**1,801**	**83.1**	**367**	**16.9**	**2,122**	**1,886**	**88.9**	**236**	**11.1**
Illinois										
Central	251	202	80.5	49	19.5	243	218	89.7	25	10.3
Northern	890	713	80.1	177	19.9	907	788	86.9	119	13.1
Southern	217	193	88.9	24	11.1	172	158	91.9	14	8.1
Indiana										
Northern	209	175	83.7	34	16.3	237	213	89.9	24	10.1
Southern	220	205	93.2	15	6.8	238	227	95.4	11	4.6
Wisconsin										
Eastern	331	265	80.1	66	19.9	172	147	85.5	25	14.5
Western	50	48	96.0	2	4.0	153	135	88.2	18	11.8
EIGHTH CIRCUIT	**2,354**	**1,952**	**82.9**	**402**	**17.1**	**1,395**	**1,190**	**85.3**	**205**	**14.7**
Arkansas										
Eastern	195	173	88.7	22	11.3	141	132	93.6	9	6.4
Western	100	78	78.0	22	22.0	94	30	31.9	64	68.1
Iowa										
Northern	130	108	83.1	22	16.9	135	127	94.1	8	5.9
Southern	91	71	78.0	20	22.0	162	131	80.9	31	19.1
Minnesota	488	394	80.7	94	19.3	205	174	84.9	31	15.1
Missouri										
Eastern	332	248	74.7	84	25.3	142	118	83.1	24	16.9
Western	433	357	82.5	76	17.6	152	143	94.1	9	5.9
Nebraska	151	136	90.1	15	9.9	154	137	89.0	17	11.0
North Dakota	192	177	92.2	15	7.8	99	94	95.0	5	5.1
South Dakota	242	210	86.8	32	13.2	111	104	93.7	7	6.3

CIRCUIT / District	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		Number	Percent	Number	Percent		Number	Percent	Number	Percent
NINTH CIRCUIT	**7,362**	**6,651**	**90.3**	**711**	**9.7**	**4,312**	**3,990**	**92.5**	**322**	**7.5**
Alaska	85	66	77.7	19	22.4	75	67	89.3	8	10.7
Arizona	1,073	989	92.2	84	7.8	483	437	90.5	46	9.5
California										
Central	1,279	1,047	81.9	232	18.1	706	598	84.7	108	15.3
Eastern	731	685	93.7	46	6.3	314	297	94.6	17	5.4
Northern	433	395	91.2	38	8.8	446	416	93.3	30	6.7
Southern	1,471	1,378	93.7	93	6.3	319	309	96.9	10	3.1
Guam	10	10	100.0	0	0.0	10	10	100.0	0	0.0
Hawaii	191	175	91.6	16	8.4	741	731	98.7	10	1.4
Idaho	97	80	82.5	17	17.5	52	44	84.6	8	15.4
Montana	236	221	93.6	15	6.4	85	75	88.2	10	11.8
Nevada	347	328	94.5	19	5.5	200	175	87.5	25	12.5
Northern Mariana Islands	1	1	100.0	0	0.0	1	1	100.0	0	0.0
Oregon	503	471	93.6	32	6.4	178	155	87.1	23	12.9
Washington										
Eastern	372	349	93.8	23	6.2	121	118	97.5	3	2.5
Western	533	456	85.6	77	14.5	581	557	95.9	24	4.1
TENTH CIRCUIT	**2,299**	**2,022**	**88.0**	**277**	**12.1**	**1,218**	**1,122**	**92.1**	**96**	**7.9**
Colorado	481	437	90.9	44	9.2	226	212	93.8	14	6.2
Kansas	308	254	82.5	54	17.5	184	163	88.6	21	11.4
New Mexico	634	558	88.0	76	12.0	132	124	93.9	8	6.1
Oklahoma										
Eastern	66	58	87.9	8	12.1	59	53	89.8	6	10.2
Northern	185	170	91.9	15	8.1	149	139	93.3	10	6.7
Western	282	247	87.6	35	12.4	266	245	92.1	21	7.9
Utah	252	213	84.5	39	15.5	154	142	92.2	12	7.8
Wyoming	91	85	93.4	6	6.6	48	44	91.7	4	8.3
ELEVENTH CIRCUIT	**5,450**	**4,489**	**82.4**	**961**	**17.6**	**3,542**	**3,084**	**87.1**	**458**	**12.9**
Alabama										
Middle	232	186	80.2	46	19.8	227	186	81.9	41	18.1
Northern	366	328	89.6	38	10.4	287	277	96.5	10	3.5
Southern	268	227	84.7	41	15.3	91	80	87.9	11	12.1
Florida										
Middle	1,112	942	84.7	170	15.3	717	647	90.2	70	9.8
Northern	360	246	68.3	114	31.7	207	176	85.0	31	15.0
Southern	1,848	1,524	82.5	324	17.5	833	697	83.7	136	16.3
Georgia										
Middle	322	274	85.1	48	14.9	342	326	95.3	16	4.7
Northern	724	591	81.6	133	18.4	448	404	90.2	44	9.8
Southern	218	171	78.4	47	21.6	390	291	74.6	99	25.4

*198 cases were excluded due to missing information on mode of conviction.

SOURCE: Administrative Office of the U.S. Courts, FPSSIS 1989-1990 Data File, excluding cases involving solely petty offenses, corporate offenders or diversionary sentences.

Table 7

GENDER OF DEFENDANT BY PRIMARY OFFENSE CATEGORY*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL	GENDER			
		Male		Female	
	Number	Number	Percent	Number	Percent
TOTAL	41,849	35,216	84.2	6,633	15.9
Homicide	156	141	90.4	15	9.6
Kidnapping	73	68	93.2	5	6.9
Robbery	1,746	1,656	94.9	90	5.2
Assault	384	353	91.9	31	8.1
Burglary/B&E	158	149	94.3	9	5.7
Larceny	2,760	1,943	70.4	817	29.6
Embezzlement	1,793	819	45.7	974	54.3
Tax Offenses	122	107	87.7	15	12.3
Fraud	3,977	3,025	76.1	952	23.9
Drug Offenses					
-Importation & Distribution	18,199	16,038	88.1	2,161	11.9
-Simple Possession	1,333	1,043	78.2	290	21.8
-Communication Facility	434	299	68.9	135	31.1
Auto Theft	256	249	97.3	7	2.7
Forgery/Counterfeiting	1,492	1,187	79.6	305	20.4
Sex Offenses	275	269	97.8	6	2.2
Bribery	172	151	87.8	21	12.2
Escape	622	539	86.7	83	13.3
Firearms	2,583	2,482	96.1	101	3.9
Immigration	2,648	2,433	91.9	215	8.1
Extortion/Racketeering	425	370	87.1	55	12.9
Gambling/Lottery	180	163	90.6	17	9.4
Money Laundering	132	112	84.9	20	15.2
Other	1,929	1,620	84.0	309	16.0

*Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 3,805 cases were excluded due to one or both of the following conditions: missing primary offense category (3,759) or missing gender (3,496).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

F. Race

Of guideline defendants sentenced between January 19, 1989, and September 30, 1990, 45.7 percent were identified as White, 27.8 percent as Black, 23.6 percent as Hispanic, and 2.9 percent as American Indian, Alaskan Native, Asian, or Pacific Islander (*see* Table 8). The percent of white defendants was higher than non-whites in all offense categories except homicide, assault, and immigration. Not surprisingly, the races of defendants sentenced for homicide and assault were likely to be American Indian, Alaskan Native, Asian, and Pacific Islander, because the largest number of crimes against persons in the federal system occur on Indian reservations or military installations. Hispanics comprised 75.6 percent of immigration offenses, not surprising given the proximity of the Mexican border. While whites represented the highest percentage in every other category, it is important to note that the ratio of whites to other race categories fell off significantly for drug offenses, the highest single category of offense type in the federal criminal justice system.

G. Age

The median age for guideline defendants sentenced between January 19, 1989, and September 30, 1990, was 32 years (mean age of 33.4 years). Defendants between 25 and 30 years of age represented the largest age group for the majority of offense types. Defendants convicted of burglary and auto theft were more likely to be less than 25 years of age, while predominantly white-collar offenses tended to be committed by defendants above age 30. Somewhat surprisingly, the highest percentage of sex offenses (federal sex offenses principally involve receiving and trafficking in materials involving the sexual exploitation of minors or the trafficking of the minor victims) were committed by defendants between ages 41 and 50. Bribery, gambling, and lottery offenses were most frequently committed by defendants above the age of 50, and tax offenders were generally above 40 years. (Table 9 provides the distribution of age by primary offense category.)

H. Single versus Multiple Count Cases

Guideline defendants sentenced between January 19, 1989, and September 30, 1990, principally received convictions for single counts (75.9%). The guidelines most frequently representing multiple count convictions included §2B1.1 (larceny and embezzlement) (6.9%), §2B3.1 (robbery) (8.7%), §2D1.1 (drug manufacturing and distribution) (49.6%), and §2F1.1 (fraud) (13.0%) (*see* Table 10).

I. Offense Level

Guideline defendants are sentenced along two broad parameters: offense seriousness and criminal history. The offense seriousness index is represented by the offense level as determined under the guidelines. For guideline defendants sentenced between January 19, 1989, and September 30, 1990, the median offense level was level 13, with 50 percent of the defendants receiving offense levels above 13 and 50 percent below. The most frequently occurring offense level was level 4 (8.2%), generally resulting from an offense with a base offense level of 6 and a two-level reduction for acceptance of responsibility. The mean offense level climbed to approximately level 16, due primarily to numbers of defendants around the five- and ten-year levels. *See* Table 11 for distribution of offense levels by criminal history category.

J. Criminal History

In addition to the characteristics of the offense and demographic profiles of the defendants, it is important to look at prior criminal record to complete the guideline defendants' profiles. Guideline

Table 8

RACE OF DEFENDANT BY PRIMARY OFFENSE CATEGORY*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL	RACE							
		White		Black		Hispanic		Other	
	Number	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	41,699	19,045	45.7	11,610	27.8	9,829	23.6	1,215	2.9
Homicide	156	46	29.5	25	16.0	14	9.0	71	45.5
Kidnapping	73	46	63.0	15	20.6	9	12.3	3	4.1
Robbery	1,743	1,084	62.2	565	32.4	83	4.8	11	0.6
Assault	384	122	31.8	97	25.3	39	10.2	126	32.8
Burglary/B&E	158	79	50.0	41	26.0	7	4.4	31	19.6
Larceny	2,734	1,451	53.1	1,010	36.9	155	5.7	118	4.3
Embezzlement	1,787	1,066	59.7	575	32.2	89	5.0	57	3.2
Tax Offenses	121	97	80.2	13	10.7	2	1.7	9	7.4
Fraud	3,954	1,978	50.0	1,233	31.2	631	16.0	112	2.8
Drug Offenses									
-Importation & Distribution	18,140	6,957	38.4	5,558	30.6	5,358	29.5	267	1.5
-Simple Possession	1,329	619	46.6	297	22.4	389	29.3	24	1.8
-Communication Facility	433	247	57.0	103	23.8	77	17.8	6	1.4
Auto Theft	256	194	75.8	34	13.3	24	9.4	4	1.6
Forgery/Counterfeiting	1,490	750	50.3	504	33.8	180	12.1	56	3.8
Sex Offenses	275	161	58.6	26	9.5	7	2.6	81	29.5
Bribery	171	88	51.5	34	19.9	23	13.5	26	15.2
Escape	617	328	53.2	174	28.2	106	17.2	9	1.5
Firearms	2,579	1,468	56.9	796	30.9	264	10.2	51	2.0
Immigration	2,643	490	18.5	105	4.0	1,999	75.6	49	1.9
Extortion/Racketeering	424	276	65.1	104	24.5	39	9.2	5	1.2
Gambling/Lottery	180	142	78.9	36	20.0	1	0.6	1	0.6
Money Laundering	129	76	58.9	8	6.2	41	31.8	4	3.1
Other	1,923	1,280	66.6	257	13.4	292	15.2	94	4.9

*Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 3,955 cases were excluded due to one or both of the following conditions: missing primary offense category (3,759) or missing race (3,670).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 9

AGE OF DEFENDANT BY PRIMARY OFFENSE CATEGORY*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL	AGE															
		Under 22		22 to 25		26 to 30		31 to 35		36 to 40		41 to 50		Over 50		Mean	Median
	N	N	%	N	%	N	%	N	%	N	%	N	%	N	%		
TOTAL	**40,915**	**3,706**	**9.1**	**6,476**	**15.8**	**8,720**	**21.3**	**7,591**	**18.6**	**5,575**	**13.6**	**6,023**	**14.7**	**2,824**	**6.9**	**33.4**	**32**
Homicide	153	30	19.6	35	22.9	37	24.2	24	15.7	9	5.9	12	7.8	6	3.9	28.9	27
Kidnapping	72	13	18.1	10	13.9	20	27.8	13	18.1	8	11.1	7	9.7	1	1.4	29.9	29
Robbery	1,728	163	9.4	233	13.5	380	22.0	374	21.6	276	16.0	224	13.0	78	4.5	32.7	32
Assault	378	47	12.4	75	19.8	96	25.4	55	14.6	52	13.8	36	9.5	17	4.5	30.1	29
Burglary/B&E	155	36	23.2	27	17.4	34	21.9	25	16.1	15	9.7	12	7.7	6	3.9	29.2	27
Larceny	2,665	336	12.6	435	16.3	521	19.6	404	15.2	316	11.9	386	14.5	267	10.0	33.6	31
Embezzlement	1,760	154	8.8	249	14.2	349	19.8	373	21.2	266	15.1	271	15.4	98	5.6	33.6	32
Tax Offenses	122	0	0.0	1	0.8	7	5.7	11	9.0	17	13.9	48	39.3	38	31.2	46.1	46
Fraud	3,827	267	7.0	466	12.2	770	20.1	652	17.0	553	14.5	717	18.7	402	10.5	35.7	34
Drug Offenses																	
-Importation & Distribution	18,102	1,649	9.1	3,117	17.2	4,010	22.2	3,379	18.7	2,487	13.7	2,483	13.7	977	5.4	32.6	31
-Simple Possession	1,277	159	12.5	255	20.0	314	24.6	253	19.8	151	11.8	111	8.7	34	2.7	30.4	29
-Communication Facility	430	36	8.4	53	12.3	81	18.8	93	21.6	72	16.7	66	15.4	29	6.7	33.9	33
Auto Theft	253	27	10.7	48	19.0	46	18.2	31	12.3	31	12.3	44	17.4	26	10.3	33.9	31
Forgery/Counterfeiting	1,446	135	9.3	234	16.2	300	20.8	266	18.4	205	14.2	220	15.2	86	6.0	33.2	32
Sex Offenses	276	20	7.3	23	8.3	45	16.3	39	14.1	36	13.0	75	27.2	38	13.8	38.3	38
Bribery	171	1	0.6	4	2.3	24	14.0	32	18.7	23	13.5	41	24.0	46	26.9	42.5	41
Escape	608	22	3.6	80	13.2	119	19.6	152	25.0	105	17.3	102	16.8	28	4.6	34.2	33
Firearms	2,542	163	6.4	383	15.1	559	22.0	521	20.5	354	13.9	406	16.0	156	6.1	33.7	32
Immigration	2,377	272	11.4	458	19.3	578	24.3	461	19.4	241	10.1	240	10.1	127	5.3	31.5	29
Extortion/Racketeering	417	31	7.4	51	12.2	64	15.4	71	17.0	53	12.7	84	20.1	63	15.1	37.1	35
Gambling/Lottery	180	1	0.6	6	3.3	8	4.4	12	6.7	22	12.2	63	35.0	68	37.8	47.6	47
Money Laundering	132	3	2.3	9	6.8	21	15.9	20	15.2	27	20.5	30	22.7	22	16.7	39.0	38
Other	1,844	141	7.7	224	12.2	337	18.3	330	17.9	256	13.9	345	18.7	211	11.4	35.8	34

*Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 4,739 cases were excluded due to one or both of the following conditions: missing primary offense category (3,759) or missing date of birth (1,743).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 10

CHAPTER TWO GUIDELINE APPLIED IN SINGLE AND MULTIPLE COUNT CASES*
(January 19, 1989 through September 30, 1990)

Guideline	Single Count N	Single Count %	Multiple Count N	Multiple Count %	Guideline	Single Count N	Single Count %	Multiple Count N	Multiple Count %
2A1.1	16	0.1	17	0.2	2D1.5	40	0.1	37	0.4
2A1.2	18	0.1	2	0.0	2D1.6	388	1.3	155	1.6
2A1.3	34	0.1	2	0.0	2D1.7	2	0.0	1	0.0
2A1.4	30	0.1	8	0.1	2D1.8	126	0.4	28	0.3
2A2.1	21	0.1	29	0.3	2D1.9	0	0.0	2	0.0
2A2.2	169	0.6	72	0.7	2D1.10	0	0.0	0	0.0
2A2.3	29	0.1	16	0.2	2D2.1	1,083	3.5	158	1.6
2A2.4	78	0.3	29	0.3	2D2.2	21	0.1	13	0.1
2A3.1	41	0.1	23	0.2	2D2.3	1	0.0	0	0.0
2A3.2	8	0.0	6	0.1	2D3.1	12	0.0	5	0.1
2A3.3	1	0.0	0	0.0	2D3.2	0	0.0	0	0.0
2A3.4	45	0.2	11	0.1	2D3.3	1	0.0	0	0.0
2A4.1	41	0.1	23	0.2	2D3.4	9	0.0	0	0.0
2A4.2	0	0.0	1	0.0	2E1.1	37	0.1	43	0.4
2A5.1	0	0.0	0	0.0	2E1.2	102	0.3	60	0.6
2A5.2	9	0.0	0	0.0	2E1.3	0	0.0	2	0.0
2A5.3	0	0.0	0	0.0	2E1.4	7	0.0	8	0.1
2A6.1	92	0.3	33	0.3	2E1.5	1	0.0	1	0.0
2B1.1	3,755	12.2	677	6.9	2E2.1	15	0.1	16	0.2
2B1.2	405	1.3	104	1.1	2E3.1	108	0.4	67	0.7
2B1.3	91	0.3	24	0.2	2E3.2	1	0.0	9	0.1
2B2.1	19	0.1	13	0.1	2E3.3	9	0.0	1	0.0
2B2.2	95	0.3	33	0.3	2E4.1	1	0.0	0	0.0
2B2.3	18	0.1	5	0.1	2E5.1	0	0.0	0	0.0
2B3.1	1,052	3.4	849	8.7	2E5.2	1	0.0	0	0.0
2B3.2	32	0.1	25	0.3	2E5.3	0	0.0	0	0.0
2B3.3	5	0.0	7	0.1	2E5.4	17	0.1	4	0.0
2B4.1	9	0.0	6	0.1	2E5.5	5	0.0	2	0.0
2B5.1	528	1.7	151	1.5	2E5.6	2	0.0	7	0.1
2B5.2	145	0.5	47	0.5	2F1.1	3,195	10.4	1,278	13.0
2B5.3	39	0.1	16	0.2	2F1.2	2	0.0	1	0.0
2B5.4	58	0.2	12	0.1	2G1.1	5	0.0	3	0.0
2B6.1	20	0.1	16	0.2	2G1.2	15	0.1	4	0.0
2C1.1	107	0.4	51	0.5	2G2.1	8	0.0	8	0.1
2C1.2	20	0.1	5	0.1	2G2.2	94	0.3	22	0.2
2C1.3	3	0.0	1	0.0	2G2.3	0	0.0	0	0.0
2C1.4	13	0.0	0	0.0	2G3.1	26	0.1	10	0.1
2C1.5	1	0.0	0	0.0	2G3.2	0	0.0	0	0.0
2C1.6	0	0.0	0	0.0	2H1.1	2	0.0	0	0.0
2D1.1	11,936	38.7	4,863	49.6	2H1.2	15	0.1	16	0.2
2D1.2	77	0.3	59	0.6	2H1.3	6	0.0	8	0.1
2D1.3	164	0.5	80	0.8	2H1.4	9	0.0	2	0.0
2D1.4	595	1.9	344	3.5	2H1.5	2	0.0	0	0.0

GUIDELINE APPLIED										
Guideline	Single Count		Multiple Count		Guideline	Single Count		Multiple Count		
	N	%	N	%		N	%	N	%	
2H2.1	1	0.0	0	0.0	2M3.9	0	0.0	0	0.0	
2H3.1	17	0.1	7	0.1	2M4.1	0	0.0	0	0.0	
2H3.2	13	0.0	5	0.1	2M5.1	5	0.0	6	0.1	
2H3.3	28	0.1	2	0.0	2M5.2	44	0.1	24	0.2	
2H4.1	0	0.0	0	0.0	2M6.1	0	0.0	0	0.0	
2J1.1	18	0.1	3	0.0	2M6.2	0	0.0	0	0.0	
2J1.2	78	0.3	43	0.4	2N1.1	2	0.0	0	0.0	
2J1.3	72	0.2	39	0.4	2N1.2	2	0.0	1	0.0	
2J1.4	29	0.1	13	0.1	2N1.3	0	0.0	0	0.0	
2J1.5	1	0.0	2	0.0	2N2.1	62	0.2	26	0.3	
2J1.6	117	0.4	81	0.8	2N3.1	6	0.0	0	0.0	
2J1.7	14	0.1	15	0.2	2P1.1	348	1.1	40	0.4	
2J1.8	2	0.0	3	0.0	2P1.2	66	0.2	17	0.2	
2J1.9	1	0.0	0	0.0	2P1.3	0	0.0	3	0.0	
2K1.1	5	0.0	2	0.0	2P1.4	0	0.0	0	0.0	
2K1.2	[illegible]5	0.1	6	0.1	2Q1.1	0	0.0	0	0.0	
2K1.3	35	0.1	18	0.2	2Q1.2	6	0.0	6	0.1	
2K1.4	56	0.2	39	0.4	2Q1.3	3	0.0	4	0.0	
2K1.5	9	0.0	4	0.0	2Q1.4	0	0.0	0	0.0	
2K1.6	2	0.0	6	0.1	2Q1.5	0	0.0	0	0.0	
2K1.7	0	0.0	0	0.0	2Q1.6	0	0.0	0	0.0	
2K2.1	1,190	3.9	524	5.4	2Q2.1	74	0.2	18	0.2	
2K2.2	446	1.5	221	2.3	2Q2.2	53	0.2	16	0.2	
2K2.3	88	0.3	49	0.5	2R1.1	9	0.0	1	0.0	
2K2.4	165	0.5	478	4.9	2S1.1	104	0.3	105	1.1	
2K2.5	16	0.1	1	0.0	2S1.2	7	0.0	5	0.1	
2K3.1	1	0.0	1	0.0	2S1.3	171	0.6	58	0.6	
2L1.1	1,098	3.6	117	1.2	2T1.1	23	0.1	40	0.4	
2L1.2	766	2.5	42	0.4	2T1.2	30	0.1	21	0.2	
2L2.1	200	0.7	83	0.9	2T1.3	28	0.1	44	0.5	
2L2.2	277	0.9	34	0.4	2T1.4	6	0.0	14	0.1	
2L2.3	22	0.1	4	0.0	2T1.5	16	0.1	3	0.0	
2L2.4	145	0.5	25	0.3	2T1.6	0	0.0	0	0.0	
2L2.5	0	0.0	0	0.0	2T1.7	2	0.0	1	0.0	
2M1.1	0	0.0	0	0.0	2T1.8	0	0.0	2	0.0	
2M2.1	0	0.0	0	0.0	2T1.9	18	0.1	33	0.3	
2M2.2	0	0.0	0	0.0	2T2.1	8	0.0	0	0.0	
2M2.3	0	0.0	0	0.0	2T2.2	1	0.0	0	0.0	
2M2.4	0	0.0	0	0.0	2T3.1	51	0.2	13	0.1	
2M3.1	1	0.0	0	0.0	2T3.2	22	0.1	6	0.1	
2M3.2	1	0.0	0	0.0	2T4.1	52	0.2	30	0.3	
2M3.3	2	0.0	0	0.0	2X1.1	336	1.1	196	2.0	
2M3.4	0	0.0	0	0.0	2X2.1	69	0.2	57	0.6	
2M3.5	0	0.0	0	0.0	2X3.1	58	0.2	8	0.1	
2M3.6	0	0.0	0	0.0	2X4.1	158	0.5	0	0.0	
2M3.7	0	0.0	0	0.0	2X5.1	139	0.5	39	0.4	
2M3.8	0	0.0	0	0.0	Total	Single Count		Multiple Count		
						Number	Percent	Number	Percent	
Total number of guidelines applied:					44,432	32,097	72.2	12,335	27.8	
Total number of cases:					40,657	30,854	75.9	9,803	24.1	

Of the 46,167 guideline cases, 4,958 cases missing guideline applied and 912 cases missing number of counts information were excluded. The totals can add to more than 100% because a single case may reference several different guidelines. A number of Chapter Two Guidelines list possible cross-references, which resulted in multiple counting of cases applying both the original and cross-referenced guideline(s). In cases in which application of a specific cross-reference was required, only the original guideline was used to avoid double-counting for these cases.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 11

OFFENSE LEVEL BY CRIMINAL HISTORY CATEGORY*
For Guideline Cases With Complete Reports on the Sentencing Hearing Received
(January 19, 1989 through September 30, 1990)

OFFENSE LEVEL	CRIMINAL HISTORY CATEGORY						TOTAL	
	I	II	III	IV	V	VI	Number	Percent
1	15	1	0	0	1	0	17	0.1
2	649	72	37	14	5	4	781	2.7
3	251	44	46	21	8	13	383	1.3
4	1,830	217	179	77	43	68	2,414	8.2
5	470	55	44	30	12	18	629	2.1
6	1,040	160	230	182	115	141	1,868	6.3
7	851	145	174	113	71	106	1,460	5.0
8	748	129	118	91	54	79	1,219	4.1
9	581	94	109	56	42	61	923	3.1
10	1,314	237	266	152	89	106	2,164	7.3
11	508	102	115	100	87	111	1,023	3.5
12	828	159	180	106	42	76	1,389	4.7
13	361	64	66	50	39	36	616	2.1
14	686	144	125	66	30	34	1,085	3.7
15	186	33	37	20	12	37	325	1.1
16	725	137	136	47	29	19	1,093	3.7
17	203	46	64	31	29	66	439	1.5
18	571	106	122	45	13	24	881	3.0
19	123	37	54	24	12	18	268	0.9
20	640	139	101	53	34	29	996	3.4
21	136	28	21	21	7	15	228	0.8
22	615	127	87	37	26	29	921	3.1
23	105	24	27	29	10	10	205	0.7
24	1,172	197	170	77	30	34	1,680	5.7
25	54	6	11	9	6	9	95	0.3
26	926	186	167	66	23	31	1,399	4.8
27	56	10	13	4	6	9	95	0.3
28	566	89	107	40	15	14	831	2.8
29	45	8	4	4	6	2	91	0.3
30	559	105	110	37	13	119	943	3.2
31	38	9	6	3	0	4	60	0.2
32	585	124	95	46	10	200	1,060	3.6
33	32	14	8	4	3	1	62	0.2
34	422	79	97	27	10	151	786	2.7
35	38	6	6	4	0	35	89	0.3
36	243	59	48	26	7	6	389	1.3
37	28	9	8	1	1	84	131	0.4
38	136	33	33	9	4	6	221	0.8
39	23	7	1	2	1	3	37	0.1
40	43	14	19	14	3	4	97	0.3
41	15	5	6	2	1	0	29	0.1
42	31	5	9	3	1	3	52	0.2
43	17	4	4	0	5	2	32	0.1
TOTAL	18,443	3,269	3,260	1,743	951	1,811	29,477	
Percent	62.6	11.1	11.1	5.9	3.2	6.1	100.0	

*Of the 46,167 guideline cases, the Commission received Reports on the Sentencing Hearing for 34,625 (75.0%). Of the 34,625 cases with such reports, 388 mixed law cases (both guideline and pre-guideline counts) were excluded. In addition, 4,760 cases were excluded due to one or more of the following conditions: missing offense level (4,443), missing criminal history category (4,580), or cases with no analogous guideline (53).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

defendants most commonly had little or no criminal history, with 62.6 percent falling in the guidelines' criminal history category I, and less than 10 percent (9.3%) falling in either of the two highest criminal history categories. *See* Table 11 for distribution of criminal history categories across offense levels.

The Sentencing Reform Act mandates lengthy sentences for defendants with two prior convictions for violent or controlled substance offenses who are convicted of a third violent or controlled substance offense. The guidelines have implemented this statutory directive to provide a sentence at or near the statutory maximum through the career offender guideline. Given that federal defendants are most likely not to have criminal records, it is not surprising to find that only 3.3 percent (n=623) of guideline defendants sentenced between January 19, 1989, and September 30, 1990, were identified as career offenders (*see* Table 12). The majority of these career offenders were convicted of drug distribution or importation (n=357 or 57.3%) or robbery (n=194 or 31.1%).

K. Role in the Offense

In general, guideline defendants received neither an enhancement nor reduction for role in the offense (*see* Table 13). More than 80 percent (82%) either acted alone or were of roughly equal culpability with other participants. Approximately 10 percent received either a two-level enhancement or reduction (4.9% and 6.4%, respectively). Another 2.2 percent and 2.6 percent, respectively, received a four-level enhancement or reduction, and an additional 2.0 percent received the three-level enhancement or reduction. Offenders convicted of gambling or lottery, money laundering, extortion, and drug importation or distribution were most likely to receive role adjustments (over 25% in each category), while those convicted of sex offenses, embezzlement, simple drug possession, and escape were least likely to receive role adjustments (less than 5% in each category).

L. Obstruction of Justice

The guidelines call for a two-level enhancement for defendants who obstruct or impede the administration of justice. Of the guideline defendants, 94.7 percent did not receive the two-level enhancement. In looking at obstruction by primary offense category, defendants convicted of kidnapping received a two-level enhancement for obstruction more frequently than other defendants (17.4%). In general, regardless of offense type, defendants did not receive enhancement for obstruction. *See* Table 14 for distribution of obstruction of justice enhancements by offense category. Defendants who went to trial (13.4%) were somewhat more likely to receive the enhancement than those who pleaded guilty (3.9%).

M. Acceptance of Responsibility

For 78.4 percent of guideline defendants, the court authorized a two-level reduction for acceptance of responsibility, while 21.6 percent of defendants did not receive the reduction (*see* Table 15). As is true with obstruction, defendants convicted of kidnapping (43.5%) failed to receive a two-level reduction more often than defendants convicted of other offenses. But several offense types show more than 25 percent defendants did not receive the reduction: homicide (32.0%), assault (31.4%), drug importation or distribution (26.9%), firearms (25.7%), and extortion (31.4%). On the other hand, few defendants convicted of embezzlement (6.1%) did not receive the reduction. When controlling for mode of conviction, defendants who pleaded guilty (88.2%) generally received the two-level reduction and defendants who went to trial generally did not (79.7%).

Table 12

CAREER OFFENDERS BY APPLICABLE OFFENSE TYPE*
(January 19, 1989 through September 30, 1990)

APPLICABLE PRIMARY OFFENSE	TOTAL		CAREER OFFENDER ADJUSTMENT			
			Non-Career Offender		Career Offender	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	19,059	100.0	18,436	96.7	623	3.3
Homicide	100	0.5	95	0.5	5	0.8
Kidnapping	46	0.2	42	0.2	4	0.6
Robbery	1,060	5.6	866	4.7	194	31.1
Assault	245	1.3	235	1.3	10	1.6
Larceny	1,775	9.3	1,770	9.6	5	1.0
Drug Import/Distribute	11,325	59.4	10,968	59.5	357	57.3
Drug Possession	762	4.0	758	4.1	4	0.6
Drug Communication Facility	278	1.5	277	1.5	1	0.2
Sex Offenses	196	1.0	193	1.1	3	0.5
Escape	371	2.0	370	2.0	1	0.2
Firearms	1,539	8.1	1,516	8.2	23	3.7
Extortion	295	1.6	290	1.6	5	0.8
Other**	1,067	5.6	1,058	5.7	9	1.6

* Of the 46,167 guideline cases, 513 involving mixed law counts (both guideline and pre-guideline) and 18,320 lacking complete information from the sentencing court were excluded. Of the 27,334 cases used for this table, 8,275 were excluded due to one or more of the following conditions: inapplicable offense type (6,335), missing primary offense category (1,889), or missing career offender information (58).

**The "Other" category includes infrequently occurring offenses such as threatening the President of the U.S.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 13

ROLE IN THE OFFENSE BY OFFENSE TYPE*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL		ADJUSTMENT FOR ROLE IN THE OFFENSE													
			Mitigating Role								Aggravating Role					
			3B1.2(a) -4		Between 3B1.2(a) & 3B1.2(b) -3		3B1.2(a) -2		No Role Adjustment Given		3B1.1(c) +2		3B1.1(b) +3		3B1.1(a) +4	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	25,423	100.0	671	2.6	115	0.5	1,626	6.4	20,851	82.0	1,252	4.9	346	1.4	562	2.2
Homicide	100	100.0	0	0.0	0	0.0	3	3.0	91	91.0	2	2.0	0	0.0	4	4.0
Kidnapping	46	100.0	0	0.0	0	0.0	2	4.4	40	87.0	4	8.7	0	0.0	0	0.0
Robbery	1,058	100.0	3	0.3	1	0.1	18	1.7	987	93.3	46	4.4	0	0.0	3	0.3
Assault	244	100.0	1	0.4	0	0.0	7	2.9	230	94.3	4	1.6	1	0.4	1	0.4
Burglary/B&E	104	100.0	0	0.0	0	0.0	2	1.9	94	90.4	4	3.9	1	1.0	3	2.9
Larceny	1,784	100.0	9	0.5	2	0.1	65	3.6	1,607	90.1	67	3.8	16	0.9	18	1.0
Embezzlement	1,078	100.0	0	0.0	0	0.0	6	0.6	1,048	97.2	18	1.7	2	0.2	4	0.4
Tax Offenses	70	100.0	0	0.0	0	0.0	2	2.9	62	88.6	2	2.9	3	4.3	1	1.4
Fraud	2,421	100.0	19	0.8	7	0.3	92	3.8	2,111	87.2	102	4.2	30	1.2	60	2.5
Drug Import/Distribute	11,339	100.0	553	4.9	84	0.7	1,189	10.5	8,201	72.3	716	6.3	242	2.1	354	3.1
Drug Possession	762	100.0	3	0.4	1	0.1	11	1.4	745	97.8	2	0.3	0	0.0	0	0.0
Drug Communication Facility	278	100.0	22	7.9	1	0.4	24	8.6	217	78.1	7	2.5	4	1.4	3	1.1
Auto Theft	182	100.0	4	2.2	1	0.6	17	9.3	137	75.3	10	5.5	3	1.7	10	5.5
Forgery/Counterfeiting	891	100.0	11	1.2	3	0.3	41	4.6	757	85.0	51	5.7	8	0.9	20	2.2
Sex Offenses	196	100.0	1	0.5	1	0.5	1	0.5	189	96.4	4	2.0	0	0.0	0	0.0
Bribery	93	100.0	0	0.0	0	0.0	5	5.4	79	85.0	3	3.2	3	3.2	3	3.2
Escape	372	100.0	0	0.0	1	0.3	1	0.3	365	98.1	5	1.3	0	0.0	0	0.0
Firearms	1,540	100.0	5	0.3	1	0.1	26	1.7	1,474	95.7	25	1.6	2	0.1	7	0.5
Immigration	1,323	100.0	2	0.2	0	0.0	28	2.1	1,173	88.7	99	7.5	1	0.1	20	1.5
Extortion	296	100.0	13	4.4	2	0.7	28	9.5	209	70.6	15	5.1	11	3.7	18	6.1
Gambling/Lottery	100	100.0	3	3.0	4	4.0	14	14.0	53	53.0	10	10.0	8	8.0	8	8.0
Money Laundering	76	100.0	3	4.0	1	1.3	10	13.2	44	57.9	4	5.3	6	7.9	8	10.5
Other	1,070	100.0	19	1.8	5	0.5	34	3.2	938	87.7	52	4.9	5	0.5	17	1.6

*Of the 46,167 guideline cases, 513 involving mixed law counts (both guideline and pre-guideline) and 18,320 lacking complete information from the sentencing court were excluded. Of the 27,334 cases used for this table, 1,911 were excluded due to one or both of the following conditions: missing primary offense category (1,889) or missing role in the offense information (23).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 14

OBSTRUCTION OF JUSTICE ADJUSTMENT BY OFFENSE TYPE*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL		OBSTRUCTION OF JUSTICE ADJUSTMENT			
			No Obstruction of Justice		Obstruction of Justice	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	25,423	100.0	24,074	94.7	1,349	5.3
Homicide	100	100.0	90	90.0	10	10.0
Kidnapping	46	100.0	38	82.6	8	17.4
Robbery	1,058	100.0	991	93.7	67	6.3
Assault	244	100.0	229	93.9	15	6.2
Burglary/B&E	104	100.0	100	96.2	4	3.9
Larceny	1,784	100.0	1,706	95.6	78	4.4
Embezzlement	1,078	100.0	1,055	97.9	23	2.1
Tax Offenses	70	100.0	65	92.9	5	7.1
Fraud	2,420	100.0	2,283	94.3	137	5.7
Drug Import/Distribute	11,341	100.0	10,684	94.2	657	5.8
Drug Possession	762	100.0	739	97.0	23	3.0
Drug Communication Facility	278	100.0	270	97.1	8	2.9
AutoTheft	182	100.0	174	95.6	8	4.4
Forgery/Counterfeiting	891	100.0	846	95.0	45	5.1
Sex Offenses	196	100.0	183	93.4	13	6.6
Bribery	92	100.0	89	96.7	3	3.3
Escape	372	100.0	354	95.2	18	4.8
Firearms	1,540	100.0	1,457	94.6	83	5.4
Immigration	1,323	100.0	1,272	96.2	51	3.9
Extortion	296	100.0	275	92.9	21	7.1
Gambling/Lottery	100	100.0	98	98.0	2	2.0
Money Laundering	76	100.0	70	92.1	6	7.9
Other	1,070	100.0	1,006	94.0	64	6.0

Of the 46,167 guideline cases, 513 involving mixed law counts (both guideline and pre-guideline) and 18,320 lacking complete information from the sentencing court were excluded. Of the 27,334 cases used for this table, 1,911 were excluded due to one or both of the following conditions: missing primary offense category (1,889) or missing obstruction of justice information (23).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 15

ACCEPTANCE OF RESPONSIBILITY ADJUSTMENT BY OFFENSE TYPE*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL		ACCEPTANCE OF RESPONSIBILITY ADJUSTMENT			
			Given		Not Given	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	25,437	100.0	19,937	78.4	5,500	21.5
Homicide	100	100.0	68	68.0	32	32.0
Kidnapping	46	100.0	26	56.5	20	43.5
Robbery	1,061	100.0	871	82.1	190	17.9
Assault	245	100.0	168	68.6	77	31.4
Burglary/B&E	103	100.0	78	75.7	25	24.3
Larceny	1,783	100.0	1,495	83.9	288	16.2
Embezzlement	1,079	100.0	1,013	93.9	66	6.1
Tax Offenses	70	100.0	60	85.7	10	14.3
Fraud	2,420	100.0	2,083	86.1	337	13.9
Drug Import/Distribute	11,344	100.0	8,296	73.1	3,048	26.9
Drug Possession	762	100.0	610	80.1	152	20.0
Drug Communication Facility	278	100.0	245	88.1	33	11.9
AutoTheft	182	100.0	149	81.9	33	18.1
Forgery/Counterfeiting	891	100.0	770	86.4	121	13.6
Sex Offenses	196	100.0	148	75.5	48	24.5
Bribery	92	100.0	77	83.7	15	16.3
Escape	372	100.0	294	79.0	78	21.0
Firearms	1,540	100.0	1,144	74.3	396	25.7
Immigration	1,331	100.0	1,135	85.3	196	14.7
Extortion	296	100.0	203	68.6	93	31.4
Gambling/Lottery	100	100.0	89	89.0	11	11.0
Money Laundering	76	100.0	60	79.0	16	21.1
Other	1,070	100.0	855	79.9	215	20.1

Of the 46,167 guideline cases, 513 cases involving mixed law counts (both guideline and pre-guideline) and 18,320 lacking complete information from the sentencing court were excluded. Of the 27,334 cases used for this table, 1,897 were excluded due to one or both of the following conditions: missing primary offense category (1,889) or missing acceptance of responsibility adjustment information (9).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

N. Single versus Multiple Defendant Cases

Whether a guideline defendant acted alone or in concert with others was split almost evenly, with 45.1 percent of sentenced defendants acting alone and 54.9 percent acting in concert with others (*see* Table 16). Primary offense category appears to influence whether a defendant will act alone or with others. In general, defendants acted in concert with others in kidnapping (70.2%), drug importation/distribution (73.0%), use of a communication facility in a drug offense (87.4%), auto theft (73.6%), extortion (73.4%), and gambling/lottery (92.5%) offenses. On the other hand, defendants principally acted alone in assault (72.5%), embezzlement (89.2%), sex offenses (88.5%), escape (80.0%), and firearms (75.9%) offenses.

O. Mandatory Minimum Defendants

Determining the number of defendants sentenced pursuant to statutes containing mandatory minimum provisions is an extremely difficult proposition given the manner in which courts report sentencing data.[133] The Commission's Special Report to the Congress on Mandatory Minimum Penalties addressed the question of frequency with which mandatory minimum penalties are imposed in the federal system. For FY 1990, approximately 6,685 guideline defendants received convictions for offenses that carry mandatory minimum provisions. Table 17 illustrates that of the 60 or more federal criminal statutes that contain provisions for mandatory minimum sentences, convictions were limited to title 21 drug offenses, 18 U.S.C. §§ 924(c) and (e) (weapons offenses), and 18 U.S.C. § 2113(e) (hostage taking or killing during bank robbery).

Summary

By September 1, 1990, 75 percent of all federal criminal defendants were sentenced pursuant to the Sentencing Reform Act. For the post-Mistretta period, January 19, 1989, through September 30, 1990, 46,167 defendants received guideline sentences; of these, more than three-quarters (77.5%) received some form of imprisonment. Nearly half of guideline defendants (47.7%) received sentences following convictions for drug offenses. Plea rates during this post-Mistretta period remained at approximately the same rate as pre-guideline rates, with 88.1 percent of defendants pleading guilty. Defendants sentenced during this period were primarily male (84.2%), white (45.7%), and were, on average, 32 years of age.

A summary of guideline factors for defendants sentenced during the post-Mistretta period begins with a median offense level of 13. Offense level 13 in combination with the lowest criminal history score represents the first guideline level that requires incarceration, an indication that approximately half of guideline defendants sentenced during this period were eligible for some form of alternative sentence. Most guideline defendants (62.6%) had little or no criminal history. In general, guideline defendants acted alone or played an equal role in the crimes they committed, and for the most part these defendants (78.4%) accepted responsibility for their criminal actions.

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[133] *See*, U.S. Sentencing Commission's Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, August 1991.

Table 16

NUMBER OF PARTICIPANTSBY OFFENSE TYPE*
(January 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL		NUMBER OF PARTICIPANTS			
			Acted Alone		Acted with Others	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	39,418	100.0	17,775	45.1	21,643	54.9
Homicide	151	100.0	90	59.6	61	40.4
Kidnapping	67	100.0	20	29.9	47	70.2
Robbery	1,646	100.0	1,098	66.7	548	33.3
Assault	356	100.0	258	72.5	98	27.5
Burglary/B&E	154	100.0	71	46.1	83	53.9
Larceny	2,572	100.0	1,462	56.8	1,110	43.2
Embezzlement	1,701	100.0	1,517	89.2	184	10.8
Tax Offenses	112	100.0	53	47.3	59	52.7
Fraud	3,694	100.0	2,122	57.4	1,572	42.6
Drug Import/Distribute	17,424	100.0	4,708	27.0	12,716	'3.0
Drug Possession	1,233	100.0	764	62.0	469	38.0
Drug Communication Facility	411	100.0	52	12.7	359	87.4
AutoTheft	239	100.0	63	26.4	176	73.6
Forgery/Counterfeiting	1,422	100.0	539	37.9	883	62.1
Sex Offenses	260	100.0	230	88.5	30	11.5
Bribery	160	100.0	85	53.1	75	46.9
Escape	595	100.0	476	80.0	119	20.0
Firearms	2,435	100.0	1,848	75.9	587	24.1
Immigration	2,310	100.0	1,316	57.0	994	43.0
Extortion	409	100.0	109	26.7	300	73.4
Gambling/Lottery	174	100.0	13	7.5	161	92.5
Money Laundering	1,772	100.0	866	48.9	906	51.1
Other	121	100.0	15	12.4	106	87.6

Of the 46,167 guideline cases, 513 invovling mixed law counts (both guideline and pre-guideline) were excluded. In Addition, 6,236 cases were excluded due to one or both of the following conditions: missing primary offense category (3,759) or missing codefendant information (6,236).

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 17

NUMBER OF GUIDELINE DEFENDANTS SENTENCED UNDER STATUTES WITH MANDATORY MINIMUM PROVISIONS[1]
(October 1, 1989 through September 30, 1990)

STATUTE	TOTAL NUMBER OF DEFENDANTS	DEFENDANTS WITH MANDATORY MINIMUM PROVISION APPLIED		STATUTE	TOTAL NUMBER OF DEFENDANTS	DEFENDANTS WITH MANDATORY MINIMUM PROVISION APPLIED	
		Number	Percent			Number	Percent
2 USC § 192	0	0	(-)	18 USC § 1917	0	0	(-)
2 USC § 390	0	0	(-)	18 USC § 1992	0	0	(-)
7 USC § 13a	0	0	(-)	18 USC § 2113(e)	19	19	(100.0)
7 USC § 13b	0	0	(-)	18 USC § 2251	10	0	(0.0)
7 USC § 195	0	0	(-)	18 USC § 2251A	0	0	(-)
7 USC § 2024	201	0	(0.0)	18 USC § 2252	92	0	(0.0)
12 USC § 617	0	0	(-)	18 USC § 2257	0	0	(-)
12 USC § 630	0	0	(-)	18 USC § 2381	0	0	(-)
15 USC § 8	0	0	(-)	18 USC § 3561	1	0	(0.0)
15 USC § 1245	0	0	(-)	19 USC § 283	0	0	(-)
15 USC § 1825	0	0	(-)	21 USC § 212	0	0	(-)
16 USC § 414	0	0	(-)	21 USC § 622	1	1	(100.0)
18 USC § 115	11	0	(0.0)	21 USC § 841	9,271	4,440	(47.9)
18 USC § 225	0	0	(-)	21 USC § 844	911	56	(6.1)
18 USC § 351	2	0	(0.0)	21 USC § 845	141	141	(100.0)
18 USC § 844(h)	15	5	(33.3)	21 USC § 845a	263	263	(100.0)
18 USC § 924(c)	1,107	1,107	(100.0)	21 USC § 845b	9	9	(100.0)
18 USC § 924(e)	46	46	(100.0)	21 USC § 848	72	72	(100.0)
18 USC § 929	0	0	(-)	21 USC § 960[2]	1,002	342	(34.1)
18 USC § 1091	0	0	(-)	22 USC § 4221	0	0	(-)
18 USC § 1111	23	4	(17.4)	33 USC § 410	0	0	(-)
18 USC § 1114	19	0	(0.0)	33 USC § 411	0	0	(-)
18 USC § 1116	0	0	(-)	33 USC § 441	0	0	(-)
18 USC § 1651	0	0	(-)	33 USC § 447	0	0	(-)
18 USC § 1652	0	0	(-)	45 USC § 83	0	0	(-)
18 USC § 1653	0	0	(-)	46 USCAppx § 1228	0	0	(-)
18 USC § 1655	0	0	(-)	47 USC § 13	0	0	(-)
18 USC § 1658	0	0	(-)	47 USC § 220	0	0	(-)
18 USC § 1661	0	0	(-)	49 USC § 11911	0	0	(-)
18 USC § 1751	0	0	(-)	49 USCAppx § 1472	15	0	(0.0)

[1] Includes cases for which the statute refers to any of the counts of conviction. Because a single defendant may be convicted under multiple statutes, that defendant may be counted under more than one statute. Because drug cases frequently involve multiple counts, we were unable to assess whether all multiple count cases listed under 21 USC § 841 or 21 USC § 960 and have mandatory minimums are actually convicted pursuant to mandatory minimum provisions of that specific statute. We were able to assess, however, the number charged under some Title 21 mandatory minimum provisions.

[2] 21 USC § 960 is the penalty statute for 21 USC §§ 952, 953, 955, 957, 959, and 960.

SOURCE: U.S. Sentencing Commission, 1990 Data File, MONFY90.

Part C
Sentencing Guidelines Training

Introduction

The advent of guideline sentencing ushered in a number of profound reforms in the federal criminal justice system. In order for judges and practitioners to keep pace with the sweeping changes, a substantial amount of training was needed prior to implementation of the new sentencing system. The necessity of sound guideline application training for all judges and practitioners has not diminished during the initial years of guideline implementation.

This part focuses on the Commission's training efforts and attempts to assess the amount and quality of guideline training available. Additionally, perceptions of the guideline application skills of judges, prosecuting and defense attorneys, and probation officers are discussed in the context of the Commission's site interviews.

I. Training Programs

A. Background

The Commission is directed by statute to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process."[134] From its inception, the Commission has considered this training mandate to be one of its top priorities.

The earliest training efforts predate submission of the guidelines as Commissioners and staff began educating judges, probation officers, attorneys, and others about guideline issues and application through a series of workshops, five topical hearings, and six regional hearings on the preliminary draft guidelines. In 1987, the Commission responded to the field's initial training needs in a variety of ways: (1) field testing sessions, (2) three nationwide "train-the-trainer" seminars, (3) in-district seminars, and (4) establishment of a telephone "hotline" to respond to questions from judges and probation officers.

Commission field testing of the guidelines in ten cities across the country from June through September 1987 served a threefold purpose: to identify ambiguities and difficulties in applying the guidelines to actual cases; to develop a series of worksheets that probation officers could use as a primary aid in applying the guidelines; and to design and develop training programs on guideline application. The testing sessions, attended by 115 probation officers, were useful from both the students' and instructors' perspectives because the participating officers received intensive, hands-on experience in guideline application while the Commission benefitted from the practical advice and constructive suggestions offered by the line officers.

A series of three formal nationwide training programs, referred to as train-the-trainer seminars, were cosponsored by the Commission and the Federal Judicial Center. Judges and probation officers from all federal districts were invited to participate in the seminars held in Washington, D.C., Dallas, and Denver in October 1987. Approximately 64 federal judges and 140 probation officers attended the intensive four-day programs on guideline application and returned to their districts as

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[134]28 U.S.C. § 995 (a)(18)

local "guideline experts." In turn, these experts conducted training programs for judges and other practitioners using materials prepared by the Federal Judicial Center and the Commission.

The Commission provided follow-up, in-district training sessions for all judges, magistrates, and probation officers who requested the Commission's participation in their local training effort. Many districts expanded their sessions to include local U.S. attorneys, federal public defenders, and the private defense bar.

With the assistance of the Department of Justice, the Commission organized and presented a two-day, train-the-trainer seminar in Washington, D.C., during this same period for assistant U.S. attorneys. Representatives from each of the 94 judicial districts were trained in guideline application using the same format and materials as the earlier train-the-trainer seminars for judges and probation officers.

In 1987, the Commission participated in numerous federal defender and private bar guideline training programs. At these programs, the Commission provided an explanation of the guideline sentencing system and reviewed application instructions. A number of states provided continuing legal education (C.L.E.) credit to attendees of these training sessions.

Constitutional challenges to the guidelines shortly after their implementation resulted in many districts not applying the guidelines after they went into effect on November 1, 1987. But in 1988, as Supreme Court resolution of the issue drew near, the Commission began to assess nationwide training needs, particularly for those districts which had not been applying the guidelines. To assist in this planning, the Commission convened working groups of judges and probation officers. The first group included 18 federal district and circuit court judges, plus representatives from the Federal Judicial Center (FJC) and the Probation Division and General Counsel's Office of the Administrative Office of the U.S. Courts. The second working group included 20 federal probation officers from across the country and representatives from the Probation Division and General Counsel's Office of the Administrative Office.

In general, both groups agreed that additional guideline training was needed and supported the train-the-trainer concept reinforced by comprehensive written training materials. They also advocated holding such training as soon as possible following the Supreme Court's ruling on the constitutionality of the guidelines.

The FJC requested that it retain administrative supervision over training for federal judges with the assurance that the Commission would provide faculty when the Center offered training on guideline application. Thus, the Commission concentrated its efforts on advanced training for probation officers, prosecutors, and defense attorneys. Federal judges participated in the Commission training on an individual basis.

In response to suggestions provided by the working groups, the Commission organized advanced train-the-trainer seminars in 1989 in five cities: Kansas City, MO, Nashville, TN, New Orleans, LA, Phoenix, AZ, and Washington, D.C. A total of 400 participants from the 12 circuits attended the two-day seminars, including at least two probation officers, two assistant U.S. attorneys, and two federal defenders or private defense attorneys from each district. The seminars provided participants with intensive instruction on guideline application and in-depth examination of the more complex issues of relevant conduct and multiple count grouping. Assistant U.S. attorneys, federal defenders, and federal probation officers spent another half day training on strategic questions related to sentencing under the guidelines.

B. Ongoing Training

The Commission does not view its training mission as having ended. Rather, it recognizes that an evolving guidelines system, coupled with a steady influx of new practitioners, produces an ongoing need for effective training programs and materials.

The Commission maintains a policy to provide training to every group that requests assistance, resources allowing. Locally held training programs generally last one or two days and commonly include topics such as relevant conduct, multiple counts, case law developments, new amendments, and policy statements on violations of probation and supervised release. The Commission makes every effort to accommodate the field's scheduling preferences within the limits of staff resources, and develops all training materials, designing program content to meet the needs of program participants, while emphasizing the most current substantive concerns.

The Commission has responded to numerous requests for assistance at various training programs held throughout the country. Individual Commissioners and staff lecture widely on the guidelines at probation officer and attorney training sessions, academic seminars, judges' meetings, and professional conferences. Each year the Commission provides training to a variety of individuals across the country, including circuit and district judges, their law clerks, probation officers, prosecutors, defense attorneys, investigative agents, congressional staff members, and staff of other government agencies. In 1989, the Commission trained approximately 3,650 individuals. These numbers increased to an estimated 4,030 in 1990 and 4,570 in 1991.

In addition to the locally-held programs, the Commission has significantly increased its collaborative training efforts with the Federal Judicial Center, Department of Justice, and Department of Treasury to develop and refine permanent, academy-based guideline education programs. These programs provide every newly-appointed judge, probation officer, assistant U.S. attorney, and federal defender with training in guidelines application and related sentencing issues.

The Commission has developed a variety of training materials to accommodate the educational needs of judges and practitioners. Based on questions received at training sessions and on the hotline, the Commission developed a quick reference guide for frequent guideline application questions. In 1990, the Commission provided judges, probation officers, prosecutors, and defense attorneys with the fourth volume of this publication, entitled Questions Most Frequently Asked About the Sentencing Guidelines. In addition, the Commission distributed a summary of new amendments entitled "Amendment Highlights," to probation officers, assistant U.S. attorneys, judges, and defense attorneys.

The Commission prepares new training materials and application aids as the need arises. For example, when the Commission recently promulgated policy statements for probation and supervised release revocation and guidelines for organizational defendants, the Commission developed worksheets and training programs as application aids.

In addition to continuing its participation in current training programs, the Commission plans to conduct two national train-the-trainer seminars for probation officers in early 1992. Topics at the sessions will include organizational guidelines, significant amendments, legal issues, and ASSYST, a Commission-developed computer software program (*see* discussion later in this section).

C. Technical Assistance and Training Unit

The Technical Assistance and Training unit, organized by the Commission in November 1987, became fully operational in 1988. This unit provides guideline application assistance and training to judges and federal criminal justice practitioners and supports the Commission on guideline application issues through its daily contact with criminal justice personnel applying the guidelines.

The Commission's Technical Assistance Service (TAS), referred to as the "hotline," was implemented in November 1987 to respond to telephone inquiries from probation officers and judges regarding application of the guidelines. Initially, TAS was envisioned as a temporary service, answering immediate-need questions during the initial phase of guideline implementation. However, the hotline proved to be an invaluable source of continuing education for both the field and the Commission, prompting the Commission to make TAS a permanent component of the Commission's guideline education and training efforts.

The hotline serves as an accessible and ongoing resource for the field. Questions that do not involve subjective judgments are readily answered by hotline staff. For example, the probation officer may question whether a prior conviction for simple possession is considered a "controlled substance offense" for purposes of applying the career offender guideline. The hotline person points to the definition of "controlled substance offense" in the Guidelines Manual and informs the caller that simple possession is not considered a "controlled substance offense."

Questions that involve a subjective determination by the judge, such as acceptance of responsibility, role in the offense, or a justification for departure are answered by directing the caller's attention to pertinent guidelines, commentary, or policy statements. Where debatable questions or interpretations of correct application arise, hotline staff assist the caller in understanding the alternative approaches while emphasizing that such decisions are left to the court.

The success of the Commission's hotline for judges and probation officers has led to the formalization of a similar hotline for defense and prosecuting attorneys. The attorney hotline is completely separate from the judge and probation officer hotline by design, keeping conflicting interests in individual cases to an absolute minimum. The attorney hotline is staffed by the Commission's office of general counsel.[135]

During the past three and one-half years, hotline staff have responded to approximately 6,198 guideline application questions from probation officers, judges, and law clerks. During 1988-89, TAS received a total of 1,857 guideline application questions. Subsequently, the hotline received 2,115 calls in 1990, and 2,226 calls in 1991. It is anticipated that the hotline will receive an even greater number of calls in 1991-92 as probation officers apply the new policy statements on violations of probation and supervised release and sentencing guidelines for organizational defendants.

For each year of operation, the greatest number of questions received pertain to the criminal history section of the guidelines. Questions regarding drug offenses ranked second in 1989 and 1990, while questions about revocation of probation and supervised release ranked second in 1991 (*see* Table 18).

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[135]In order to ensure accuracy in responding to questions from the field, a computerized log of each call received and the response provided allows supervisors to monitor responses, and provides the Commission with a record of calls received.

Table 18

Number of Questions Received by Guideline Section
October 1, 1988 to September 30, 1991

Guideline	Number		
	FY89	FY90	FY91
Chapter 1: Introduction and Application Principles			
Application	39	58	31
Relevant Conduct	99	112	111
Other Information To Be Used	5	2	2
Interpretation of References	1	1	3
Use of Certain Information	17	11	15
Petty Offenses	6	11	0
Retroactivity of Amended Guideline Range	N/A	3	1
Chapter 2: Offense Conduct			
Offenses Against the Person	23	27	33
Offenses Involving Property	57	63	83
Offenses Involving Public Officials	5	13	18
Offenses Involving Drugs	169	164	129
Offenses Involving Criminal Enterprise & Racketeering	13	15	21
Offenses Involving Fraud and Deceit	21	54	56
Offenses Involving Prostitution, Sexual Exp. of Minor	4	0	6
Offenses Involving Individual Rights	4	2	6
Offenses Involving Admin. of Justice	29	42	43
Offenses Involving Public Safety	52	96	86
Offenses Involving Immigration, Naturalization, Passports	11	7	12
Offenses Involving National Defense	5	3	3
Offenses Involving Food, Drugs, Agriculture Products	2	3	2
Offenses Involving Prisons and Correctional Facilities	0	3	9
Offenses Involving the Environment	11	7	9
Antitrust Offenses	1	0	2
Money Laundering and Monetary Transaction Reporting	6	21	21
Offenses Involving Taxation	18	23	44

Table 18 (cont'd)

Guideline	Number		
Other Offenses	49	44	49
Chapter 3: Adjustments			
Victim Related Adjustments	15	22	26
Role in the Offense	62	87	62
Obstruction	64	54	52
Multiple Counts	106	123	130
Acceptance of Responsibility	40	38	32
Chapter 4: Criminal History and Criminal Livelihood			
Criminal History	270	288	280
Career Offenders and Criminal Livelihood	132	83	111
Chapter 5: Determining the Sentence			
Sentencing Table	4	3	2
Probation	13	12	8
Imprisonment	24	25	22
Supervised Release	35	18	26
Restitution, Fines, Assessments	35	34	48
Sentencing Options	6	3	4
Implementing the Total Sentence of Imprisonment	70	67	54
Specific Offender Characteristics	4	3	7
Departures	44	46	44
Chapter 6: Sentencing and Plea Agreements			
Sentencing Procedures	6	5	4
Plea Agreements	3	13	11
Chapter 7: Violations of Probation and Supervised Release	0	31	261
Chapter 8: Sentencing of Organizations	N/A	N/A	1
Appendix B: Authorizing Legislation and Related Sentencing Provisions	0	0	0
Other Questions			
Amendments	11	49	17
Miscellaneous	45	93	75

Table 18 (cont'd)

Guideline		Number	
Old Law/New Law	56	55	18
Presentence Report	15	31	11
Statutory/Legal	99	126	111
Corporate	7	12	11
Juvenile	3	5	2
Statement of Reasons	4	4	1
TOTAL	1,857	2,115	2,226

SOURCE: U.S. Sentencing Commission, TAS Hotline Database, FY 1989-1991.

D. Effectiveness of the Hotline

The Commission's hotline appears to remain a useful resource for the field as evidenced by the growing number of calls received during the past four years. As reported earlier, the calls have increased since the program's initiation, and current figures suggest that the hotline receives an average of 12 to 15 calls daily. Based on their continued use of and favorable comments about the hotline, probation officers appear satisfied with its availability and the assistance they receive.

Although the hotline has proven to be beneficial to the field, it is not without limitations. First, its usefulness is only as good as the information the Commission staff member receives. For example, a caller may omit significant information from his or her explanation of a particular issue and this omission may have a profound impact on the answer provided.

Callers may find certain hotline responses frustrating. For example, the "answer" to questions in more subjective areas such as acceptance of responsibility, role in the offense, and departure considerations rests solely with the court. It would be inappropriate for the Commission to offer definitive guidance as to what is "correct" guideline application on questions that involve consideration of a multitude of factors that are appropriately determined by the sentencing court, so Commission staff on the hotline refrain from attempting to do so.

In an effort to address these concerns, the Commission recently drafted an article for the federal probation service's national newsletter to better educate the field on the operation of the hotline. Additionally, probation officers and judges are reminded of the availability of the hotline at every training program. Despite the hotline's limitations, the field continues to depend on the service, and thus it remains an important source of education for the field and the Commission.

E. Temporary Assignment at the Commission

In August 1988, the Commission initiated a temporary assignment program for probation officers to promote guideline application training and provide an important link between the Commission and the field. Volunteers are detailed to the Commission for six weeks, during which time officers assist on the hotline, become involved in the amendment process, and assist in various case review projects.

Officers return to their home districts as trained resources on sentencing guideline issues. Additionally, the Commission acquires a better understanding of the practical concerns confronting probation officers through interaction with officers who daily apply the guidelines. A total of 64 probation officers have participated in the program since its initiation, representing more than one-third of all federal districts. The officers represent a diverse geographical constituency and provide the Commission with broad insight into sentencing practices in various regions.

Visiting probation officers have evaluated the temporary assignment program in two areas: (1) whether the experience met the officer's expectations; and (2) what were the most valuable aspects of the temporary assignment. To date, all 64 officers responded affirmatively that the program met their expectations for learning the guidelines and acquiring knowledge of how the Commission works. As one former visiting probation officer commented, "To the extent the program is in place to train, I can say that this is the finest training experience I've had in my fifteen years in this system. I'll certainly be able to translate this to work in the field."

When asked about the two most valuable things about this assignment, most officers commented that it gave them an opportunity to learn more about the sentencing guidelines. "This was valuable

to me as it increased my understanding of the guidelines and made me more familiar with obscure language in the manual."

The success of the program can also be measured by the willingness of chief probation officers to allow their officers to participate in the program despite heavy district workloads and understaffing. In fact, some chiefs have recently made the Commission's temporary assignment program a requirement for their guideline specialists. The Commission plans to continue the temporary assignment program and encourage officers from those districts that have yet to participate.

F. ASSYST

In conjunction with implementation of the guidelines, the Commission developed a computer software program to aid judges, probation officers, and attorneys in applying the sentencing guidelines. This software program, ASSYST, is a computerized version of the Commission's guideline worksheets and was first made available to probation officers in early 1988. Like the worksheets, ASSYST was designed to lead probation officers, judges, and attorneys through the guideline application process, and to aid probation officers in preparing presentence investigation reports for the court. With an eye to the future, the Commission hoped that ASSYST might someday facilitate electronic transmission of data from the courts to the Commission.

Following a year of use by practitioners, the Commission began receiving reports that ASSYST was of limited value to the field due to a number of problems. Users complained that the program was too slow and that once familiar with the guidelines, manual application was faster than using ASSYST. Not all probation officers had access to a computer, resulting in delays in writing presentence reports in order to schedule time on what too often turned out to be the office's sole computer. But, perhaps most importantly, ASSYST had become outdated.

The Commission amended the guidelines in January, June, and October of 1988, and November of 1989, 1990, and 1991. Unfortunately, updates of ASSYST could not keep pace with the rapid development of amendments in the early days of guideline implementation. Additionally, the courts found that *ex post facto* considerations prevented the application of the most recent version of the guidelines for cases in which the defendant was exposed to a more onerous penalty. Early versions of ASSYST could not accommodate this *ex post facto* problem because it did not allow users to choose among versions of the guidelines.

Still believing that ASSYST might serve a useful data collection function, the Commission decided to devote resources to updating ASSYST. The Commission hoped to promote increased reliance on ASSYST by making current editions available at the time new guidelines were distributed to the field. The Automation Committee of the Chief Probation Officers' Management Council encouraged the Commission to continue development and improvements to ASSYST, believing, as did the Commission, that the program had great potential.

In October 1990 the Commission distributed its first improved version of ASSYST that incorporated all amendment language through November 1, 1990. As part of this effort, more than 300 amendments were incorporated in order to bring ASSYST up-to-date. Several help screens were added, as well as a directory containing recent case law developments. This 1.0 version addressed the *ex post facto* problem by allowing for completion of different versions of the guidelines with an ability to compare applications and determine the potential relevancy of *ex post facto* considerations. In March 1991, the Commission distributed a 1.1 version of ASSYST, making additional improvements and correcting problems identified by probation officers.

Even given these improvements, the number of districts using ASSYST was sufficiently low to cause the Commission to question the continued hope that ASSYST could become an electronic data collection tool. Before deciding whether to abandon the project, the Commission surveyed chief probation officers about their officers' experiences with ASSYST. Of the 77 responses (out of 94 possible), 63 chiefs responded that the Commission should continue to update and provide ASSYST to practitioners. They reported that while not all probation officers in their districts found the program beneficial, many did. They said the recent improvements to the program enhanced its effectiveness as a training tool as well as an aid to experienced officers. While only 27 of the 77 districts reported officers using ASSYST 50 percent or more of the time, a number of those districts represented the higher caseload districts. Only 13 districts reported that none of their officers used ASSYST.

As part of the survey, the Commission suggested improvements to the program that might encourage expanded usage. Of these suggested changes, all but one respondent supported the concept of ASSYST generating a shell presentence report. Streamlining the program and developing monthly report generators were supported by over half of the respondents.

The Commission followed the suggestions of the chiefs and dramatically modified ASSYST. In November 1991 the latest version was distributed to all federal probation offices. In addition to incorporating amendments effective November 1, 1991, ASSYST 1.2 contains several significant improvements: the criminal history section is streamlined; additional fine amounts using the latest figures are automatically generated; cross references are streamlined; and the capability of generating a presentence report shell after completion of ASSYST worksheets is provided. Also, ASSYST was expanded to facilitate the conversion of multiple drug types into a common denominator without going through the entire guideline application process. This latest improvement was made in response to requests from probation officers for a faster drug conversion program.

Yet, the enthusiasm expressed by chief probation officers has not necessarily filtered down to line probation officers. During the Commission's site visits, many officers complained that ASSYST remained out of date and difficult to use. Clearly, the Commission needs to better communicate ASSYST's improvements to probation officers because many officers have not attempted to use it since 1989 when it was outdated.

Finally, efforts to test the feasibility of electronic data collection through ASSYST must be renewed. While the Commission has initiated electronic data submission in two districts, the emphasis on this effort has taken a back seat to the need to keep ASSYST current. But through initiatives to streamline the program, add a presentence report shell, and provide a report generator, the Commission is moving closer to this eventual goal.

G. Additional Training Resources

In addition to the Commission-sponsored training, judges and federal court practitioners have access to a variety of other training programs that may or may not involve the Commission. These training sessions play an important part in practitioners' knowledge of guideline application and sentencing practices under the Sentencing Reform Act. The Federal Judicial Center sponsors training for probation officers and judges, often with Commission participation. The Commission assists both the Department of Justice and the Federal Defender Services with training programs for their attorneys. The American Bar Association, the National Association of Criminal Defense Lawyers, and many local bar associations around the country sponsor training sessions for the defense bar. Law schools have sponsored symposiums related to sentencing issues, and have added material on sentencing guidelines to their curriculums.

Data from the field study (*see* following section) indicate that practitioners are participating in a variety of local training programs. Even though the success of these training efforts may be difficult to measure, their variety and quantity are certain to have a positive effect on practitioners' knowledge of the guidelines.

II. Guidelines Training: Perspectives from the Site Visits

A. Introduction

Among the issues probed during the 12 site interviews were questions regarding two broad areas of guideline training: how judges and practitioners obtained their guideline training, and whether this training was sufficient. All respondents except supervisory staff were asked these questions either in a face-to-face interview or in a supplemental written survey completed after the face-to-face interview.

U.S. attorneys, federal defenders, chief probation officers, or their respective deputies were asked how guidelines training programs were conducted in their districts. In addition, supervisory probation officers were asked several questions about their district's use of the Commission's hotline, participation in the Commission's temporary assignment program and train-the-trainer seminars, and use of the ASSYST software.

B. How Judges Receive Training

During the site interviews, judges were asked, "How did you receive training in guideline application?" At all sites, judges reported receiving training from probation officers more frequently than from any other source. The judges typically did not distinguish between "formal" programs conducted for judges (or others) by probation officers and education obtained through interaction with probation officers during routine case processing. One judge noted: "As the probation officers got trained, they organized a program just for judges with worksheets and hypothetical cases."

Some judges said they relied on probation officers on an ongoing basis for their guidelines training: "Well, I taught myself, I worked with probation officers and our officers have done an outstanding job in implementing and training. I rely on them." Frequently when judges identified probation officers as the source of their training, they did not specify the nature or type of training that the probation officers provided.

Most of the judges identified at least two sources of formal guidelines training, such as combinations of circuit, FJC, probation officer, or other district-based training programs. Fifteen of the judges (n=47 or 32%) said they received training through more informal processes such as discussions with other judges and independent study ("You just have to take the book and with each case you learn more and more") and application of the guidelines to actual cases ("To really know about the guidelines, however, you need to do some cases, and have some 'hands-on, hard knocks'"). Only two of the judges said they had received no training at all, although one of these indicated that he did attend "a circuit conference." Table 19 summarizes the number of times judges mentioned each source of guideline training.

C. How Other Practitioners Receive Training

Assistant U.S. attorneys, federal defenders, private defense attorneys, and probation officers interviewed in this study were asked, "What forms of guidelines training have you received?" The

Table 19

Frequency of Training Methods for Judges

Type of Training	Number of Times Mentioned
Commission-sponsored training	9
FJC training	13
Sentencing Institute training	5
Judicial conferences	6
Bar-related programs	1
Circuit-sponsored training/seminars	14
Probation officers in court	22
District-sponsored training (general[a])	14
Independent study	11
Discussion with other judges	3
On-the-job training	5
Training coordinator/taught guidelines/learned guidelines from other judges	12
No formal training	2
Other training	4

[a] In addition to other general district training programs (*e.g.*, "Locally, the district organized a school, and one judge here was the resident judge expert"), this category includes other responses that could not be classified in any of the other more specific variables.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

self-administered questionnaire asked respondents to circle all applicable categories in a pre-coded range of responses, and afforded them the opportunity to write in additional responses.[136] Table 20 shows the frequency of responses by each group.

Respondents were also asked: "On the whole, how would you rate your guidelines training with regard to increasing your understanding of the guidelines and their application?" Overall, 65 percent of the respondents said that their training was "very good" or "excellent" and 26 percent said it was "fair." Only one percent of the respondents rated their training as "poor," and no respondent said it was "very poor."

Interviews were conducted with U.S. attorneys, chief probation officers, and federal defenders or their respective deputies[137] to collect information on policies and administrative procedures relating to the sentencing process. In general, supervisors reported on the way in which their office guidelines training was conducted and the nature and extent of continuing education programs. Supervisory probation officers provided information about their officers' use of the Commission's hotline, participation in the Commission's temporary assignment program, and use of ASSYST.

1. U.S. Attorneys

Supervising U.S. attorneys tended not to make a distinction between new officer training and continuing education on the guidelines. According to the interviews, guidelines training programs in U.S. attorneys' offices typically consist of training one or more individuals in an office, and using these specialists to instruct and supervise other individuals on a case-by-case basis. This is supplemented with either regularly scheduled or ad hoc meetings on guidelines issues. Relevant materials, such as bulletins and updates, were mentioned as sources for training.

In three of the twelve districts, supervisors said they either had no formal training programs in place or had not conducted such a program recently. Only three respondents mentioned a specific training topic (*i.e.*, circuit cases, "problems and pitfalls of the guidelines," and "J & C procedures") that had been covered by a recent training program.

2. Probation Officers

In ten of the 12 sites, supervisory probation officers said they conducted training programs for new staff. Most of these supervisors described their training programs in considerable detail, suggesting that it is a priority and that it is well-integrated into orientation programs for new officers. In ten sites, including the two sites in which respondents reported that no formal training programs existed, supervisors specifically said they are intimately involved in training: "The best training with guidelines is to give them a few cases and work with them closely."

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[136]The range of pre-coded responses to this question was slightly different in the attorney questionnaires (assistant U.S. attorneys, federal defenders, and private counsel) from that used for the probation officers.

[137]Interviews were conducted in the 12 sites with 15 administrative officers in the U.S. attorney's office, 15 in the probation office, and six federal defenders, all of whom serve in a supervisory capacity in their offices. Nine other supervisory officers participated in a "courtesy interview" that did not directly include questions on training and are not incorporated into this analysis.

Table 20

Frequency of Training Methods by Type of Respondent

Type of Training[a]	Respondent Type: Probation Officer (N=46)	AUSA (N=52)	Federal Defender (N=10)	Private Attorney (N=32)	Total (N=140)
A. Train-the-trainer	4	4	2	2	12
B. USSC training	17	9	0	0	26
C. District-sponsored program	40	32	[illegible]	15	91
D. In-house staff program	5	7	2	1	15
E. Independent study	1	1	0	4	6
F. New office orientation	18	0	0	0	18
G. FJC-sponsored program	21	0	0	0	21
H. Hotline experience	1	0	0	0	1
I. DOJ Advocacy Institute	0	16	0	0	16
J. Bar-related program	0	0	1	4	5
K. Federal public defender	0	0	6	2	8
L. Criminal defense bar	0	0	0	4	4
M. Other programs[b]	1	1	2	4	8
N. No formal training	0	5	2	8	15

[a] Rows A-B on the table were applicable to all respondents, and conform to the first two pre-coded values on the survey instrument. Rows C-E, and M, N represent codes derived from the open-ended "other," and were applicable to all respondents. Rows F-H apply only to probation officers, and rows I-L apply to the attorney respondents.

[b] This category includes those respondents who said they trained others.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Survey.

The supervisors in the ten sites that conduct training programs for new officers reported that they conduct advanced training programs as well. Continuing education is accomplished in a variety of ways: regional training with or without Commission staff participating, dissemination of publications, conducting seminars, and participating in unit and staff meetings. Supervisors in four of these sites said specifically that ongoing training included participation of Commission staff, and another said that a session with Commission staff was in the planning stages.

Supervisors in all 12 sites said they provide updates on guidelines training materials for their offices. Typically, this involves circulating Guidelines Updates from the Federal Judicial Center, as well as conducting meetings on specific guideline topics. Other training materials mentioned include Guideline Grapevine, The Federal Sentencing Reporter, publications of cases on appeal, circuit cases, and Questions Most Frequently Asked About the Sentencing Guidelines.

Supervisors in three of the sites said that probation officers in their districts have been on temporary assignment to the Commission, and two others said that they have probation officers scheduled to come. According to the supervisors, probation officers in ten of 12 sites attended Commission train-the-trainer seminars, ranging from one to five officers per site.

The majority of supervising probation officers interviewed said that they rarely use the ASSYST software, and only one thought the program useful, reporting that the "latest version was very good." Several noted that usage varies from officer to officer, with some using it regularly while others use it only to recheck guideline calculations. Several noted that the program was generally used in complicated drug cases involving several different types of drugs.

3. Federal Defenders

All six chief federal defenders in this study reported that they had conducted guideline training programs for their staffs. Four of the federal defenders said they send staff to the programs sponsored through Federal Defender Services Division of the Administrative Office of the U.S. Courts. Three described the programs only in very general terms, such as, "[training is obtained] through hard experience and federal defender training programs." Two others described their office's training programs in considerable detail:

> *When a new lawyer is brought in, they go through intensive training. We do it ourselves; sentencing is incorporated into the program. Yearly we sponsor a basic orientation into federal criminal practice which is required for panel attorneys. It's a nine-hour program; three hours focus on sentencing.*

> *Our organization provides core training. We have attended FJC training, and we ourselves have put on two seminars for panel attorneys. We get current information from the 'Guideline Grapevine,' and if I have a guideline research question, I go there. I send our people to the NACDL (National Association for Criminal Defense Lawyers) seminars, and every seminar has a guideline component. We have a library here and we circulate all documents we get from the Commission. Also, it's normal for us to have informal discussions at lunch about cases. Most of our staff has been in place since the guidelines were enacted. The newest hire was in 1988.*

Five of the federal defenders said that they have active continuing education programs that take the form of participating in regular staff meetings to discuss problems, attending conferences, and keeping up-to-date with such publications as the Guideline Grapevine, case law, and circuit decisions.

D. Sufficiency of Training — Judges

When asked whether their training was sufficient,[138] 39 of the 45 judges said they felt they had been afforded sufficient opportunities to receive guideline training. Only three judges said they had not had sufficient opportunities for training. Even though they described it as adequate, several judges offered suggestions for improving guidelines training programs, most frequently raising the need for additional sessions on problem areas. As two judges noted:

> *They [the guidelines] are long and complicated; we need more than a morning or afternoon. Maybe we should do it in small groups. After three years we can talk about specific things that were done.*

> *[I]t would be helpful to have training programs for the most prevalent problems, since most programs only cover the how-to-do-it mechanics. The experience has shown that there are problems and some are difficult to apply -- this would be a good topic for training.*

Several judges said that they had not taken advantage of all the programs that are offered, and one commented:

> *There's ample training if the judges want to make use of it. It is disappointing, however, that attendance by district judges at training sessions is not always good. Many will not attend unless mandated by FJC.*

A number of judges indicated that they rely on the expertise of the probation officers:

> *People really do need to talk to probation. I turn to them. Probation is mandated by Congress to do this.*

> *I don't know the minutiae. We have others around -- probation officers, assistant U.S. attorneys, law clerks who do. I can zero in [on an] area of concern, and get a ballpark estimate of what guidelines are....*

> *[I have all the training] I want. I feel it's primarily a matter for the probation department. They come in with a calculation that has been seen and reviewed by the defendant and the defense attorney. If the defense has learned about it and gotten help from the probation officer, they're pretty well set up.*

E. Sufficiency of Training — Practitioners

The third question in the sequence on training asked respondents, "Have you been offered sufficient opportunities for guidelines training?" Nearly three-quarters of all respondents (74%) said they felt they had received sufficient training.

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[138]The question was: "Do you feel you have been offered sufficient opportunities to receive guideline training?" If the response was "no," the respondent was asked to record, "What training programs would you want implemented?"

F. Mandatory Training for Private Defense Attorneys

Chief judges were questioned about any training requirements for private defense attorneys practicing in their districts.[139] All seven chief judges who were asked this question reported that there is no rule in their courts requiring training in guideline application before a defense attorney can practice in court. One of these judges said that, in his district, the "chief federal defender puts on a seminar twice a year for anyone interested. This is required of our panel attorneys." Based on the responses to this question, it appears that panel attorneys in these districts are expected to get guideline training on their own.

One chief judge commented on this issue even before the formal interview had begun. The chief judge cited the lack of participation by the private defense bar in guidelines training saying, "The problem is, how do we get people to attend? [We plan] to send out a strongly worded letter to panel attorneys that say[s], 'We expect you to be here unless you call us and tell us you have a conflict,' and also publish the same in the local bar journal urging attendance." Another respondent in the same district was not optimistic about the success of such efforts based on experience with a prior program in which only four people signed up.

G. Assessment of Guideline Application Knowledge

With the exception of supervisors, all respondents were asked a series of questions on how well they thought other judges and practitioners knew the guidelines. The general form of the question was: "In general, how would you rate judges' [and prosecutors', probation officers', federal defenders', and private attorneys'] current knowledge of guideline application?" Probation officers and attorneys were asked these questions as part of the supplemental written survey. Judges were asked the same question in the face-to-face interview. Respondents were asked to first rate all other practitioners and then to rate their own knowledge of the guidelines. Supervisory officers in both the U.S. attorney's office and the probation office were asked to rate their own knowledge, but judges were not.

Tables 21 and 22 display the respondents' assessment of other practitioners' knowledge of guideline application. Most respondents rated other judges and practitioners as fair, very good, or excellent. Probation officers were consistently rated higher on guidelines knowledge by every group except federal defenders. Probation officers were rated as "very good" or "excellent" by 43 assistant U.S. attorneys, 29 private defense attorneys, and five federal defenders. Most respondents (n=76 or 86%) rated prosecutors' knowledge as "fair" or "very good."

Of those eligible to respond,[140] federal defenders were given similar ratings on guidelines application knowledge by probation officers and assistant U.S. attorneys (the only groups that rated them). Federal defenders were rated as "very good" or "excellent" by 42 percent (n=19) of the probation officers and by 45 percent (n=23) of the assistant U.S. attorneys. Federal defenders were rated as "fair" or "poor" by 16 percent (n=7) of probation officers, and by 21 percent (n=11) of the assistant U.S. attorneys. Private defense attorneys consistently received the lowest rating of any group on guidelines application knowledge. Only one probation officer and one judge rated defense

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[139]The question was, "Does your court require training in guideline application before a defense attorney can practice in court?"

[140]The question asking respondents to rate federal defenders was not applicable for districts in which there were no federal defenders.

Table 21

Judges' Evaluation of Court Practitioners Guideline Application Knowledge

Rating	Judges (N=47)							
	Probation Officer		AUSA		Federal Defender		Private Attorney	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Excellent	31	(66)	7	(15)	12	(26)	1	(2)
Very good	7	(15)	21	(45)	14	(30)	3	(6)
Fair	—	—	3	(6)	1	(2)	22	(47)
Poor	—	—	—	—	—	—	1	(2)
Very poor	—	—	—	—	—	—	—	—
Respondent gave other response[b]	5	(11)	12	(26)	3	(6)	16	(34)
Not applicable[c]	—	—	—	—	14	(30)	—	—
No answer	4	(9)	4	(9)	3	(6)	4	(9)
Breakdown of Responses by Judges Who Gave Additional Comments								
Varies from good to excellent	4	(36)	7	(44)	1	(25)	—	—
Varies from fair to good	—	—	7	(44)	2	(50)	8	(30)
Varies from fair to very poor	—	—	—	—	—	—	4	(15)
Depends on the individual	1	(9)	2	(13)	1	(25)	13	(48)
Other response	6	(55)	—	—	—	—	2	(7)

[a] Column percents appear in parentheses.

[b] Some judges gave a response that did not fit the range that was read to them (excellent, very good, fair, poor, or very poor). The breakdown for judges who gave a different response as well as those who made additional comments is included in the second part of the table: included are responses by 16 judges who commented on assistant U.S. attorneys, 11 judges who did so on probation officers, four judges on federal defenders and 27 judges on private counsel.

[c] There were no federal defenders in some of the districts.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 22

Knowledge of Guideline Application

A. Judges Rated by Others

Rating	Probation Officer (N=46)		AUSA (N=52)		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=140)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Excellent	3	(7)	3	(6)	1	(10)	3	(9)	10	(7)
Very good	15	(33)	23	(44)	3	(30)	20	(63)	61	(44)
Fair	19	(41)	21	(40)	4	(40)	9	(28)	53	(38)
Poor	8	(17)	1	(2)	—	(—)	—	(—)	9	(6)
Very poor	—	(—)	—	(—)	1	(10)	—	(—)	1	(1)
Multiple answers	1	(2)	4	(8)	1	(10)	—	(—)	6	(4)

B. Probation Officers Rated by Others

Rating	Probation Officer		AUSA (N=52)		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=94)[b]	
	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)
Excellent	N/A	N/A	14	(27)	2	(20)	14	(44)	30	(32)
Very good	N/A	N/A	29	(56)	3	(30)	15	(47)	47	(50)
Fair	N/A	N/A	5	(10)	4	(40)	3	(9)	12	(13)
Poor	N/A	N/A	1	(2)	1	(10)	—	(—)	2	(2)
Very poor	N/A	N/A	—	(—)	—	(—)	—	(—)	—	(—)
Multiple answers	N/A	N/A	2	(4)	—	(—)	—	(—)	2	(2)
Not applicable	N/A	N/A	—	(—)	—	(—)	—	(—)	—	(—)
No answer/ not asked	N/A	N/A	1	(2)	—	(—)	—	(—)	1	(1)

[a] Column percents appear in parentheses.

[b] Excludes the 46 probation officers.

Table 22 (cont'd)

Rating	C. Prosecutors Rated by Others									
	Probation Officer (N=46)		AUSA		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=88)[a]	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[a]	N	(%)[b]
Excellent	—	(—)	N/A	N/A	—	(—)	3	(9)	3	(3)
Very good	18	(39)	N/A	N/A	3	(30)	17	(53)	38	(43)
Fair	23	(50)	N/A	N/A	4	(40)	11	(34)	38	(43)
Poor	3	(7)	N/A	N/A	2	(20)	1	(3)	6	(7)
Very poor	—	(—)	N/A	N/A	1	(10)	—	(—)	1	(1)
Multiple answers	1	(2)	N/A	N/A	—	(—)	—	(—)	1	(1)
No answer/not asked	1	(2)	N/A	N/A	—	(—)	—	(—)	1	(1)

Rating	D. Federal Defense Attorneys Rated by Others									
	Probation Officer (N=46)		AUSA (N=52)		Federal Defender		Private Attorney		Total (N=98)[c]	
	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)
Excellent	3	(7)	4	(8)	N/A	N/A	N/A	N/A	7	(7)
Very good	16	(35)	19	(37)	N/A	N/A	N/A	N/A	35	(36)
Fair	4	(9)	8	(15)	N/A	N/A	N/A	N/A	12	(12)
Poor	3	(7)	3	(6)	N/A	N/A	N/A	N/A	6	(6)
Very poor	—	(—)	—	(—)	N/A	N/A	N/A	N/A	—	(—)
Multiple answers	—	(—)	—	(—)	N/A	N/A	N/A	N/A	—	(—)
Not applicable	19	(41)	11	(21)	N/A	N/A	N/A	N/A	30	(31)
No answer/not asked	1	(2)	7	(14)	N/A	N/A	N/A	N/A	8	(8)

[a] Excludes 52 assistant U.S. attorneys.

[b] Column percents appear in parentheses.

[c] Excludes the 42 federal defenders and private counsel.

Table 22 (cont'd)

Rating	Probation Officer (N=46)		AUSA (N=52)		Federal Defender		Private Attorney		Total (N=98)[a]	
	E. Private Defense Attorneys Rated by Others									
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
Excellent	1	(2)	—	(—)	N/A	N/A	N/A	N/A	1	(1)
Very good	3	(7)	11	(21)	N/A	N/A	N/A	N/A	14	(14)
Fair	22	(48)	20	(39)	N/A	N/A	N/A	N/A	42	(43)
Poor	15	(33)	11	(21)	N/A	N/A	N/A	N/A	26	(27)
Very poor	4	(9)	5	(10)	N/A	N/A	N/A	N/A	9	(9)
Multiple answers	1	(2)	4	(8)	N/A	N/A	N/A	N/A	5	(5)
Not applicable	—	(—)	—	(—)	N/A	N/A	N/A	N/A	—	(—)
No answer/not asked	—	(—)	1	(2)	N/A	N/A	N/A	N/A	1	(1)

[a] Excludes the 42 federal defenders and private counsel.

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Survey.

counsels' guidelines knowledge as excellent. Most of the probation officers (n=41 or 90%) and assistant U.S. attorneys (n=36 or 70%), the two groups that rated private defense attorneys in the surveys, reported that private attorneys have only a "fair," "poor," or "very poor" knowledge of the guidelines. Judges (n=23 or 49%) also thought defense attorneys had only a "fair" or "poor" knowledge, but more than one-fourth (28%) also said that "it depends on the individual" or that it varies.

In the face-to-face interviews, respondents often spontaneously mentioned the lack of guidelines knowledge on the part of some practitioners in the system (n=53 or 26%). For example, one assistant U.S. attorney said:

> *In the other office where I worked, the defense attorneys were sophisticated, but here they're easy pickings. The defense attorneys don't understand relevant conduct so when you offer them a plea to a one count conspiracy, they think they've got a good deal.*

One of the strongest statements came from the U.S. attorney in one of the larger sites who said:

> *Another big obstacle is dealing with defense attorneys who don't have a clue as to what's going on. That's a problem. Defense bar hasn't done their homework. They're not prepared in lots of cases if it's more than simplistic guideline application. The ones who have difficulty are mostly guys that cross over from the state system. [This site] has state guidelines, but it's a disaster. There are always departures and outrageous pleas. They're coming from that and the learning curve is slow.*

Several private defense attorneys believed there were grave implications inherent in such a situation. According to one:

> *Many defense lawyers do not know what the guidelines are. Can you imagine being a defense attorney and not knowing what the guidelines are?... [Defense attorneys] miss many issues. Fortunately, the probation officer catches many of these issues, but the probation officers are government-oriented so they are not going to give the benefit of the doubt to the defendant, particularly in drug cases or child porno cases.*

Another member of the private bar added, "When I get a guidelines case, I always learn something new. By the way, that's very dangerous for the client that I don't know everything."

H. Self-Assessment of Guideline Application Knowledge

Assistant U.S. attorneys, federal defenders, private defense attorneys, and probation officers interviewed on the site visits assessed their own knowledge of guidelines application by answering the question: "How would you assess your knowledge of guideline application? 1. Excellent, 2. Very Good, 3. Fair, 4. Poor, 5. Very Poor." As shown in Table 23, most of the respondents rated their knowledge of guidelines application as "very good" (n=78 or 56%) or "excellent" (n=29 or 21%).

With the exception of federal defenders,[141] there was little variation among the groups: approximately the same percentage of probation officers (n=9 or 20%), assistant U.S. attorneys

[141]There were only ten federal defenders in the study; five rated their knowledge as "excellent" and five as "very good."

Table 23

Court Practitioners' Self-evaluation on Guideline Application Knowledge

Rating	Probation Officer (N=46)		AUSA (N=52)		Federal Defender (N=10)		Private Attorney (N=32)		Total (N=140)	
	Respondent Type									
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Excellent	9	(20)	8	(15)	5	(50)	7	(22)	29	(21)
Very good	30	(65)	27	(52)	5	(50)	16	(50)	78	(56)
Fair	7	(15)	16	(31)	—	(—)	7	(22)	30	(21)
Poor	—	(—)	—	(—)	—	(—)	—	(—)	—	(—)
Very poor	—	(—)	—	(—)	—	(—)	—	(—)	—	(—)
Multiple answers	—	(—)	1	(2)	—	(—)	2	(6)	3	(2)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Survey.

(n=8 or 15%) and private defense attorneys (n=7 or 22%) rated themselves as excellent. No group of respondents rated themselves as "poor" or "very poor." It is interesting to note that even though the probation officers, assistant U.S. attorneys, and judges interviewed generally rated the guidelines knowledge of private defense attorneys as fair to poor, members of this group saw themselves and the other practitioners in the federal court system as equally knowledgeable.

Supervising U.S. attorneys, federal defenders, and probation officers at each site were asked to evaluate their own knowledge of the guidelines. For the most part, the supervising probation officers and federal defenders rated their knowledge of the guidelines as "very good," "excellent," "good to excellent," or with some term that was equivalent (*e.g.*, "outstanding"). Only one supervisory federal defender and one supervisory probation officer described their knowledge as "fair." One probation officer said, however, "It depends on who I'm compared to; it's very good compared to other chiefs, but only fair compared to line officers." The federal defender who commented that he had a "fair" knowledge of the guidelines said that this "is like saying you have a knowledge of the federal statutes."

The supervising assistant U.S. attorneys rated their own knowledge more modestly. Of the 14 who were interviewed, only two said their knowledge of the guidelines was "excellent"; four said it was "very good"; four said it was "fair" to "very good"; two said it was "poor" or "very poor"; and two gave other qualified answers (*e.g.*, "I'm conversant in the guidelines, since I have to approve plea agreements"; and, "It's pretty good in matters outside of drugs").

III. Case Review

Another view of practitioners' knowledge of the guidelines can be obtained through a review of documents from sentenced cases submitted to the Commission. Assessing knowledge of guideline application of judges, probation officers, prosecutors, and defense counsel as a whole is not easily accomplished given the limited sentencing documentation received by the Commission's Monitoring Unit for each case. The resolution of important sentencing factors may never be noted in the documents submitted to the Commission. For example, decisions regarding guideline factors determined in the courtroom at the time of sentencing may not be reflected in the presentence report, written plea agreement, or the judgment and commitment order.

With these important limitations in mind, the Commission initiated a case review project to help gauge probation officers' knowledge of guideline application through an extensive review of submitted case files.

The case review project involves an analysis of randomly selected case files to identify areas of guideline application that appear problematic. Case review was conducted by members of the Commission's Technical Assistance Service (TAS) staff and federal probation officers on temporary assignment at the Commission. Case review involves a thorough review of all documents in a case file, including the presentence report and addendum, worksheets, plea agreement, statement of reasons, and the judgment and commitment order.

TAS reviewed a randomly selected sample of 996 cases, representing approximately 4 percent of all cases sentenced under the guidelines between August 1, 1989, and July 31, 1990. TAS reviewed all documents in each case file and assessed the guideline range based on the information available. This calculation was then compared with the calculation as presented in the presentence report. Each section of the guidelines (*e.g.*, the base offense level, specific offense characteristics,

Chapter Three adjustments, criminal history) was reviewed in a systematic fashion using a coded worksheet. To ensure recency of data, the cases were reviewed within six months of sentencing.

Discrepancies in calculations were coded as potential problems in guideline application. Possible reasons for inconsistencies were also recorded (*e.g.*, misinterpretation of guideline language, stipulations in the plea agreement). Specific guideline sections were recorded as having "no problems" when the guidelines appear, based on available information, to have been applied accurately.

Although a number of probation officers interviewed during site visits often commented that particular guidelines were problematic due to lack of clarity in application instructions, data compiled in the case review project indicated that officers as a whole demonstrate a high level of proficiency in interpreting guideline application instructions. Accuracy rates compiled for 15 critical areas in guideline application reveal that in most areas of the guidelines that directly impact the sentencing range, probation officers demonstrated an accuracy rate above 95 percent (*see* Table 24). For example, in determining victim-related adjustments, based on the information available in the case files submitted to the Commission, probation officers were accurate in 100 percent of the cases reviewed. In choosing the correct guideline, they were accurate in 99.1 percent of the cases reviewed.

The guideline application issues that appear most problematic are criminal history (93.3% accuracy), supervised release terms (89.2% accuracy), and the fine range (84.3% accuracy). Based on this information, the Commission has clarified guideline language through amendments. For example, the application notes to the criminal history guidelines have been amended in 1990 and 1991 in an attempt to clarify application. In November 1991, the Commission amended U.S.S.G. §5E1.2 (Fines for Individual Defendants) to eliminate the determination of gain and loss as it relates to the fine range for individuals. The fine range will be determined simply by consulting the fine table, subject to statutory maximum limits. Problems in determining the correct term of supervised release were partially the result of using outdated guideline worksheets, which have since been revised, distributed to the field, and called to the field's attention during training sessions.

IV. Conclusions

From its inception, the Commission has undertaken an extensive program of guideline training for all judges and practitioners, with special emphasis on the training of probation officers. The Commission has prepared and disseminated training publications and provided technical support and services. The Commission adapts these programs to keep them current with guideline amendments and devises new programs and materials to meet the changing requirements of federal court professionals.

The site interviews included an examination of training, its sources, and its adequacy from the point of view of judges and practitioners. According to the interviews with supervising U.S. attorneys, probation officers, and federal defenders, most sites provide some type of in-district guideline training. Typically, these programs focus on the training of one or more individuals at a site who, in turn, act as "specialists" to supervise others on a case-by-case basis. In contrast, while practitioners said that they generally received training through various in-district training programs, most of the judges interviewed said that they received training from probation officers. It is not clear from the data, however, the extent to which this training consists of formal or informal programs. Overall, most respondents said that they had received sufficient training, and rated the training they received as "very good" or "excellent."

Table 24

Results of Case Review Analysis

Guideline Area	Total Cases Without Apparent Problems	Accuracy Rate
Choice of guideline §1B1.2	987	99.1%
The use of relevant conduct §1B1.3 in determining the base offense level	955	95.9
The use of relevant conduct §1B1.3 in determining specific offense characteristics	981	98.5
Victim related adjustments	996	100.0
Role adjustments	961	96.5
Obstruction	993	99.7
Acceptance of responsibility	973	97.7
Multiple counts	978	98.2
Criminal history	929	93.3
Career offender	993	99.7
Sentencing options	983	98.7
Supervised release terms	888	89.2
Probation term	974	97.8
Fine range	840	84.3
Departures	947	95.1

SOURCE: U.S. Sentencing Commission Case Review Database, August 1, 1989—July 31, 1990.

All respondents in non-supervisory positions were asked a series of questions assessing the level of guidelines knowledge of judges and practitioners in the court system. Most respondents rated the guidelines knowledge of others in the court system as fair, very good, or excellent. Probation officers were rated highest by all groups, while private defense counsel were given the lowest ratings by judges, probation officers, and assistant U.S. attorneys. Of the 45 judges interviewed, 13 commented that the level of guidelines knowledge of private counsel depends on the individual. Most respondents rated the guidelines knowledge of the judges and prosecutors in the middle of a scale ranging from excellent to poor. Federal defenders were generally rated in the middle of the scale (very good or fair), except by judges, who rated them at the higher end of the scale (excellent or very good).

Respondents were asked to rate their own knowledge of the guidelines using the same scale. Most probation officers, federal defenders, assistant U.S. attorneys, and private defense counsel rated their knowledge as very good or excellent. Supervisory probation officers rated their guidelines knowledge at the high end of the scale (very good, excellent, or some other equivalent term). Supervisory assistant U.S. attorneys rated their own knowledge more modestly: of the 14 supervisors interviewed, eight said their guidelines knowledge was very good or fair. Supervisory federal defenders rated their knowledge of the guidelines from fair to outstanding. No respondents rated themselves as poor or very poor.

A significant number (n=53 or 26%) of all judges and practitioners reported that, in general, private defense attorneys generally do not know the guidelines. While this was mentioned frequently as a problem, it was not specifically defined. Only a few respondents identified specific problem areas, and most did not elaborate on either the problem's implications or solutions. This may suggest the need for an ongoing assessment of the training needs of judges and practitioners, with special emphasis on encouraging the development of guideline training programs for private defense attorneys in districts across the nation.

The review of case files by Commission staff indicates that probation officers are generally very knowledgeable on application of the guidelines. This result appears to support the perception in the field that of all the practitioners, the probation officers are the most knowledgeable about the guidelines.

Part D
Judges and Practitioners General Impressions of the Guidelines

Introduction

Much can be learned about the implementation of the guidelines through collection of nationwide statistics on sentencing practices. However, an analysis of guideline implementation would be incomplete without an examination of certain difficult issues that do not lend themselves to numeric interpretations. Consequently, a great deal of information on this topic can only be acquired through research based on direct contact with judges and practitioners who are implementing the guidelines. This section of the report focuses on two of these larger, more impressionistic issues: 1) judges and practitioners' opinions about the general appropriateness of guideline sentences; and 2) judges and practitioners' views of the benefits and problems of guideline sentencing.

Background

Enactment of any new system of detailed legal rules by thousands of different actors spread across the nation is bound to engender problems and disagreements over application, particularly in its beginning stages of implementation. Guideline sentencing is no exception. While judges and federal court practitioners might agree that Congress sought a fair, equitable, and proportional sentencing system in the Sentencing Reform Act, the questions concerning the extent to which the current guideline system has accomplished these objectives generates considerable discussion.

A number of benefits and problems of the guidelines identified by judges and practitioners in the site visits relate directly to the Commission's initial policy decisions. For example, relevant conduct — the guidelines' compromise between a pure "real offense" and "charge offense" system — was frequently mentioned in response to interview questions about benefits in the sentencing system. Similarly, the issues of complexity of the guidelines and the relative harshness or leniency of guideline sentences were also identified. In regard to this latter issue, it is important to keep in mind the pervasive effect congressionally enacted mandatory minimum statutes and other sentencing directives have on guideline sentences, especially in the area of drugs, firearms, and career offenders.

The question of the general appropriateness of guideline sentences elicited the judges' and practitioners' views of the fairness of the ultimate sentence resulting from the guideline range (apart from any other concerns such as the complexity of calculations or difficulties in application of specific guidelines). Those responses are analyzed below, providing insight into selected judges' and practitioners' perceptions of the guidelines' achievement of a fair and consistent sentencing system.

The second half of this section of the report summarizes the benefits and problems of the guidelines as identified by judges and practitioners interviewed during the site visits. In the interviews, researchers asked both general and specific questions, such as "What problems and benefits do you see in the current guidelines system?" and "Are there any specific guidelines that are problematic in application for you?" For the purposes of organization and presentation, this section is separated into a discussion of general problems and benefits, followed by a review of specific guideline application concerns.

I. Views on Appropriateness of Guideline Sentences

This section analyzes responses to the question: "Generally, how do the guidelines fit into your sense of what is an appropriate sentence?"

A. Judges

A substantial majority of judges interviewed reported that sentences under the guidelines generally agree with their sense of what is an appropriate sentence. As shown in Table 25, 30 of 46 judges interviewed (65%) responded that guideline sentences are generally appropriate. Many respondents stated without qualification that guideline sentences are appropriate, but several provided more explanation. Two representative responses of the group follow:

> *Generally, fits most of the time. Almost uniformly, judges in this district hate them; I don't hate them. I like the fact that 85 percent of what I give, they serve. The old system was not credible. In most cases the guidelines are logically set. Ninety percent of the time I find myself sentencing within the range and feel free that I have done what I would have wanted to otherwise.*

> *In the majority of cases the guidelines come out with the appropriate sentence. I was not a fan of the guidelines, but now I generally feel that the guidelines are fair, rational, even humane in the majority of cases.*

A number of judges said guideline sentences are usually appropriate, but qualified their response to some degree. These judges are generally comfortable with the sentences they impose under the guidelines but mentioned specific situations in which they believe the guidelines are too lenient (mostly bank robbery) or too harsh (such as with career offenders).

In contrast, 13 judges (28%) report that guideline sentences are mostly inappropriate. Interestingly, about half view the guidelines as too harsh and half see them as too lenient. *See* Table 26. Two representative responses from this group of judges follow:

> *As a general rule, the guidelines are lower than I'd sentence if given full discretion. Probably I'm the exception.*

> *They tend to be heavier than I would like to see. Sentencing is not rehabilitation, it only punishes and keeps people off the street. Guidelines do not take into consideration that older defendants are less likely to commit future crimes. Generally the drug guidelines are higher than necessary.*

Finally, the responses of three judges (7%) could not be classified as either "mostly appropriate" or "mostly inappropriate." These respondents generally stated that the guidelines were sometimes appropriate and sometimes inappropriate, but their overall view of guideline sentencing could not be determined.

B. Assistant U.S. Attorneys

Table 25 shows that federal prosecutors interviewed in this study overwhelmingly report that guideline sentences are appropriate (39 or 83%). Although many prosecutors qualified their responses by saying that the guidelines were either too harsh or too lenient in specific areas or that

Table 25

Opinions on the Appropriateness of Guideline Sentences

Responses	Respondent Type									
	Judge (N=46)[a]		AUSA (N=47)[a]		Federal Defender (N=10)[a]		Private Attorney (N=35)[a]		Probation Officer (N=45)[a]	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
Mostly appropriate	30	(65)	39	(83)	–	–	11	(31)	31	(69)
Mostly inappropriate	13	(28)	6	(13)	9	(90)	21	(60)	9	(20)
Mixed opinion	3	(7)	2	(4)	1	(10)	3	(9)	5	(11)

[a] Excludes respondents who were unresponsive in answering the question (four assistant U.S. attorneys and two probation officers) and respondents who were not asked the question (three judges, five assistant U.S. attorneys, and three private defense attorneys).

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 26

Opinions of Respondents Who Considered Guideline Sentences to be Mostly Inappropriate

Responses	Respondent Type									
	Judge (N=13)		AUSA (N=6)		Federal Defender (N=9)		Private Attorney (N=21)		Probation Officer (N=9)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Too lenient	5	(38)	3	(50)	–	–	–	–	1	(11)
Too harsh	7	(54)	2	(33)	9	(100)	21	(100)	7	(78)
Some too lenient/ others too harsh	1	(8)	1	(17)	–	–	–	–	1	(11)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

sentencing disparity has not been entirely eliminated, it is clear from the responses that federal prosecutors as a group strongly support the sentences produced by the guidelines.

Only six prosecutors (13%) said that guideline sentences are mostly inappropriate, and these responses were about evenly split between whether the guidelines are too lenient or too harsh (*see* Table 26). Drug cases presented the most obvious difference of opinion, with some prosecutors reporting that guideline sentences are too high (particularly for first time drug offenders) and some reporting that drug sentences under the guidelines are too low. There was also some complaint that the criminal history score fails to adequately identify serious offenders.

The responses of two prosecutors (4%) could not be classified as either "mostly appropriate" or "mostly inappropriate."

C. Federal Defenders

None of the ten federal defenders interviewed said they consider guideline sentences to be appropriate (*see* Table 25). While one defender's response to the question was mixed, the other nine defenders report that the guidelines are too harsh (*see* Table 26). A representative response follows:

> *This is a hard question. I really do not think that they do. I am a strong believer in judicial oversight. In most cases the guidelines are far too punitive. Totally irrational in drugs and fraud because they are driven by quantity, which is a totally fortuitous circumstance. The reason they did it is far more important than how much.*

D. Private Defense Attorneys

Unlike federal defenders, about one-third of the private defense attorneys interviewed (11 or 31%) report that guideline sentences are mostly appropriate (*see* Table 25). Two typical responses from this group follow:

> *All in all, good. Guidelines have eliminated judges giving widely disparate sentences for the same offense. In addition, prior to the guidelines, race played a big role and guidelines have eliminated that.*

> *With exception of career offender, by and large, I feel the guidelines have been fair. Another exception is at the other end of the guideline range where a petty involvement with drugs results in incarceration.*

Twenty-one private defense attorneys (60%) stated that guidelines sentences are mostly inappropriate (*see* Table 25) and thought the guidelines are too harsh (*see* Table 26). Most of the criticism of the guidelines concerned the perceived harshness of the drug guidelines (particularly for first offenders) and the perceived ability of the prosecutors to manipulate the guidelines through charging decisions or substantial assistance motions. Two representative responses from this group follow:

> *To be fair there are very few cases when the guidelines fit in. As far as drugs go, it is nothing more than institutionalized barbarism.*

> *I think they are unjust. I'd much rather just have a judge sentence. Everything is left up to the prosecutor. Judges here would probably agree. If you think drugs are bad, then you'll like the guidelines. You've got to have hope or you give up.*

The responses of three private defense attorneys (9%) could not be classified as either "mostly appropriate" or "mostly inappropriate."

E. Probation Officers

More than two-thirds of the probation officers interviewed (31 or 69%) report that guideline sentences are mostly appropriate (*see* Table 25) even though a few expressed concern over the harshness of the guidelines for first offenders. Two representative responses from this group follow:

> *I like the guidelines. They promote fair sentencing. Charging is the key. Assistant U.S. attorneys can skirt the guidelines, but I don't see it that much here.*

> *I favor the tougher penalties that the guidelines give for crime. I favor determinate sentences; it's constructive in that sense, easy to buy into. I also like the concept of having a third party outside the adversarial process intervene and give the court an objective analysis. It was difficult in the past to see a guy with a ten-year sentence get out in six months.*

One-fifth of the probation officers interviewed (9 or 20%) report that guideline sentences are mostly inappropriate (*see* Table 25) and almost all of these officers say they believe the guidelines are too harsh (*see* Table 26). A response illustrative of probation officers in this category follows:

> *The people at the low and high ends are getting hit too hard. Mandatory minimums are grotesque. Some defendants who shouldn't go to prison because of personal characteristics are going in. I don't know how to fix this. Departures are too narrow, i.e., there are not enough reasons for them. Judges respond by imposing home detention in order to stay within the guidelines.*

Finally, five probation officers (11%) gave responses that could not be classified as either "mostly appropriate" or "mostly inappropriate."

II. Views on Benefits and Problems of the Guidelines

Opinions on perceived benefits and problems of the guidelines were obtained through the following question: "What problems and benefits do you see in the current guidelines system?"

Most respondents talked about both benefits and problems of the guidelines, while some chose to focus only on one or the other. Additional interview questions directed at various aspects of guideline sentencing also generated responses related to perceived benefits and problems, and those responses are included in the findings. For example, when respondents were asked about long-range consequences of the guidelines or changes they would like to see, this elicited opinions about what was perceived to be wrong with the system and how it could be improved.

Interview responses were grouped into 11 categories describing benefits and 14 categories of problems that represent a number of closely related issues (*see* Tables 27 and 28).[142] A description of the more frequently occurring response types follows:

A. Benefits

- ***Decrease Disparity***: This group most commonly includes responses that the guidelines have decreased sentencing disparity, and also a few comments that the guidelines set sentencing parameters.

- ***Increase Predictability***: Responses include statements that the defendant is better able to know in advance what the sentence is likely to be, as well as favorable comments on the abolition of parole and the imposition of determinate sentences.

- ***Well Constructed***: This category most commonly includes statements that the guidelines are well written or take into account the major factors in determining a sentence. It also includes a few observations that the guidelines continue to be improved through the amendment process and a few generalized references to the "fairness" of the guidelines.

B. Problems

- ***Reduce Judicial Discretion***: Responses include statements that the judges have lost too much discretion under the guidelines, that it is too difficult to depart, or that discretion has been transferred from the judge to the prosecuting attorney or the probation officer.

- ***Inflexible***: This is a broad category that includes responses that the guidelines are too inflexible, too mechanical, or fail to take into account personal factors and therefore "dehumanize" the sentencing process. It also includes a few opinions that the guidelines inappropriately restrict the use of sentencing alternatives.

- ***No Impact on Disparity***: The responses include statements that the guidelines fail to decrease disparity, that they are manipulated by the court or the prosecutors, or that the guidelines are racially discriminatory.

- ***Overburden Judiciary***: This is a broad category that includes responses that the guidelines have increased the number of trials or appeals, increased the length of sentencing hearings, made it more difficult to secure a plea, or overburden the probation officer.

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[142]One additional note about categories of responses: Some respondents considered "no parole" a benefit under the guidelines, while others said it was a mistake to abolish it. Therefore, references to the elimination of parole were categorized as either a benefit or problem, depending upon the respondent's point of view.

Table 27

Respondents Identifying Benefits of the Guidelines System

Benefits	Respondent Type: Judge (N=50)		AUSA (N=75)[a]		Federal Defender (N=17)		Private Attorney (N=37)		Probation Officer (N=66)	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
Decreased disparity	25	(50)	57	(76)	7	(41)	12	(32)	39	(59)
Increased predictability	11	(22)	22	(29)	6	(35)	16	(43)	13	(20)
Longer sentences	2	(4)	20	(27)	—	—	1	(3)	7	(11)
Well constructed	6	(12)	11	(15)	1	(6)	5	(14)	18	(27)
Easier sentencing	11	(22)	1	(1)	—	—	—	—	2	(3)
Increased accountability	—	—	1	(1)	—	—	—	—	6	(9)
Increased deterrence	1	(2)	6	(8)	—	—	—	—	8	(12)
Encourage cooperation	—	—	6	(8)	—	—	1	(3)	2	(3)
Easier pleas	—	—	4	(5)	—	—	—	—	—	—
Encourage respect for law	—	—	2	(3)	—	—	—	—	3	(5)
Encourage restitution	—	—	—	—	—	—	—	—	1	(2)
No benefits	10	(20)	4	(5)	5	(29)	11	(30)	11	(17)

[a] This includes U.S. attorneys and supervising assistant U.S. attorneys.

[b] Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 28

Percent of Respondents Identifying Problems with the Guideline System

Problems	Respondent Type									
	Judge[a] (N=50)		AUSA[b] (N=75)		Federal Defender (N=17)		Private Attorney (N=37)		Probation Officer (N=66)	
	N	(%)[c]	N	(%)[c]	N	(%)[c]	N	(%)[c]	N	(%)[c]
Reduce judicial discretion	24	(48)	11	(15)	14	(82)	21	(57)	19	(29)
Inflexible	21	(42)	11	(15)	11	(65)	22	(59)	16	(24)
Too harsh	6	(12)	14	(19)	9	(53)	17	(46)	17	(26)
Too lenient	—	—	13	(17)	—	—	—	—	4	(6)
No impact on disparity	9	(18)	12	(16)	5	(29)	7	(19)	24	(36)
Overburden judiciary	19	(38)	31	(41)	7	(41)	13	(35)	30	(45)
Too complex	6	(12)	5	(7)	6	(35)	3	(8)	16	(24)
Overburden prisons	16	(32)	6	(8)	7	(41)	12	(32)	18	(27)
Increased recidivism	6	(12)	2	(3)	5	(29)	6	(16)	5	(8)
No impact on deterrence	3	(6)	—	—	—	—	2	(5)	1	(2)
No parole	—	—	—	—	1	(6)	5	(14)	1	(2)
Reduce prosecutorial discretion	—	—	1	(1)	—	—	—	—	—	—
Promote disrespect for law	—	—	—	—	2	(12)	—	—	—	—
Discourage cooperation	—	—	1	(1)	—	—	—	—	—	—
No problems	3	(6)	14	(19)	—	—	—	—	5	(8)

[a] Includes one magistrate judge.

[b] Includes U.S. attorneys and supervising assistant U.S. attorneys.

[c] Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

C. Analysis of Responses

The two broad topics of benefits and problems cited by judges and practitioners can be discussed, for the most part, in terms of corresponding positive and negative sides of the same issues. A common expression, "flip-side of the coin," illustrates this relationship. For purposes of discussion, the more commonly mentioned benefits can be juxtaposed to problems frequently mentioned by respondents as follows:

1. Disparity/Inflexibility

One of the benefits of the guidelines mentioned most frequently by respondents was decreased disparity in sentencing. This issue was expressed to varying degrees by judges, assistant U.S. attorneys, federal defenders and private defense attorneys, and probation officers. A large majority of assistant U.S. attorneys (76 percent of the 75 respondents) said that the guidelines have decreased disparity, along with one-half of the 50 judges, approximately one-third of 54 defense attorneys, and 59 percent of the 66 probation officers who were asked to name problems and benefits of the guidelines (*see* Table 27).

A judge who felt that disparity had been reduced called it "very wholesome," adding, "There is now no reason to complain about the judge." Another judge candidly reflected on his own experiences:

> *I was never convinced that my sentences were so appropriate and correct, and I have had more experience than most judges. If I'm not comfortable with sentences, why should less-experienced individuals be so sure of themselves? You can work with these guidelines and depart if there's a reason to. You can say something other than 'Congress tells me I have to do this.' There is greater consistency under the guidelines.*

A probation officer remarked, "I can't understand why defense attorneys are so opposed to the guidelines. It does assure similar sentences wherever a defendant is sentenced."

An examination of respondents' opinions on benefits of the guidelines reveals that if a respondent mentioned only one benefit (along with multiple problems), the benefit was far more likely to be reduced disparity. This was true of judges, prosecuting attorneys, federal defenders, and probation officers; private defense attorneys were the exception to the pattern in that among those who mentioned a single benefit, more noted increased predictability of sentences.

Some respondents stated that the guidelines have failed to reduce disparity, although in many fewer numbers than those who said the guidelines have succeeded in reducing it. Probation officers were more likely as a group to indicate that the guidelines have had no impact on disparity (36% or 24 of 66), and assistant U.S. attorneys the least likely as a group (16% or 12 of 75). A supervisory probation officer commented, "Cooperation gets you out of the guidelines and the courts don't want to deny pleas.... The Commission should look at plea bargaining and U.S.S.G. §5K1.1. Everything else is under close scrutiny, but these are the greatest sources of disparity." It is important to note that one-fourth of the 24 probation officers who stated that the guidelines have not reduced disparity were from the non-random site that was selected partly because of its high departure rate.

The corresponding negative aspect of decreased disparity is a perception that the guidelines are inflexible, a problem mentioned by a majority of federal defenders (11 or 65%) and private defense attorneys (22 or 59%), and to a lesser extent by judges (21 or 42%), probation officers (16 or 24%)

and assistant U.S. attorneys (11 or 15%) (*see* Table 28). The following criticism by a defense attorney is typical of this group: "There is resentment over computer sentencing. The complexity of the guidelines generates systematic problems. It introduces rigidity when judges need flexibility." One judge remarked that what he resented most was doing the mathematics of the guidelines. He acknowledged that there was great disparity in sentencing prior to the guidelines, but felt that "the guidelines are too mechanical — what is the judge for?"

2. Predictability of Sentence/Reduced Judicial Discretion

Increased predictability was a benefit mentioned by respondents in all groups (*see* Table 27). Private defense attorneys cited this in greater numbers than other groups — 16 of 37 (43%), although a substantial number of judges (11 or 22%), assistant U.S. attorneys (22 or 29%), and probation officers (13 or 20%) saw increased predictability as beneficial. As one defense attorney said, "Ten years ago, the judge and probation officer were an unknown quantity and thus the sentence was [unknown] too. When the prosecutor works with you, at least you know what is expected going in, and the defendant can prepare him/herself for what's coming." A probation officer noted, "They are fair — no surprises. People going in know what they're going to get. I tell them to expect it."

On the other hand, a number of respondents indicated that the flip-side of predictability, reduced judicial discretion, was a problem under the guidelines. Nearly one-half of the 50 judges, 65 percent of the 54 defense attorneys, and 29 percent of the 66 probation officers reported reduced judicial discretion as a problem. As one judge noted, "Individual differences are important. A defendant who supports his wife and family and holds down a job is a better candidate for probation than a man who, though committing the same crime, has deserted his family and can't hold a job. But under the guidelines, I must treat them the same." A federal defender stated: "There should be a way to filter out people who are being unjustly punished. Judges don't have enough discretion. If I were a judge, I'd be offended by the guidelines." Fewer assistant U.S. attorneys than any other group, 11 of 75 (15%), mentioned reduced judicial discretion as a problem (*see* Table 28).

It is important to consider the relationship between these two sets of commonly mentioned benefits and problems. Many respondents saw the decreased disparity and the predictability of guideline sentences as benefits, yet were opposed to the factors (*i.e.*, "reduced judicial discretion" and "guidelines inflexible") that they said resulted in the beneficial effects. As one judge expressed the issue:

> *The benefits are that it [guidelines system] promotes conformity and uniformity and absence of disparity. Truth in sentencing is good. The sentence is reviewable — everything the district judge does should be reviewable. On the other side, I wish you would trust me with greater latitude. It's not flexible enough.*

3. Appropriate/Inappropriate Sentences

While a sizeable majority of the judges (30 or 65%), prosecutors (39 or 83%), and probation officers (31 or 69%) report that guideline sentences are "mostly appropriate," the summary of opinions is not as clear in the responses to other questions about problems and benefits, long-range consequences, or desired changes. A substantial number of federal defenders and private defense attorneys said that guideline sentences are too harsh (9 or 53% and 17 or 46%, respectively) (*see* Table 28.) On the side of "too harsh," a federal defender stated, "There is a flaw in the guidelines themselves because of the high sentences called for; existing practice should have been the basis, but they're just more severe.... The public is shocked." A private defense attorney who said he

considered the length of sentences to be "vengeful," protested, "You can't get any credit for good deeds.... The humiliation of arrest and prosecution [is] enough in some cases. Some still should have to do time... [but] people who will never get into trouble again will do great amounts of time." Probation officers who said that the guidelines are too harsh focused more on drug offenses than any other specific offense, although some felt that sentences under the guidelines are too harsh in general. One probation officer noted, "I think they're a little harsh — no, a lot harsh — especially for first-time drug offenders. I'm just glad I won't be here to supervise these people when they get out. They're going to be animals on the street or robots."

In contrast, a fairly small percentage of assistant U.S. attorneys (13 or 17%), very few probation officers (4 or 6%), and no judges or defense attorneys indicated that the guidelines are too lenient. The opinion that longer sentences constitute a benefit of the guidelines was almost unique to prosecutors (20 or 27%). Few probation officers and judges and only one defense attorney said that longer sentences are a benefit. Prosecutors most often singled out white-collar offenders, as exemplified in this comment: "Tremendous benefits to the U.S. attorney's office in a district where you have traditionally light sentences. Particularly for white-collar offenses, it has helped greatly — now they do prison time."

One figure in particular in Table 28 identifying perceived problems in the guidelines is noteworthy. Only six judges (12% of the sample) said that the guidelines are too harsh. This is the smallest proportion of any of the groups and stands out in sharp contrast to the defense bar. This could imply that notwithstanding the variety of problems listed, a considerable number of judges seem to think that guidelines sentences are about right. As one judge put it, "Nevertheless... day in and day out, I do not see many cases sentenced inappropriately."

4. Overburden the Criminal Justice System

Many respondents made comments about the guidelines that fall into the category of overburdening the system, including the judiciary and prisons. The "coin" analogy breaks down in this particular area because there is no corresponding beneficial "flip-side" to this criticism mentioned by respondents. Approximately equal proportions of each group of respondents reported problems that fell into the category of overburdening the system, with some variation in the specific form of the problem. More than one-third (n=19) of the judges said that the guidelines are responsible in various ways for causing the judicial system to be overburdened. A few thought the number of trials had increased, but more noted such factors as "longer hearings" or "takes more time" in a general way. One judge was particularly concerned about the amount of time required for sentencing under the guidelines: "There will never be perfect justice. A serious question is asked because of time, extra cost — is it worth it?" For prosecutors, this problem was higher on the list than any other, with 31 (41%) assistants noting this particular issue. Observations that there are more trials, more appeals, and the plea process is more difficult were the most common concerns cited by prosecutors. One assistant U.S. attorney commented on this issue as follows:

> *More time [is] spent by prosecutors and defense attorneys in negotiating — more trials and time-consuming plea negotiations.... Appellate courts are backlogged at least in the short run. Perhaps this is natural. When the Speedy Trial Act of 1974 kicked in, everyone panicked, but slowly settled into an easily assimilated process.*

Although a number of prosecutors did mention more trials as a problem, several others said that while they had expected the guidelines to cause more trials, this had not occurred in their experience.

More than one-third of 17 federal defenders and 37 private defense attorneys commented on problems relating to workload in the system. A federal defender noted:

> *The number of cases we can handle has gone down dramatically. Cases that would take one month now take six. I had to write a 20-page sentencing memo regarding guidelines issues — ex post facto, etc. So much time is being spent on little refinements that the entire system is dragging to a halt. The government doesn't have the time to indict as many cases as they used to.*

A private defense attorney commented that he thought more cases are going to trial that should not: "This means one side is losing badly and that's not right. You should be able to compromise; where your ability to compromise is diminished, you do everyone a disservice, the government, everyone... money, time, heartache."

Probation officers were especially vocal about the negative effects of increased workload. Thirty (45%) probation officers, representing a higher percentage than with respect to any other type of problem mentioned by the group, expressed concern in this area. One probation officer said, "We're not attorneys, yet we're reading the law and being called upon to make judgments we shouldn't be making. Probation sometimes gets 'finagled' into calling the shots, and we have only quasi-immunity." A supervising probation officer summed up several related problems as follows:

> *The guidelines have affected the PO most. Today 60 to 65 percent of their time is spent dealing with something with reference to the guidelines; probably 25 to 30 percent of the time managing their caseload, a very important facet of their work. Another thing: a goal we work on is keeping out of an adversarial role. This threw us into an adversary role. On top of that, everyone is getting manpower and raises except the line officer and the supervisor. As far as 'Are they [guidelines] working?' Yes, but the PO's role, I've told you. Is there a plan of relief?*

Another issue mentioned in relation to overburdening the criminal justice system was overcrowding prisons. Many of the remarks about prisons were in response to the question on long-range consequences of the guidelines. Thirty-two percent of judges (n=16), 41 percent of federal defenders (n=7), 32 percent of private defense attorneys (n=12), and 27 percent of probation officers (n=18) expressed concerns about this issue. Many of the comments on prison overcrowding were linked to increased recidivism. A representative criticism by defense attorneys is: "Warehousing of people for so many years — they are only getting better at their crime. It would be foolish to think that they are being rehabilitated." Assistant U.S. attorneys were less likely to mention prison overcrowding and increased recidivism than the other groups interviewed (*see* Table 28).

5. Guidelines Well Constructed/Too Complex

A number of respondents said in various ways that the guidelines are well constructed. Twelve percent of the judges (n=6), 15 percent of the assistant U.S. attorneys (n=11), 11 percent of defense attorneys (n=6), and 27 percent of probation officers (n=18) noted this aspect of the guidelines (*see* Table 27). One probation officer stated, "I generally agree with the philosophy of the guidelines [and] what adjustments they consider. The range provides enough flexibility."

On the negative side, a few judges, assistant U.S. attorneys, and a larger number of probation officers (16 or 24%) indicated that the guidelines are too complex (*see* Table 28). As one probation officer said, "They're complicated. Some writing is complex and convoluted. They create, not

resolve problems. The application notes are helpful and could be expanded upon. I frequently refer to them in my response to objections."

A middle ground on this issue was expressed by a supervising probation officer who remarked, "I think they work pretty well. I'd like the Commission to back off the amendments and just let them work for a while."

6. Problems/Benefits

When asked about perceived problems and/or benefits in the guidelines, a large percentage of all respondents mentioned at least one perceived problem (*see* Table 28). On the whole, assistant U.S. attorneys were less likely than other groups to identify perceived problems. Conversely, some respondents did not mention any perceived benefits as they were discussing problems. Ten judges (20%), four assistant U.S. attorneys (5%), five federal defenders (29%), 11 private defense attorneys (30%), and 11 probation officers (17%) made no positive statements about the guidelines in response to this question. One judge said he was skeptical that the guidelines are worth the "intrusion on the judicial function." However, he added that "if the goal of uniformity is obtained, it will be worth it." It is instructive to note that among the 10 judges and 11 probation officers who mentioned no benefits, four of each group were from a single site.

D. The National Survey

One question in the national survey addressed the respondent's perceptions of whether unwarranted sentencing disparity has increased, decreased, or stayed about the same under the guidelines system compared to the pre-guidelines sentencing system (*see* Table 29). A majority of the prosecutors (224 or 51%) and probation officers (296 or 52%) stated that unwarranted disparity has decreased under the sentencing guidelines. Only a very small percentage of prosecutors (10 or 2%) and probation officers (36 or 6%) reported that it has increased. By contrast, federal defenders (62 or 44%) and private defense attorneys (68 or 28%) are more likely to say that disparity has increased under the guidelines and less likely to say that disparity has decreased (16 or 11% of the federal defenders and 45 or 19% of the private defense attorneys). Judges are about equally divided as to whether disparity has decreased (132 or 32%) or increased (116 or 28%) under the guidelines. Nineteen percent (338) of all 1,802 survey respondents indicated they thought sentencing disparity had remained about the same, while 25 percent (n=459) said that they did not know.

Those who believed disparity is increasing under the guidelines most often cited the limiting of judicial discretion to take individual circumstances into account or unfettered prosecutorial discretion. Those who see disparity as decreasing most often gave as a reason the guidelines themselves or the limiting of judicial discretion.

Table 29

Unwarranted Sentencing Disparity Under the Sentencing Guideline System Compared to the Pre-Guideline Sentencing System[a]

	Respondent Type									
Response	Judge (N=415)		AUSA (N=436)		Federal Defender (N=140)		Private Attorney (N=240)		Probation Officer (N=571)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Disparity now increased	116	(28)	10	(2)	62	(44)	68	(28)	36	(6)
Disparity now decreased	132	(32)	224	(51)	16	(11)	45	(19)	296	(52)
Disparity about the same	117	(28)	44	(10)	34	(24)	53	(22)	90	(16)
Don't know	50	(12)	158	(36)	28	(20)	74	(31)	149	(26)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type.

SOURCE: U.S. Sentencing Commission, 1991 National Survey.

III. Guideline Application

Introduction

During the site visits and in follow-up written surveys, judges, assistant U.S. attorneys, defense attorneys, and probation officers[143] were asked: "Are there any specific guidelines that are problematic[144] in application for you?"

Most respondents identified particular guidelines or specific sections of the guidelines they considered problematic, while some gave global answers such as "no," "none," or "all." Table 30 reports responses by individual group. Twelve judges (approximately one-fourth of the group) reported no problematic guidelines, a higher percentage than for assistant U.S. attorneys, defenders, or probation officers. Likewise, a higher percentage of judges (7 or 14%) than other respondents said that all the guidelines are problematic.

A. Specific Guideline Issues

This section discusses areas of the guidelines identified by judges and practitioners as problematic. Responses from other interview questions are included whenever a specific guideline issue was addressed. For example, the question, "Generally, how do the guidelines fit into your sense of what is an appropriate sentence?" sometimes generated comments about a particular guideline.

Although the anticipated focus of the responses was on problems, a few judges and practitioners said that specific guidelines are "right on the money" and not problematic. Others respondents simply named a guideline without discussing the nature of the problem. All responses are included in Table 30 in descending order of frequency. For example, drug guidelines were the most frequently cited by all respondents, followed by relevant conduct, role in the offense, and departures.

1. Drugs

Sixty-two (27%) of the judges and practitioners interviewed identified concerns with regard to the drug guidelines (*see* Table 30). Among those who cited drugs as problematic, the most frequently described problem (n=11) was the difficulty in agreeing on the quantity of drugs for which the defendant was culpable. This finding overlaps with problems with relevant conduct, the second most frequently cited guideline. Others who spoke about drugs objected to the offense level being tied in any way to quantity, asserting that it was a poor measure of culpability.[145] For example, one federal defender criticized the guidelines as "totally irrational in drugs and fraud because they are driven by quantity, which is a totally fortuitous circumstance. The reason they did

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[143]Prosecutors, federal defenders, and probation officers in supervisory positions were not asked this specific question.

[144]"Problematic" was intended to mean unclear or subject to varying interpretation, but some respondents answered on the basis of whether they had difficulty in a philosophical sense with a particular guideline.

[145]The Commission's drug guidelines must accommodate a series of mandatory minimum statutes passed by the Congress that proscribe penalties based solely on quantities of drugs.

Table 30

Guidelines Identified as Problematic: Frequency of Responses

Guidelines	Respondent Type				
	Judge (N=49)	AUSA (N=67)	Defense (N=53)	Probation Officer (N=58)	Total[a] (N=227)
None	12	9	5	5	31
All	7	1	1	6	15
Some	30	57	47	47	181
Drugs	10	22	16	14	62
Relevant conduct	10	12	21	14	57
Role in the offense	8	15	11	19	53
Departures	8	8,	22	12	50
5K1.1 substantial assistance	5	4	13	6	28
Other	3	4	9	6	22
Acceptance of responsibility	9	7	12	14	42
Fraud/embezzlement/white-collar	6	17	4	4	31
Multiple counts	2	5	5	5	17
Bank robbery	2	9	2	3	16
Career offender	3	2	8	3	16
Weapons	6	6	0	3	15
Across guidelines	0	2	4	8	14
Criminal history	1	4	0	7	12
More than minimal planning	2	2	4	2	10
Loss	0	3	2	5	10
Reckless endangerment/aliens	2	3	0	4	9
Obstruction	0	3	3	2	8
Child pornography	3	1	0	2	6
Conspiracy	0	1	3	1	5
Sentencing options, (Chapter 5)	1	0	3	0	4

Table 30 (cont'd)

Guidelines	Judge (N=49)	AUSA (N=67)	Defense (N=53)	Probation Officer (N=58)	Total[a] (N=227)
Income tax	0	1	0	3	4
Theft	0	2	0	1	3
Environment	0	1	0	2	3
Money laundering	0	0	2	1	3
Counterfeit	1	0	1	0	2
CCE	1	1	0	0	2
Perjury	0	2	0	0	2
Violent crimes	0	2	0	0	2
Victim crimes	0	2	0	0	2
Use of certain information (1B1.8)	0	1	0	1	2
Sexual assault	0	0	0	1	1
Career criminal	1	0	0	0	1
Arson	1	0	0	0	1
Sex offenses	1	0	0	0	1
Export admin. act	1	0	0	0	1
Failure to appear	0	1	0	0	1
RICO	0	1	0	0	1
Regulatory offenses	0	1	0	0	1
Currency	0	1	0	0	1
Structuring	0	1	0	0	1
No analogous guideline	0	0	0	1	1
Revocation	0	0	0	1	1
Conspiracies, attempts (2X1.1)	0	0	0	1	1

[a] Due to multiple comments, the number of respondents is fewer than the total number of responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

it is far more important than how much." Other respondents said that role in the offense is a better indicator of culpability than quantity of drugs.

Seven respondents objected to the penalty for crack being much higher than for cocaine.[146] Purity of drugs was also cited as problematic because it is not taken into account in determining offense level.[147] A number of respondents identified the penalty for methamphetamine as being too high compared to those for other drugs. Several said that drug penalties are generally too high; others singled out first offenders, mules, or marijuana growers as receiving unduly harsh sentences. Finally, five respondents — all assistant U.S. attorneys — said they thought that the drug guidelines are about right.

2. Relevant Conduct

One-fourth (n=57) of all respondents who described guideline problems identified relevant conduct, with the difficulty most frequently described being determining its extent.[148] Several respondents, many of them probation officers who must determine relevant conduct to calculate the guideline range for the court, commented upon difficulties in application and suggested clarification and examples. A judge stated that he has to hold evidentiary hearings to determine the extent of relevant conduct, *e.g.*, the amount of drugs in a drug case. Respondents in all groups who considered this guideline problematic made comments such as "What is it?" and "What is 'reasonably foreseeable' and 'common scheme or plan'?"

A number of respondents who identified relevant conduct noted its impact upon other aspects of the guideline process, especially in multiple defendant conspiracies. A private defense attorney discussed the issue in this way: "Real offense sentencing and plea bargaining are conceptually incompatible... There's liability... for conspiracy, even when you're acquitted of the substantive offenses. If I'm the defendant, I want to be named in every count so if I'm acquitted, I won't be held responsible for all conduct of others." The changes that most defense attorneys recommended would limit the breadth of relevant conduct. Respondents citing relevant conduct also mentioned

[146]The Commission's crack cocaine guideline is driven by a mandatory minimum statute.

[147]Prior to implementation of the guidelines in 1987, the statute did not address drug purity in distribution offenses. However, the U.S. Parole Commission's guidelines used to calculate an offender's parole eligibility were based on the amount of pure drug. Consequently, an estimate of the parole guideline based on purity was provided to the court in the presentence report for use in determining the sentence in pre-guideline cases.

[148]U.S.S.G. §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), states in part: "(1) ...all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense; (2) ...all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction; Application Note 1. ...the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant."

the issue of standard of proof. One defense attorney stated, "The government should be required to prove uncharged relevant conduct by a reasonable doubt, or lose the benefit of the enhancement."

3. Role in the Offense

Role in the offense is the third most frequently cited guideline issue raised by respondents, mentioned by 53 respondents (23%).[149] Of all the groups interviewed, probation officers mentioned it more frequently than judges, assistant U.S. attorneys, or defense attorneys.

For purposes of discussion, comments on role in the offense can be divided into two groups: (1) problematic or subjective with a need for clarification; and (2) suggestions for modification. Of the two types, the need for clarification was noted by more respondents. Many judges and practitioners suggested general clarification without reference to a particular section they believed problematic. Some mentioned very specific problem areas, *e.g.*, the difference between "minimal" and "minor" participants or a better explanation of "abuse of position of trust." Occasionally, a respondent would say that role adjustments were subject to varying interpretations, but in many cases respondents would provide no further explanation other than that role adjustments can be problematic.

Suggestions for modification varied considerably. Some said that there should be more levels or a wider range of adjustment. A number of respondents, particularly defense attorneys and probation officers, advocated a greater reduction for minimal participants and drug "mules" [couriers], or a provision allowing a single defendant in a drug case to receive a downward adjustment. Occasionally, respondents suggested that role in the offense should have more to do with determining offense level than the quantity of drugs or money in fraud or embezzlement cases.

4. Departures

For purposes of this discussion, remarks about departures based on substantial assistance[150] (28 or 12% of all respondents) were separated from those regarding other downward and upward departures (22 or 10%). A total of 50 respondents (22%) raised departures as an issue, and the majority of these were defense attorneys.

a. Substantial Assistance

The comments on substantial assistance for the most part fell into groups according to the profession of the respondent. Eleven of the 13 defense attorneys who mentioned substantial assistance proposed that the defense should be allowed to make the motion for a sentence reduction for substantial assistance, or that the judge, not the assistant U.S. attorney, should determine the value of a defendant's cooperation. Judges agreed to some extent, saying that application of substantial assistance was too subjective, the prosecutor had too much power, or there were no criteria to determine the amount of recommended reduction. The few assistant U.S. attorneys who

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[149]U.S.S.G. §§3B1.1-4 (Aggravating Role, Mitigating Role, Abuse of Position of Trust or Use of Special Skill, and no adjustment).

[150]U.S.S.G. §5K1.1 (Substantial Assistance to Authorities (Policy Statement)): "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

commented on the issue suggested such changes as a scale to structure rewards for cooperation or clarification of what is meant by "substantial assistance."

Probation officers citing the issue as problematic focused on the discretion of the assistant U.S. attorneys in choosing whether to make the motion for substantial assistance and the potential for disparity. One probation officer explained that the lower-level conspirator cannot offer anything to "cut a deal" with the government and therefore will not receive the motion for a sentence reduction. Another probation officer recommended closer scrutiny by judges of plea agreements, saying that "the door for 'substantial assistance' agreements is opening too wide. Assistant U.S. attorneys may be manipulating some to get pleas."

b. Other Departures

The comments on other departures focused on problems with downward departures. Respondents from every group indicated that there were either insufficient reasons available to depart downward from the guidelines or that judges should have more flexibility in deciding when departure was appropriate. Other respondents suggested clarification of guideline departure language and better definition of what circumstances could be grounds for departure. As one judge observed, "The newest amendments constrict and are very specific regarding what not to consider. We need to know what can be considered." A supervising federal defender expressed some frustration when he said, "The judges here are reluctant to depart. I can't think of anything [reasons for departure] other than for substantial assistance."

5. Acceptance of Responsibility

Forty-two (19%) of the respondents interviewed identified acceptance of responsibility as a problematic guideline.[151] Probation officers (n=14) and defense counsel (n=12) tended to mention it more frequently than other groups. Among all respondents, the largest number of comments on acceptance indicated that it was too subjective or needed clarification. For example, an assistant U.S. attorney said that different judges' interpretations vary while a federal defender felt that the acceptance adjustment was applied arbitrarily by probation officers. A supervisory probation officer suggested that more clarifying notes be added to the guideline commentary.

Several respondents discussed the application of acceptance of responsibility as it relates to case disposition by plea bargain or by trial. An assistant U.S. attorney suggested that there should be "a presumption of the grant of two points [levels] upon a guilty plea, and more specific delineation of when the two points could be granted despite the absence of a guilty plea." A defense attorney from a district that evidently does not award acceptance after trial said that a defendant should be able to receive acceptance in such a case if he "behaves."

A number of respondents were in favor of revising the guideline in some way, most often by making it proportional to the offense level. For example, one judge suggested a "one to four point

[151] U.S.S.G. §3E1.1 (Acceptance of Responsibility) states, "If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels." The guideline further instructs that this reduction is considered "without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury" and that "a defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."

range... at the discretion of the court. Language should be developed to describe when a one-, two-, three-, or four-level reduction is appropriate." Defense attorneys tended to favor increasing the amount of reduction or limiting acceptance to the offense of conviction.

6. Fraud, Embezzlement, White-Collar Offenses

Of the 67 prosecutors who discussed guideline application issues, one-fourth (n=17) cited guidelines dealing with fraud, embezzlement, or white-collar offenses. These remarks represent more than half the total made about these guidelines by all respondents (31 or 14%). Only six judges, four defense attorneys, and four probation officers commented on these particular guidelines.

The vast majority of comments on fraud, embezzlement, and white-collar issues indicate that the penalties for these offense types are too low. Respondents said that the guideline dollar enhancements are not punitive enough and that there should be definite incarceration for economic/white-collar offenders. In contrast, two prosecutors said that the penalties for white-collar offenses were appropriate. Occasionally, respondents pointed out the difference between penalties for white-collar offenders (which they thought were low) and drug offenses (which they believed were high). A few respondents suggested revising the fraud and embezzlement guidelines so that the dollar amount is less of a determinant factor in calculating the offense level.

7. Multiple Counts

Beginning with multiple counts, relatively few respondents identified problems with the remaining guidelines listed in Table 30. While 31 respondents (14%) reported concerns about fraud, embezzlement, and white-collar offenses, the next most frequently mentioned guideline, multiple counts, was mentioned by only 17 (7%) of the total group. All 17 respondents indicated that the application of multiple counts and the grouping rules are too complicated. Although respondents criticized the complexity, no one suggested a way to simplify the guideline.

8. Bank Robbery

Of the 16 respondents (7%) who listed bank robbery as problematic, 11 said the penalty is too lenient. As one of the probation officers said, "The offense is violent and involves a serious threat. Even the money enhancement is ridiculous. The offender should not get a break just because they don't get any money. This guideline is low compared to what drug mules are getting." Assistant U.S. attorneys in particular noted that multiple bank robberies are not punished severely enough. On the other hand, one assistant U.S. attorney and one defense attorney expressed the opinion that the penalty for bank robbery is appropriate.

9. Career Offender

One-half of the 16 respondents who cited career offender as problematic are defense attorneys.[152] Problems included defining a "crime of violence" and other prior offenses that count

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[152]U.S.S.G. §4B1.1 (Career Offender), provides for an enhanced penalty at or near the statutory maximum if "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense," and the defendant, who must be at least 18 years old at the time of the instant offense, "has at least two prior felony convictions of either a crime of violence or a (continued...)

in determining the application of the career offender adjustment. One defense attorney stated, "One domestic assault or barroom brawl and you're halfway to career offender." Other respondents said that the guideline was unfair or excessively harsh. Among the latter group, a federal defender thought that the guideline ought to be rewritten to pick up the "really bad" offenders, not those who "technically fit" the definition.

10. Weapons Offenses

While 15 respondents (7%) commented about weapons offenses, the responses cannot be readily characterized due to their wide variation. Three judges said the penalties for weapons offenses are too high, while four assistant U.S. attorneys and one probation officer stated that they are too low. One assistant U.S. attorney indicated that he thought the penalties for weapons offenses are appropriate. Several judges and probation officers suggested clarification/elaboration of the enhancement language in guideline §2D1.1, "If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by two levels." Two respondents noted problems in the case of multiple weapons. No defense attorneys commented about problems or desired changes in the weapons guidelines.

11. Across Guidelines

Fourteen respondents (6%) referred to general guideline problems unrelated to any specific guideline. Probation officers made the most comments (8 or 4%), citing problems with *ex post facto* issues, narrow guideline ranges, and the difficulty of applying the guidelines in unusual cases. Three out of four defense attorneys stated that offender characteristics should be a greater factor in guideline calculation.

12. Criminal History

Seven of the 12 respondents who expressed opinions related to criminal history were probation officers. Their concerns varied from two officers who believed that all prior valid convictions should count regardless of when they occurred, while one said that criminal history "repeats the mistakes of the past." Other problems included related cases, ambiguity, and confusing issues in determining the criminal history category.

13. Definitions

Continuing through the list of guidelines most frequently mentioned as problematic or needing change, "loss" and "more than minimal planning" were identified by ten respondents each. The focus of concern with "loss" was the difficulty of determining the amount of loss, especially in fraud cases. The majority of the ten who mentioned "more than minimal planning" said that further clarification of the definition was needed.

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[152](...continued)
controlled substance offense." This guideline responds to the Congressional directive in 28 U.S.C. § 994(h).

14. Other Guidelines

Fewer than ten respondents commented on each of the remaining guidelines listed in Table 30. Reckless endangerment[153] and offenses involving aliens[154] were cited by respondents in certain border regions, with the majority of persons commenting on these guidelines saying that they are too low. The six respondents commenting on offenses involving child pornography indicated that the penalty for "passive receipt" of such materials is too high. Although this type of offense could not be considered regional, four of the six respondents who mentioned it were from one district.

IV. Summary

Congress directed the Commission to establish a system of guideline sentencing that would be honest, ensure reasonable uniformity in sentencing by narrowing wide disparity, and impose appropriately different sentences for criminal conduct of differing severity.

Based on interviews with judges and practitioners, there is evidence that judges, prosecutors, and probation officers perceive that the Commission generally has been successful in meeting these goals. It is important to note that in response to the question of whether the guidelines generally fit into the respondents' sense of what is an appropriate sentence, a sizable majority of the judges (30 or 65%), federal prosecutors (39 or 83%), and probation officers (31 or 69%) report that guideline sentences are "mostly appropriate."

A more indirect source of opinions on the effectiveness of the guidelines comes in response to open-ended questions about the long-range consequences and the problems and benefits of the guidelines. Without being specifically asked, a large number of judges (25 or 50%), prosecutors (57 or 76%), and probation officers (39 or 59%) interviewed commented that the guidelines have reduced sentencing disparity. This lends credence to the conclusion that judges, prosecutors, and probation officers generally agree that the guidelines have, in some measure, achieved the goals established by Congress.

In contrast, federal defenders and private defense attorneys are generally negative in their assessment of the guidelines. None of the ten assistant federal defenders, and only about one-third of the private attorneys (11 or 31%) commented that sentences under the guidelines are appropriate. Defense attorneys (public and private) are also less likely to respond that the guidelines have decreased sentencing disparity.

While many judges and practitioners agree that the Commission, at least in part, has met the goals identified by Congress, there is disagreement over the methods the Commission has chosen to achieve those ends. For example, in order to provide for uniformity and proportionality in sentencing, the guidelines consider and quantify a host of major factors relevant to sentencing. This process must, to some degree, result in a certain amount of complexity along with a reduction in judicial discretion. As a consequence, many respondents in the interviews report dissatisfaction with various aspects of the guidelines. Judges, for example, report that the guidelines have gone too far in reducing judicial discretion (24 or 48%), are inflexible (21 or 42%), overburden the judiciary (19 or 38%), and overburden prisons (16 or 32%). Responses from federal defenders and private

[153]U.S.S.G. §3C1.2 (Reckless Endangerment During Flight)

[154]U.S.S.G. Ch.2, Pt.L

attorneys are similar to judges, while prosecutors and probation officers are much less likely to see problems in these particular areas. Nevertheless, the interviews point to the difficulty of achieving a uniform, proportional sentencing system without raising perceptions that the guidelines unduly restrict judicial discretion or are difficult to apply.

Respondents raised additional concerns about the Commission's decision to adopt a modified real offense sentencing system and the difficulty in applying a relevant conduct standard that includes offense conduct that did not result in a conviction.

Finally, the guidelines reflect the congressional intent to increase the sanctions for drug offenses, economic crimes, and serious repeat offenders. As a result, many federal defenders and private defense attorneys assert that the guidelines are too harsh in these areas. On the other hand, a few judges, prosecutors, and probation officers say that the guidelines are too lenient.

In conclusion, the interview data clearly reflect that while some of the policy decisions made by the Commission are controversial, the end result (*i.e.*, the sentence imposed under the guidelines) receives general support from the majority of judges, prosecutors, and probation officers interviewed, but the majority of defense attorneys commented that they believe that sentences under the guidelines are mostly too harsh.

Part E
Roles and Influences of Judges and Court Practitioners

Introduction

The implementation of the Sentencing Reform Act introduced a dramatic change in the process by which sentencing decisions were to be made. Important components of that change are manifested in the procedures, functions, and roles of various participants in the sentencing process. Many of these changes are modifications or formalizations of prior practices, while others are entirely new. Implementation of the guidelines was expected to alter, sometimes obviously and at other times subtly, the relative influence on sentencing of various court practitioners.

I. The Judge's Role Under the Guidelines

Under the modified real offense guidelines system created by the Sentencing Commission, district judges have a number of new or modified responsibilities. Their fact-finding function under Rule 32(c)(3)(D) was modified and formalized. Prior to the guidelines, judges were presented with the two parties' versions of the offense. Disputed factors were resolved either informally or judges would indicate that they would not consider a disputed factor before imposing sentence. Except to the generally limited extent they were restrained by the statute of conviction, judges had complete discretion to determine the appropriate sanction.

Under the guidelines, they generally are required to resolve disputes regarding any factual assertions contained in the presentence report that bear upon the sentence. This more formalized fact-finding function takes on enhanced significance under guideline sentencing because court findings of fact concerning the offender's criminal history and/or offense conduct may directly affect the determination of the guideline sentencing range and must be stated in open court.

Under the guidelines system, judges are expected to play a crucial role in the review of plea agreements, rejecting those that do not "adequately reflect the seriousness of the actual offense behavior."[155] Without such review and rejection as necessary, their ability to control the appropriate sentence may be undermined. This represents a substantial change from past practice under which acceptance of a plea agreement constrained the judge's sentencing options only to the extent of limiting the defendant's maximum statutory penalty exposure. However, accepting a plea agreement under the guidelines that does not reflect the offense seriousness effectively constrains the judge to the seriousness dictated by the plea.

Although their discretion is structured under the guidelines, judges retain the flexibility to depart from the guideline sentencing range if the judge determines 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."[156] It is also possible, upon motion of the government, for the judge to depart downward from the guideline range because of the offender's substantial assistance in an

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[155]U.S.S.G. §6B1.2(a), as directed under 28 U.S.C. § 994(a)(2)(E).

[156]U.S.S.G. §5K2.0, 18 U.S.C. § 3553(b).

investigation or prosecution of another person.[157] While the sentencing judge had similar latitude to reward cooperation prior to the sentencing guidelines, this procedure is now formalized by statute and a policy statement issued by the Sentencing Commission.

Finally, in all sentencings, judges must state for the record their reasons for imposing a particular sentence, whether within the final guideline range or not; and for sentences that depart from the guideline range, judges are required to give their specific reason for imposition of a departure sentence.[158]

II. The Probation Officer's Role Under the Guidelines

Probation officers have new and/or expanded responsibilities under the guidelines system. The Probation Division of the Administrative Office of the U.S. Courts anticipated substantial changes in the role of probation officers when it issued its guide for the preparation of presentence investigation reports for offenders to be sentenced under the Sentencing Reform Act of 1984. The Manual's preface includes a statement concerning this issue: "What is clear . . . is the importance of the probation officer under the new law. The officer will enjoy a major new role as guideline expert and preliminary fact finder for the court."[159] In many important respects the probation officers' new responsibilities do not add to their organizational role but are more of a formalization of duties performed under the former indeterminate sentencing system.

Prior to implementation of the guidelines, probation officers provided the court with presentence reports that included the prosecution's and defendant's version of the offense, considerable personal and family data on the defendant, the probation officer's evaluation of these factors, and "information regarding the parole guidelines that the probation officer believes the Parole Commission will apply to the defendant if he is sentenced to a term of imprisonment and information concerning sentencing practices for the offense."[160]

Probation officers continue to prepare presentence reports to aid the court in the sentencing process, but the character of this report has changed substantially in response to the dictates of sentencing reform. As part of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3552(a) requires that the probation officer make a presentence investigation, as required under the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, that includes "the classification of the offense and of the defendant under the categories established by the Sentencing Commission.... that the probation officer believes to be applicable to the defendant's case." In order to facilitate the sentencing decision, the presentence report contains a single version of the offense conduct. Probation officers are required to perform an independent assessment based on reliable information and to include in the report their recommendations for application of the guidelines and determination of the sentencing range, along with sufficient information for the court to make an

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[157]U.S.S.G. §5K1.1, 18 U.S.C. § 3553(e), and 28 U.S.C. § 994(n).

[158]18 U.S.C. § 3553(c).

[159]Administrative Office of the U.S. Courts, Division of Probation, Presentence Investigation Reports Under the Sentencing Reform Act of 1984, May 1988, p.ii. *See also* Fed. R. Crim. P. 32(c).

[160]S. Rpt. No. 225, 98th Cong., 1st Sess, 70, *reprinted in* 1984 U.S. Code Cong.& Admin. News 3182.

appropriate sentencing decision under the guidelines. Probation officers are required to state clearly their guideline application recommendations and provide reliable information consistent with the sentencing guidelines to support and justify their recommendations.

These requirements are part of the overall scheme of the sentencing guidelines to provide a more uniform and consistent sentencing system. However, closer examination of the secondary changes produced by the guidelines reveals the possibility of an increase in both the reasons and opportunities for sentencing disputes among the probation officer, prosecutor, and defense counsel. Disputes over the content of the offense conduct section of the report and/or the offender's criminal history determination are either tentatively settled in consultation with the prosecution and/or the defense, or they are left to the sentencing judge to decide. To the extent that the probation officer does more than simply report disagreements to the court for decision, this casts the officer in the role of assisting in the resolution of disputes between prosecution and defense, or between one or both parties and the probation officer, over the content of the presentence report.

These new and pivotal roles for probation officers under the sentencing guidelines system -- preliminary fact finder (subject to final decisions by the court), guideline expert, and, at times, preliminary resolver of disputes -- might be expected to have a noticeable effect on the existing balance of power among court practitioners.

III. The Prosecutor's Role Under the Guidelines

The government's role in the guideline sentencing process remains fundamentally the same as under prior law, but the effects of some prosecutorial decisions are now more visible and quantifiable. Under the former system, the prosecutor determined the charge(s) that, upon conviction, set the statutory maximum and any applicable minimum sentence. The court then imposed sentence in a proceeding in which the prosecutor's role consisted largely of general advocacy on behalf of the government. Subsequently, the Parole Commission determined the defendant's actual period of confinement on the basis of its assessment of the defendant's real offense conduct. In doing so, however, the Parole Commission was limited by the parameters of the sentence the court had imposed (which might be shorter than the minimum set forth in the parole guidelines applicable to the case or, at the other extreme, so lengthy that the one-third minimum required by law to be served exceeded the maximum set forth in the applicable parole guidelines). Moreover, the sentence the court imposed may itself have been limited by the parameters of the statute(s) the prosecutor charged.

The prosecutor continues to select the charge under the sentencing guidelines system. The count of which a defendant is convicted initially determines the generic offense conduct guideline that will apply. However, in respect to those offenses for which quantity is a significant indicator of severity (such as drug trafficking, fraud, theft, firearms, money laundering, and tax violations), the sentencing guidelines base the applicable sentencing range on the real offense conduct for which the defendant is accountable. Thus, for these types of offenses (representing most of the convictions obtained in the federal system), there is little effective difference in the charge selection and plea negotiation role of the prosecutor under sentencing guidelines as compared to the former system. Prosecutorial decisions to add or bargain away multiple counts have no effect on the applicable sentence in these types of cases (save impacting the statutory maximum and any mandatory minimum), because the guideline range is based on the defendant's real offense conduct.

On the other hand, under the modified real offense guidelines system adopted by the Commission, prosecutorial charge selection and bargaining practices may have a more substantial impact for the

class of offenses that the guidelines treat as separate and distinct instances of criminal behavior. For these offenses, which include crimes against the person (such as murder, assault, rape), robbery (including bank robbery), extortion, burglary, civil rights offenses, and, perhaps most significantly, offenses that by statute carry consecutive mandatory minimum sentencing provisions, prosecutorial decisions not to charge or to drop counts may significantly impact the applicable guideline sentencing range. This is so because, for these "non-aggregatable" offenses, it is generally necessary for the defendant to be convicted of a particular count before the relevant conduct associated with that count will be included in determining the guideline range. Under such conditions, the court may, however, use its authority to depart upward for aggravating factors within the statutory limits.[161]

Moreover, for all types of offenses, the fact that the guideline sentence is based upon specific offense and offender characteristics established to the satisfaction of the court means that the prosecutor necessarily has a more active role in sentencing under the guidelines. Prosecutors may bargain and enter into stipulations with defense attorneys with respect to the applicability of particular guideline factors. Nevertheless, as the Commission's policy statements make clear, such stipulations are not binding upon the court, and the court is to determine independently the facts relative to sentencing under the guidelines with the aid of the presentence report and any other relevant sources of information.

IV. The Defense Attorney's Role Under the Guidelines

The defense attorney's role has also changed. Before accepting a negotiated plea, the defense attorney is expected to understand the implications of relevant conduct based on the count of conviction, so as to know the likely guideline range. Despite the fact that the guidelines are activated by the conviction charges, a reduced set of conviction charges will not necessarily result in a lower sentence. Here again, the offense conduct section of the presentence report becomes important as the context upon which the offense level is based. Before the sentencing guidelines, the defense attorney had an opportunity to affect the presentence report by including a defense version of the offense behavior and, perhaps as important, by assisting the probation officer in describing the personal and social history of the defendant. Because the guidelines, consistent with congressional intent, state that the majority of these personal factors (other than the defendant's criminal history) ordinarily are not relevant in determining the guideline range, the defense attorney's role as an advocate in the sentencing process has changed. Now, the defense attorney's main focus in shaping the presentence report is to have disputed portions of the offense conduct description resolved in favor of the defendant.

The defense attorney's role in sentencing hearings has also significantly changed under the guidelines system. The defendant's advocate now must be prepared to contest disputed guideline factors and underlying factual assertions in a much more active fashion; to a significantly greater degree, the advocate may offer evidence, call and/or cross examine witnesses and generally orient his/her presentation to specific aspects of the defendant's alleged offense behavior or prior record.

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[161]Note, however, that the Ninth Circuit has ruled that conduct embodied in dismissed counts may not be the basis for an upward departure. U.S. v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1991). Subsequently, the Ninth Circuit has extended its Castro-Cervantes rationale to also preclude conduct in dismissed counts from being considered under §1B1.3 (Relevant Conduct) to determine the guideline range. U.S. v. Fine, No. 90-50280 (9th Cir. Oct. 1, 1991).

These shifting roles and spheres of influence, brought about by the guidelines system, are a crucial part of the fabric that constitutes the story of guideline implementation and are the subjects under study in the following sections.

V. Fact-Gathering and Dispute Resolution

The following analysis consists of an examination of the process for gathering information in preparation of the presentence report and the resolution of disputes among the participants within the context of the sentencing process.

A. Fact-gathering and Preparation of the Presentence Report

As part of the inquiry into the effect of the guidelines on the preparation of the presentence report, judges were asked about changes that have taken place in the probation officer's role since the implementation of the guidelines.[162] Of the 47 judges who were asked this question, ten (21%) said that the probation officer's role had not changed. Of those who specified ways in which the probation officer's role had changed, five mentioned new responsibilities of guideline calculation, and three mentioned dispute resolution. Three or fewer judges also mentioned that more investigation, less supervision, more discretion (*e.g.*, "making findings"), and the loss of job function as a social worker are consequences of the guidelines system. Five judges said that the probation officer's job is more mechanical. The remaining responses (each made by only one respondent) included: the probation officers make more recommendations now, they are more active at the sentencing hearing, they discuss legal issues, they provide justification for departure, and they have become advocates and are no longer an arm of the court.

When asked directly about the function of probation officers under the guidelines, all groups of practitioners mentioned investigation, calculation of the guidelines, advising/informing the court, and dispute resolution. They also mentioned the importance of accuracy and objectivity/fairness; and defense attorneys and prosecutors took this opportunity to mention the influence probation officers have over the judge.

Probation officers seem to feel that they are successful within the context of their role as preliminary fact gatherers and independent investigators. Table 31 summarizes their responses to three interview questions regarding whether the information in the offense conduct section of the presentence report accurately reflects defendants' offense conduct.[163] Two-thirds of the 47 probation officers interviewed said unequivocally that the information in the presentence report reflects the offense conduct, except in the case of information that is legitimately withheld from use

[162]The question was worded as follows: "In your opinion, has this [function] changed significantly from what it was before the guidelines?" Only one judge had no opinion on this because his experience has been entirely under the guidelines.

[163]The three questions were worded as follows: "Does the presentence report generally reflect the total offense conduct?," "Are there stipulations in the plea agreement that shape or restrict the reporting of offense conduct or guideline application?," and "Other than stipulations, are there any restrictions on your ability to fully describe and report the offense conduct section of the presentence report?"

Table 31

Responses Given by Probation Officers that Indicate Whether the Information in the Offense Conduct of the Presentence Report Accurately Reflects Defendants' Offense Conduct

Response	Probation Officers (N=47)	
	N	(%)[a]
Yes, unqualified; or mentioned only §1B1.8	31	(66)
Yes, despite the government's unwillingness to provide information	3	(6)
Yes, personally, although respondent knew of some USPOs who have problems	2	(4)
Yes, despite the fact that relevant conduct is ambiguously defined	1	(2)
No, because of the government limiting information	8	(17)
No, because of stipulations in the plea agreement	2	(4)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

in determining the guideline range under §1B1.8[164] because of the defendant's cooperation. Only eight respondents said that they doubt the completeness of the description of the offense conduct in the presentence report because of the prosecutor's placing limits on the probation officers's access to information about the offense.

The importance of the prosecutor's roles as selector of charges, negotiator of plea agreements, and provider of information to the probation officer were described earlier in this section. A detailed analysis of the way prosecutors make decisions regarding charging and plea negotiations is contained in a separate section of this chapter (Part F - Charging and Plea Practices). The findings of the Implementation Study with respect to the government's role as an essential conduit of information are discussed below.

In order to pursue the issue of the prosecutor's role in sentencing vis-à-vis their ability to control the flow of information to the probation officer, assistant U.S. attorneys were specifically asked at the site interviews about the kinds of information they provide probation officers.[165] Probation officers, in turn, were asked about the circumstances under which the government tries to influence their guideline application.[166]

Responses to the question concerning information provided by the government are summarized in Table 32. Of the 56 assistant U.S. attorneys interviewed, 16 (29%) reported that they give probation officers "everything."[167] Another 13 (23%) indicated that they provide "everything," albeit with certain qualifications. The most commonly noted exceptions are grand jury material (five respondents) and information concerning an ongoing investigation (seven). Six respondents mentioned giving the probation officers everything they asked for, and another five said that they would give them anything they asked for, except something specific, such as "anything having to do with a Privacy Act issue," "grand jury material," or "my personal notes." Some prosecutors simply listed the items of information they give to the probation officer. Because it was impossible to tell whether this constituted virtually "everything," as in the first category, or excluded certain items, these responses were identified separately. A final and important category that emerged was the response that the prosecutors at times provide the probation officer with a summary of the offense.

[164]This guideline generally provides that information obtained from a defendant pursuant to a cooperation agreement may not be used to determine the guideline range of imprisonment.

[165]The question asked of assistant U.S. attorneys was, "What information do you provide the probation officer about a case?" Probation officers were asked about the kinds of information they use in writing the offense conduct section of the presentence report. The probation officers' responses consisted of a "laundry list" of information sources that were uninformative with respect to the subtleties of the exchange of information between the prosecutor and the probation officer. Thus, the data generated by this question turned out to be practically useless for addressing the issue of the prosecution's influence over the probation officer.

[166]This was a two-stage question. The first part was, "Does the prosecutor try in any way to influence your guideline application or sentence recommendation?" For those who answered in the affirmative, a follow-up question of "In what way?" was asked.

[167]One respondent qualified that response by saying, "I provide all the reports, my own version of the case, which includes what I would have proven if the case had gone to trial." This seems to indicate that he provides the probation officer with everything, including a summary version of the case.

Table 32

Information Provided the Probation Officer by the Prosecutor

Type of Information	AUSAs (N=56) N	(%)[a]
Everything; the case file	16	(29)
Everything, with certain qualifications	13	(23)
Everything the probation officer asks for	6	(11)
Everything the probation officer asks for, with certain qualifications	5	(9)
Specific items	12	(21)
A summary, or "official" version of the offense	15	(27)
Total substantive responses	67	(--)
No answer	3	(5)

[a] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S Sentencing Commission, 1990-91 Site Visit Interviews.

For example, one prosecutor said, "Virtually everything. I will try to condense information from larger cases." Another said that he would give them "the case file, absent the grand jury material. In certain cases, I have written a statement of facts for the file if I have strong feelings about it or if it's a novel or unique case." No inferences can be made about the extent of the editing in these cases.[168]

All probation officers interviewed were asked whether the government ever tries to influence their guideline application. Table 33 contains a summary of the responses to the follow-up question asked of those who said "Yes." Of the 35 probation officers (74%) who said that prosecutors try to influence their application of the guidelines,[169] almost half said it was done by informal means[170] such as "try[ing] to get us to see their point of view," and "Occasionally they try to ask what type of recommendation we have in mind. There is no pressure, but they offer an appropriate sentence hoping that we'll agree with them." The second category of response (12 or 34%) includes those that contained references to filing objections or trying to get information into the report. Five respondents (14%) in four separate sites mentioned that prosecutors try to influence their guideline application by putting a limit on their access to, or otherwise controlling, information. Some of these limits are legitimate under guideline 1B1.8 (mentioned by three of the five probation officers), but others are less so. For example, one probation officer said that "the case agents are good about what they allow us to look at, but the assistant U.S. attorney can put a clamp on it." The remaining three answers were largely unresponsive in that they either were concerned with the circumstances under which the prosecutor tries to influence the probation officer or simply did not choose to elaborate.

These data suggest that under certain circumstances prosecutors will provide the probation officer with a summary version of the offense, particularly if the case is large and/or complex. Probation officers report that those prosecutors who try to influence guideline application in the presentence report generally do so on an informal basis and through objections--essentially by "doing their job" of advocating for what they feel is an appropriate sentence. There is little evidence of prosecutors withholding information from the probation officer in order to influence guideline application and the probation officer's sentencing recommendation.

Defense attorneys were also asked about the kinds of information they provide the probation officer about a case. Three defense attorneys said that they either provide nothing at all or they only provide it on occasion. One of these attorneys said he preferred to have input to the presentence report through objections, and another said, "Basically, I don't provide any information. If the probation officer contacts me, I will provide whatever is needed if it doesn't violate client privilege." Nineteen attorneys (40%) said that they either provide "everything" (or everything that the probation officer asks for) or gave a list of information sources that suggests that they place no constraints on the information they provide to the probation officer. Five attorneys said that they provide information with a positive slant either specifically in order to get the reduction for

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[168]This seems particularly to be practiced in Sites 04, 06, and 09.

[169]Four probation officers said that assistant U.S. attorneys do not try to influence them but went on to describe the way(s) in which they do. These were categorized as if they had said "Yes" to the screening question.

[170]All responses were coded as "formal" unless the response was clearly informal. For example, a response such as "Getting the statement of facts with the guideline calculation included" was coded as formal since it was not clearly an informal means of persuasion, whereas "they may try to tell me what a bad guy the defendant is" was coded as informal.

Table 33

Prosecutors' Methods of Influence Over Probation Officers' Guideline Application

Method of Influence	Probation Officers (N=35)[a]	
	N	(%)[b]
Informal persuasion	15	(43)
Through formal mechanisms	12	(34)
By withholding information	5	(14)
Total substantive responses	32	(91)
No answer, unresponsive	3	(9)

[a] Twelve of the 47 respondents said that prosecutors do not try to influence their guideline application and were screened out.

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

acceptance of responsibility or role in the offense, or simply to put the defendant in a favorable light with the court. One attorney said, "Anything from the person's character to the things the guidelines thinks are important. There's still some humanity in the system. If the defendant is likable, it can affect the guidelines." Another said that he "provides a biography of the client, pictures of the family, military record, whatever is favorable."

Seventeen attorneys (35%) indicated that they limit the information in some way: either by providing an edited version of the facts or instructing their client not to say anything about the offense or criminal history. Four attorneys (from four different sites) said that the probation officers limit the information. When asked about the information they provide to the probation officer, one said, "In my view, not enough. The probation officers want to talk to all except the defense lawyer. They may take a statement from the defendant. Normally the probation officer is prosecutorially-oriented. The first time I talk with the probation officer is when I get notice that the presentence report is coming out. It's negatively slanted because all contacts are the government's."

B. Frequency and Methods of Dispute Resolution

Questions concerning the frequency of objections to the probation officer's application of the guidelines in the presentence report were included in the site survey.[171] Responses suggest that objections by defense attorneys are more frequent than by prosecutors. Eighty-nine percent of the probation officers responding to the survey (41 of 46) and 79 percent of the defense attorneys (33 of 42) indicate that disputes take place between probation officers and defense attorneys in at least some cases.[172] In contrast, only 48 percent of the probation officers (22 of 46) and 48 percent of the prosecutors (25 of 52) say that disputes between the probation officer and the prosecutor over guideline calculations take place in at least some cases. It is noteworthy that in three sites all probation officers surveyed indicated that disputes with prosecutors occur in some or more cases, and in all but two sites all probation officers reported having disputes with defense attorneys. In those same two sites, not all defense attorneys report having disputes in at least some cases.

In general, there is consistency in the way probation officers and prosecutors report the frequency of disputes between them over guideline application, although there are four sites where there are slight differences in either direction. Only three probation officers and four assistant U.S. attorneys indicated that disputes between them occur in many or most cases.

There is even greater consistency in responses between defense attorneys and probation officers. In only one site is there any difference, with private defense attorneys reporting fewer disputes than probation officers. Moreover, of the 33 defense attorneys who reported having disputes in at least some cases, 25 said that disputes occur in many, most, or all cases; and similarly, 30 of the 41 probation officers who report having disputes with defense attorneys in at least some cases, report having disputes in many, most, or all cases. These findings are consistent with interview data that

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[171]The question asked how often the respondent has disputes with other practitioners. Probation officers were asked two questions about the frequency of their disputes with prosecutors and defense attorneys; and prosecutors and defense attorneys were asked about the frequency of their disputes with probation officers. Respondents were offered the choices of "in no cases," "in few cases," "in some cases," "in many cases," and "in all or most cases."

[172]All federal defenders, except one who responded by "Don't Know," reported that they have disputes with probation officers over guideline application in at least some cases.

show that defense attorneys and probation officers have disputes with greater frequency than do prosecutors and probation officers.

The formal mechanisms available to resolve disputes among the probation officer, assistant U.S. attorney, and defense attorney are limited within the structure of the sentencing process. Most, if not all, districts have a local rule or order that establishes a precise structure and procedure for addressing disputes (objections to the presentence report). Following these procedures, all mentioned disputes are filed as objections to the presentence report. If unresolved by the probation officer, disputes become part of an addendum to the presentence report that is submitted to the court. Ultimate resolution of remaining disputes filed in the addendum rests with the court.

There appears to be some variation across probation officers and sites in how active the probation officer is in attempting to resolve disputes with and between the parties prior to submission of the issues to the judge for resolution. Some responses indicated meetings were frequently held between the parties to resolve issues, while other responses indicated that most disputes were documented and submitted to the court for decision-making. In general, it was found that prosecutors were more likely to have objections resolved by the probation officer prior to submission to the court than were defense attorneys.

Some responses indicated that even more informal methods for dispute resolution were used at times. These practices typically involved phone conversations or informal contacts with the probation officers to present alternative facts or calculations. Such contacts are more likely to be pursued by prosecutors than by defense attorneys. It appears that informal relationships already existing between many prosecutors and probation officers make these informal contacts with prosecutors more prevalent.

The judges in any court may influence the process of dispute resolution through the overall approach to dispute settlement at the sentencing hearing. In practice these procedures are not uniform. In response to a question asking, "What is the procedure in your courtroom for resolving disputes arising from presentence reports?," the following examples demonstrate the range of procedures employed by various judges:

> *We have a local rule. Defense files their objections and the government responds; however, the government doesn't generally respond. I work on the presentence reports and have an idea of what I'm going to do. It takes a lot of time to do this. I try not to have testimony. I try to maximize the time; I have 8-10 sentencings a week and spend a lot of time trying to deal with things beforehand.*
>
> *Generally, the attorney raises a dispute and presents what it is based on. Then I let the prosecutor answer. And then I let the case agent testify. It is a very loose operation.*
>
> *I treat it pretty formal. If both sides are adamant in their positions, I ask them if they are factually correct. I make a special finding, and if it calls for a change, I ask the probation officer to change it to conform to the finding.*

C. Disputes Between Probation Officers and Assistant U.S. Attorneys

In order to better understand the nature of disputes between the parties, prosecutors and probation officers were queried concerning the typical areas of dispute between them. In total, 56 assistant U.S. attorneys provided 87 responses and identified 13 topics of dispute. Table 34 contains a summary of the responses to the question asking prosecutors to identify the sources of

Table 34

Source of Dispute Concerning Guideline Application: Probation Officer and Assistant U.S. Attorney

Subject of Dispute	AUSAs (N=56)	
	N	(%)[a]
Role in the offense	13	(14.9)
Quality evidence, offense conduct (readily provable)	11	(12.6)
Obstruction of justice	10	(11.5)
Guideline calculation/application	10	(11.5)
Acceptance of responsibility	10	(11.5)
Relevant conduct	9	(10.3)
Amount of loss/drug	5	(5.7)
Offense characteristics	3	(3.4)
Departure	3	(3.4)
More than minimal planning	2	(2.3)
Gun enhancement	2	(2.3)
Criminal history	1	(1.1)
Unresponsive/other	8	(9.2)
Total	87[b]	

[a] Percents are based upon the total number of responses.

[b] Due to multiple comments, the number of respondents is fewer than the total number of responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

dispute. Over 70 percent of the responses could be placed in one of six categories. Three of these categories involved disputes over guideline adjustments for role in the offense, acceptance of responsibility, and obstruction of justice. These general sentence adjustments are clearly some of the most difficult issues the probation officer has to address. All participants recognize that these adjustments require a degree of subjective assessment, and therefore it is not uncommon for the probation officer to decline to make a determination on this point, leaving the disputed issue entirely to the court. Another frequent response, mentioned by nine respondents, was the issue of relevant conduct. In addition, 21 respondents gave very general responses that involved either quality of evidence and proof problems (n=11) or general guideline application concerns (n=10).

Although prosecutors most frequently report disputes involving application of role in the offense, these disputes generally appear to be easily resolved. As one assistant U.S. attorney reported:

> *In four or five defendant cases where you recommend a minor role on one and the probation officer disagrees, it doesn't result in any problem or even a call. If the government and the agents think it's appropriate, it is generally okay with the judge.*

In cases like this, the probation officer generally amends the presentence report based on informal discussions with the parties.

On the other hand, disputes involving relevant conduct and evidentiary issues such as what is "readily provable" are not so easily resolved between the parties. Unlike disputes over issues such as role in the offense, relevant conduct issues generally must be left to the court's resolution.

Responses by the probation officers are similar to those of the prosecutors (*see* Table 35). Perhaps the most interesting similarity is that role in the offense is the most frequently cited source of dispute by both assistant U.S. attorneys and probation officers. Four of the first five kinds of disputes mentioned by probation officers were also mentioned by prosecutors. To some extent, while they may disagree on the relative hierarchy of disputes, they identify the same general cluster.

The only notable exception involves the identification by the probation officer of plea bargaining as a source of dispute. Several examples illustrate these disputes from the perspective of the probation officer. Most responses are concise and to the point, much like the following: "Relevant conduct that's not in the plea agreement. Role adjustments. Sometimes we come out much higher than they anticipate." Another probation officer, in assessing the issue of disputes, said that most concerned "specific offense characteristics and enhancements which can go either way."

To some extent it seems that probation officers expect to have disputes with assistant U.S. attorneys, but only expect such disputes to be of certain types. That is, they do not consider it unusual to have disagreements over specific issues (*e.g.*, drug weight) as defined in the plea bargain, but would consider it uncommon for the assistant U.S. attorneys to challenge their calculation of criminal history.

D. Disputes Between Probation Officers and Defense Attorneys

Table 36 contains the most common disputes identified by defense attorneys. It includes four of the six topics most frequently mentioned by assistant U.S. attorneys, namely role in the offense, general guideline application, acceptance of responsibility, and relevant conduct. Although defense attorneys mentioned the same number of dispute subjects, they were more likely to give multiple responses, so that compared to assistant U.S. attorneys, a smaller number of respondents produced

Table 35

Source of Dispute Concerning Guideline Application: Probation Officer and Assistant U.S. Attorney

Subject of Dispute	Probation Officers (N=47)	
	N	(%)[a]
Role in the offense	14	(17.1)
Amount of loss/drug	14	(17.1)
Relevant Conduct	11	(13.4)
Acceptance of responsibility	10	(12.2)
Guideline calculation/application	8	(9.6)
Offense conduct	4	(4.9)
Plea bargain	4	(4.9)
Adjustments	4	(4.9)
Offense characteristics	3	(3.7)
Obstruction of justice	3	(3.7)
Gun enhancement	2	(2.4)
Departure	2	(2.4)
More than minimal planning	1	(1.2)
Criminal history	1	(1.2)
Other	1	(1.2)
Total	82[b]	

[a] Percents are based on the total number of responses.

[b] Due to multiple comments, the number of respondents is fewer than the total number of responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 36

Source of Dispute Concerning Guideline Application: Probation Officer and Defense Attorney

Subject of Dispute	Defense Attorneys (N=48)	
	N	(%)[a]
General sentencing/facts/information	16	(13.8)
Role in the offense	13	(11.2)
Guideline calculation/application	12	(10.3)
Amount of loss/drug	11	(9.5)
Acceptance of responsibility	11	(9.5)
Criminal history/background/characteristics	11	(9.5)
Relevant conduct	10	(8.6)
Obstruction of justice	5	(4.3)
More than minimal planning	4	(3.4)
Gun enhancement	3	(2.6)
Adjustments	3	(2.6)
Departures	3	(2.6)
Grouping	1	(.9)
Missing, not asked, unresponsive	13	(11.2)
Total	116[b]	

[a] Percents are based upon the total number of responses.

[b] Due to multiple comments, the number of respondents is fewer than the total number of responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

more responses. Overall, about 72 percent of the total responses are concentrated in the first seven subject categories.

The basic frequencies indicate that the most common source of dispute between the probation officer and defense counsel is over general sentencing facts and information, followed by the determination of role in the offense and general guideline application. The three most common disputes involve the determination of issues based on information obtained by the probation officer from the U.S. Attorney's office. While it is not uncommon for the probation officer to perform an independent investigation and gather data on these issues, it is likely that much of the necessary information is taken directly from reports supplied by the U.S. attorney's office.

The second cluster of disputed topics includes the amount of drugs or loss, acceptance of responsibility, determination of criminal history, and relevant conduct. In many courts, the reduction for acceptance of responsibility is awarded without dispute for all defendants pleading guilty. In those instances where acceptance of responsibility is disputed, the disputes generally focus on identifying the actions that display a true and fundamental sense of acceptance. The other subjects in this group, except for criminal history, rely substantially on information supplied by the assistant U.S. attorney to the probation officer and contained in the offense conduct section of the presentence report.

Examples of this general theme are represented in the following responses from defense attorneys in two sites:

> *More often in dispute over the contents of the report rather than application of the guidelines. Generally, I have problems with how they have stated the offense conduct and the specifics of the offense.*
>
> *[U]sually over the offense itself and what occurred. The probation officer takes offense conduct from the agent report which is one-sided and they provide subjective impressions of the individuals.*
>
> *It is my belief that probation officers view themselves as an arm of the Department of Justice.... The offense conduct section of the presentence report contains the prosecution version only -- not mine. In the personal history section, the probation officers use words like 'purports,' 'claims,' 'alleges'; the prosecution's information is represented as fact.*

Comparing the list of dispute subjects as identified by probation officers to that previously identified for defense attorneys reveals few differences (*see* Table 37). The general adjustment for role in the offense continues to be one of the most common sources of dispute, along with the determination of drug amount and the assessment of relevant conduct. The most obvious difference concerns the relative frequency of acceptance of responsibility. Probation officers indicate that this is one of the most common sources of dispute with defense attorneys, while defense attorneys indicate that it is less often a source of dispute. Some of this difference may reflect varying definitions concerning who should be eligible, and under what circumstances, to receive the adjustment for acceptance of responsibility. As one probation officer stated: "Defense attorneys don't like denial of acceptance of responsibility." Many defense attorneys assume that if their client pleads guilty, the reduction for acceptance of responsibility is guaranteed. Much to the dismay of defense attorneys, many probation officers do not share this assumption and occasionally recommend denying acceptance under these circumstances.

Table 37

Source of Dispute Concerning Guideline Application: Probation Officer and Defense Attorney

Subject of Dispute	Probation Officers (N=47)	
	N	(%)[a]
Role in the offense	23	(19.5)
Acceptance of responsibility	18	(15.3)
Amount of loss/drug	17	(14.4)
Relevant conduct	11	(9.3)
Guideline calculation/application	10	(8.5)
Criminal history	8	(6.8)
Obstruction of justice	6	(5.1)
Offense conduct	6	(5.1)
Adjustments	6	(5.1)
More than minimal planning	4	(3.4)
Departure	3	(2.5)
Offense characteristics	3	(2.5)
Other	3	(2.5)
Total	118[b]	

[a] Because of the possibility of multiple responses per respondent, total responses exceed the number of respondents.

[b] Due to multiple comments, the number of respondents is fewer than the total number of responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

In discussing the type of disputes they have with defense attorneys, many probation officers include some assessment of the defense attorneys' role in the sentencing process and a degree of speculation as to why defense attorneys make so many objections to the presentence report. When asked about disputes with defense attorneys, one responded with:

> *Always. It's a judgment call, especially acceptance, role in the offense. Some will not concede because they want to preserve issues for appeal.*
>
> *It depends on the defense attorney. There are two kinds of defense attorneys: those who know the guidelines and those that don't. Those that don't, object to everything; those that are knowledgeable, base objections on relevant conduct and how it is applied.*

And, finally, at least one probation officer offered a rather blunt evaluation of defense attorneys and disputes:

> *Are you kidding? In drug cases, one attorney always has a dispute no matter what you do, but most attorneys have no idea what's going on with the guidelines.*

VI. Perceptions of Influence Under the Guidelines

The interviews included questions concerning the areas of influence judges and each group of federal court practitioners has over the sentencing process. Such questions were asked of and about all judges and federal court practitioners.[173] The self-administered survey included questions regarding how much influence each group of practitioners has over the sentencing process.

A. Prosecutors' Areas of Influence

Prosecutors, defense attorneys, and probation officers were asked about the prosecution's areas of influence over the sentencing process. The responses to this question are summarized in Table 38. Each practitioner seems to have a unique perspective on the way that prosecutors influence the sentencing outcome. For example, charging is apparently seen as less important by the prosecutors than by defense attorneys, and probation officers seem to see plea negotiations as a sphere of considerable influence. Prosecutors view their expertise in guideline application and sentencing recommendations as a way to influence the sentence. All groups identified the ability to make a substantial assistance motion for reduction of sentence (§5K1.1) as an important area of influence. While these five areas of influence do not comprise the entirety of responses to this question, they are the main areas identified by the three groups of respondents.

1. Charging

Overall, respondents clearly believe that charging is the most important area of prosecutorial influence (*see* Table 38). Eighteen of the 56 prosecutors interviewed (32%) specified charging as

[173]The questions for assistant U.S. attorneys, defense attorneys, and probation officers were worded as follows: "What are the areas in which PRACTITIONERs have the greatest influence over the sentencing process?" For judges' influence, the wording of the question was "What are the areas in which judges exercise the greatest control over the sentencing outcome?" Judges were not asked to identify the areas of influence of the other actors.

Table 38

Prosecutors' Areas of Influence Over the Sentencing Process

Area of Influence	Respondent Type							
	AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Charging	18	(32)	28	(58)	18	(38)	64	(42)
Plea negotiations	9	(16)	5	(10)	23	(49)	37	(25)
Influencing other practitioners (unspecified)	1	(2)	3	(6)	1	(2)	5	(3)
Influencing the probation officer	8	(14)	8	(17)	5	(11)	21	(14)
Influencing the court	4	(7)	4	(8)	2	(4)	10	(7)
Determining appropriate guideline application	11	(20)	7	(15)	2	(4)	20	(13)
Making sentencing recommendations (other than 5K)	10	(18)	1	(2)	2	(4)	13	(9)
Making 5K motions	11	(20)	14	(29)	11	(23)	36	(24)
Other responses	8	(14)	7	(15)	5	(11)	20	(13)
Prosecutors have no influence	1	(2)	—	—	1	(2)	2	(1)
Total substantive responses	81	(—)	77	(—)	70	(—)	228	(—)
No answer/unresponsive/unclear	5	(9)	7	(15)	2	(4)	14	(9)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

important.[174] Most prosecutors said simply that "charging" or "the charging decision" was the most (or one of the most) important areas; others said "charging certain crimes and not others," and "how to charge so that 'no one can touch it.'" Most defense attorneys were general in their assessment, but a few were specific about how charging is influential: "Their weapon is the conspiracy count. They throw this in when they can't and don't have the evidence to prove the substantive offense"; "charging mandatory minimums"; and "the count which they choose to pursue. They know which guideline is higher." One response revealed some cynicism: "Creating offenses to threaten the client.... They have complete control over the sentence." Finally, probation officers report that they are aware of the prosecutors' power through the charging process. One probation officer's response reflected this understanding of the process: "In the initial process, if you look at what they charge, there's a lot of discretion which affects application of the guidelines, the statutory maximums, plea agreements, and stipulations."

2. Plea Negotiations

Plea negotiation is a second area of influence identified as important. Only nine of the 56 prosecutors (16%) identified this as important, whereas 23 of the 47 probation officers (49%) did so.[175] Those prosecutors who mentioned plea negotiations did so in a general way, although one prosecutor said, "The only place we have any effect is agreements that are contrary to the guidelines, such as writing the plea to certain counts." Defense attorneys were even less inclined to identify plea negotiations than were the assistant U.S. attorneys. Only five of them (10%) included any mention of plea negotiations. One private attorney saw the plea process as entirely under the government's control: "They determine the sentence by.... what they require the defendant to plead to." It is important to note that no federal defender identified this as important.

Probation officers see the plea agreement as something of particular importance that allows the prosecutor to influence the sentence. One reason may be that probation officers feel that the terms of plea agreements are a potential constraint upon their application of the guidelines. Every probation officer interviewed in the non-random site identified this as an area of influence for the prosecutor. Most probation officers were general in their responses (*i.e.*, they said "plea bargaining" or "the plea agreement"), but some specifically identified either dropping counts or stipulating to a particular guideline range.

3. Determining Appropriate Guideline Application

Eleven of the 56 prosecutors interviewed (20%) identified their ability to apply the guidelines correctly as having an effect on the sentence. Responses such as "sticking to the guidelines" and "how we do our guideline calculations" were included in this category, but it also included such responses as "relevant conduct" (especially by defense attorneys), "acceptance," "the determination

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[174]It should be noted that six, or 33 percent of the 18 responses, were from prosecutors in the one site that was selected to augment the random sample, whereas the prosecutors interviewed in that site represent only 16 percent of the total number of prosecutors interviewed, suggesting that prosecutors in this non-random site may approach the process differently.

[175]It should be noted that 26 percent of the responses in this category were made by probation officers in the one site that was selected to augment the random sample, again suggesting that prosecutors and their apparent influence are somehow different in this particular site. These officers accounted for only 13 percent of the total number of probation officers interviewed for the Implementation Study.

of role," and "weight of drugs." These are all factors that must be considered in the application of the guidelines and were cited by all three groups as an area over which prosecutors have influence.

4. Sentencing Recommendations

The ability of prosecutors to make sentencing recommendations was identified by ten prosecutors (18%) as an important source of influence, and several responses indicated that the court is particularly attentive to their sentencing and departure recommendations (other than substantial assistance). One typical response is, "If I recommend something, there's a strong possibility that the judge will follow." Probation officers and defense attorneys did not identify these recommendations as particularly important.

5. Motions for Substantial Assistance

All groups of federal court practitioners identified the prosecutor's ability to make a substantial assistance motion as important. Eleven of the 56 prosecutors (20%), 14 of the 48 defense attorneys (29%), and 11 of the 47 probation officers (23%) interviewed cited this with virtually no elaboration, apparently because the way it influences the sentencing decision is so obvious that it requires no further comment.

6. Summary

Charging and plea negotiations are seen by probation officers and defense attorneys as sources of influence for the prosecution, whereas prosecutors, while viewing these as important, have a unique view of their own power to apply the guidelines properly and "make them stick," as well as to recommend sentences and departures to the court successfully. The data suggest that all practitioners see prosecutors as having a significant amount of influence over the sentencing process due to control over the substantial assistance motion.

B. Defense Attorneys' Areas of Influence

Table 39 summarizes responses to the interview question regarding the ways in which defense attorneys are able to influence the sentencing process. As was the case with prosecutors, these data suggest that each group of practitioners sees the influence of defense attorneys somewhat differently. It is interesting to note that prosecutors and probation officers see defense attorneys as being effective in their advocacy skills with the court; probation officers see defense attorneys' effectiveness in their ability to negotiate a plea; prosecutors indicate that pushing for the application of certain guidelines is an important source of influence. Defense attorneys, on the other hand, see these areas of influence as less important, except perhaps in plea negotiations and recommending departure.

1. Charging

Charging is seen as a defense attorney area of influence only by defense attorneys, but only five of the 69 responses included any mention of charging. In order to obtain information about the defense attorney's role in the charging decision, defense attorneys were asked in the interview about their ability to influence the charging decision.[176] The responses are summarized in Table 40.

[176]This question was presented in two parts: "Do you have any influence over the charging decision?" and, for those who responded in the affirmative, "How?"

Table 39

Defense Attorneys' Areas of Influence Over the Sentencing Process

Area of Influence	Respondent Type							
	AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Charging; pre-indictment negotiations	—	(—)	5	(10)	—	(—)	5	(3)
Plea negotiations	9	(16)	15	(31)	20	(43)	44	(29)
Influencing other practitioners (unspecified)	2	(4)	3	(6)	2	(4)	7	(5)
The probation officer	6	(11)	7	(15)	7	(15)	20	(13)
The court	19	(34)	7	(15)	15	(32)	41	(27)
The prosecutor	4	(7)	3	(6)	1	(2)	8	(5)
Unspecified practitioner regarding guideline application	11	(20)	5	(10)	4	(9)	20	(13)
The client	6	(11)	4	(8)	2	(4)	12	(8)
Knowledge of the guidelines	3	(5)	3	(6)	4	(9)	10	(7)
Making sentencing recommendations	8	(14)	11	(23)	13	(28)	32	(21)
Defense attorneys have no influence	8	(14)	3	(6)	3	(6)	14	(9)
Other responses	3	(5)	3	(6)	—	(—)	6	(4)
Total substantive responses	79	(—)	69	(—)	71	(—)	219	(—)
No answer	1	(2)	6	(13)	—	(—)	7	(5)

[a] Column percents appear in parentheses and are based upon the number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 40

Defense Attorneys' Methods of Influence Over the Charging Decision

Method of Influence	Defense (N=34)[a]	
	N	(%)[b]
By acquiring a case early	26	(76)
By trying to persuade the government	6	(18)
By having a client who is willing to cooperate	3	(9)
Other responses	2	(6)
Total responses	37	(–)

[a] Fourteen of the 48 respondents said that they are not able to influence the charging decision and were screened out.

[b] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Fourteen of the 48 respondents (29%) said they had no influence. Twenty-six of those who said defense attorneys have some influence over charging (76%) said that by getting in early they are able to influence the charging decision. One private attorney said, "I do a lot of grand jury work so I do investigative work prior to charging, and this helps to narrow the scope of the charges." Fourteen of these respondents specifically noted that their ability to influence the sentence is rare or only occasional. One respondent pointed out that negotiating over the charge is frowned upon if policy is interpreted strictly. "That's a loaded question in that the prosecutor is supposed to charge the most readily provable charge. If pre-indictment negotiating is involved, it will often result in a different, or lesser charge." Only three attorneys mentioned the willingness of clients to cooperate as being a condition under which they are able to influence the charge. One federal defender noted that cooperation was the only circumstance under which he had any influence at all because of his usual inability to represent a client prior to indictment. Six defense attorneys noted in passing specific ways in which they are able to influence the prosecutor's charging decision. Several mentioned getting them to charge a pre-guideline count, and several others mentioned waiving the indictment and charging a misdemeanor.

Acquiring a case early is clearly the most important factor in the defense attorney's ability to affect the charging decision. Indigent defendants are thus at a disadvantage because of their dependence upon court-appointed counsel and federal defenders. But charging in general is not considered an important source of defense attorney influence, except by a few defense attorneys.

2. Plea Negotiations

Assistant U.S. attorneys view plea negotiations as a less important source of influence for defense attorneys than do probation officers and defense attorneys; nevertheless it is an area that is cited by many respondents. Probation officers, especially, view this as an important area of influence.[177] All three groups of practitioners were very general in citing this area of influence and gave such responses as "cutting a deal at the plea bargaining stage" (from a prosecutor), "getting the right plea agreement" (from a probation officer), and "You start with the plea negotiations and attempt to limit the offense level" (from a private defense attorney). A few respondents (two prosecutors and one defense attorney) said that agreeing to plead guilty was the crucial factor. Some respondents (two prosecutors, three defense attorneys, and one probation officer) were specific about the influence of defense attorneys over the contents of plea agreements, as illustrated by the following response from an assistant U.S. attorney: "In plea bargaining. A lot of times in reducing charges from felony to misdemeanor." One private attorney said that they had influence by "attempting to limit exposure and reducing ambiguities so that you don't have to fight about them later."

Many responses included in this category reveal that the dropping or reduction of charges are critical negotiating points. It is therefore perhaps an artificial distinction to separate charging and plea negotiations as areas of influence in Table 39. Nevertheless, these respondents chose to identify areas of influence as occurring within the context of plea negotiations; therefore, their responses are identified accordingly.

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[177]It should be noted that six (30%) of the 20 probation officers who cited this as an area of influence were from the one site that was selected to augment the random sample. (Probation officers interviewed in this site represent only 13 percent of the total number of probation officers interviewed.) Furthermore, all probation officers in this site mentioned plea negotiations as an area of influence.

3. Influencing Other Practitioners

Using their powers of persuasion, especially with the court, is a third way in which defense attorneys are able to influence the sentencing process. They are also felt to have some influence over the application of specific guidelines, especially role in the offense and acceptance of responsibility.

Both prosecutors and probation officers report that defense attorneys are able to influence the court, but this belief is not shared to the same extent by defense attorneys themselves. Most responses in this category included some mention of the sentencing hearing and arguing before the court; and many respondents mentioned their ability to produce letters of reference. One assistant U.S. attorney asserted that this can still make a difference in a marginal case:

> *They still can do their somewhat traditional role of casting the defendant in a particular light by gathering letters or playing on their family history. We generally do not rebut. If the crime doesn't grab the judge, they can affect the sentence.*

Several defense attorneys mentioned getting the judge to sentence at the bottom of the range.

Prosecutors apparently are aware of defense attorneys' efforts to influence guideline application at virtually every stage of the process, beginning with plea negotiations. Chapter Three adjustments and criminal history, especially, are seen as being susceptible to defense attorneys' influence.

Probation officers report that guideline application is another area of influence for defense attorneys. Table 41 summarizes probation officers' responses to the question concerning defense attorneys' influence over the probation officer's guideline application.[178] Forty-one probation officers (87%) reported that defense attorneys try to influence their application of the guidelines or sentence recommendation. Fourteen of the 41 officers (34%) reported that they do it informally: "They come in and make their pitch, they try to tell us he's a minor participant and try to minimize behavior." Fourteen probation officers (34%) reported that defense attorneys attempt to influence them through formal mechanisms such as sentencing memoranda and objections. Another 14 (34%) indicated strategies that were neither clearly formal nor informal so were categorized separately. A typical response of this kind was, "Tries to reduce sentencing exposure and to reduce defendant's role in the offense."

4. Other Responses

Other responses by prosecutors consisted of references to the defense attorneys' knowledge of the guidelines and their ability to make recommendations for departure, appeal unfavorable sentences, and advocate for the defendant at conferences with probation officers and prosecutors. Three defense attorneys said that their willingness to go to trial gave them some influence in the sentencing process.

Fourteen respondents (eight prosecutors, three private defense attorneys, and three probation officers) (9%) said that defense attorneys have little or no influence in the sentencing process. One

[178]Probation officers were asked this question in two stages: "Does the defense attorney try in any way to influence your guideline application or sentence recommendation?" and for those who responded in the affirmative, "In what way?"

Table 41

Defense Attorneys' Methods of Influence Over Probation Officers' Guideline Application

Method of Influence	Probation Officers (N=41)[a]	
	N	(%)[b]
Informal persuasion	14	(34)
Through formal mechanisms	14	(34)
Neither formal nor informal means	14	(34)
No answer	2	(5)
Total responses	44	(–)

[a] Six of the 47 respondents said that defense attorneys do not try to influence their guideline application and were screened out.

[b] Column percents appear in parentheses and are based on the total number of respondents. Percents will add up to more than 100 because three respondents mentioned both formal and informal means.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

assistant U.S. attorney said, "Very little -- the guidelines are killing them." One private attorney became expansive on this topic:

> *I wish I thought I did. I don't think we do like we did under the parole guideline system where we could try to persuade the judge. Before the guidelines we put together a sentencing memo that tried to put together a good picture of the defendant. Now this and letters don't mean much anymore. The defendant being a good man and a family man doesn't mean anything anymore.*

5. Summary

Prosecutors see defense attorneys' main sources of influence as their ability to advocate for guideline adjustments (mainly for role in the offense and acceptance of responsibility) and their talent for arguing vigorously before the court. Probation officers see them as having influence in plea negotiations, courtroom tactics, and raising issues for departure. Defense attorneys themselves see their greatest influence coming from their ability to gain concessions through the plea negotiation process. It is noteworthy, however, that defense attorneys alone (n=5) indicate a belief they have some influence on the charging decision. Fourteen of the 151 respondents interviewed (9%) said that defense attorneys have no influence to speak of; as a group, prosecutors in particular seem to view defense counsel as having little or no influence under the guidelines system.

C. Probation Officers' Areas of Influence

The following discussion focuses on the probation officer's areas of influence under the guidelines system. The data that form the basis for the analysis are derived from interview questions asked of prosecutors, defense attorneys, and probation officers concerning probation officers' influence in the sentencing process under the guidelines.[179] The areas of influence mentioned in the interview are identified and discussed below (*see* Table 42).

1. Conducting the Presentence Investigation

Eleven of the 56 prosecutors interviewed (20%) and 16 of the 47 probation officers interviewed (34%) view the probation officer's ability to conduct an independent investigation into the circumstances and conduct of the offense and report on that to the court as an important source of influence; however, only two of the 48 defense attorneys interviewed (4%) identified this as an area of influence.

2. Providing Information to the Court

All groups of practitioners, but particularly probation officers, view providing information to the court as an important source of influence. Prosecutors mention the judges' dependence on probation officers and the information they provide through the presentence report. These responses ranged from occasional to unequivocal dependence. One said, "If the judge does not have a clue, he defers to the probation officer for interpretation of the guidelines. I've seen this happen a number of times. Their judgment sentences the person." Another said "Whatever side they come down on with the facts, the judges listen to them." Several mentioned how judges differ in their reliance on the

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[179]These questions were worded as follows: "What is the main function of the probation officer in the sentencing process under the guidelines?" and "What are the areas in which probation officers have the greatest influence over the sentencing process?"

Table 42

Probation Officers' Areas of Influence Over Sentencing

Area of Influence	Respondent Type							
	AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Preparing the report, providing information; independent analysis	11	(20)	2	(4)	16	(34)	29	(19)
Providing information to the court	14	(25)	14	(29)	20	(43)	48	(32)
Private interaction with the judge	5	(9)	5	(10)	1	(2)	11	(7)
Determining appropriate guideline application	39	(70)	26	(54)	21	(45)	86	(57)
Making sentencing recommendations	13	(23)	11	(23)	15	(32)	39	(26)
Interviewing the defendant	3	(5)	—	—	2	(4)	5	(3)
POs have little or no influence	—	—	3	(6)	3	(6)	6	(4)
Other responses	—	—	—	—	1	(2)	1	(1)
Total substantive responses	85	(—)	61	(—)	79	(—)	225	(—)
No answer/unresponsive	2	(4)	5	(10)	—	—	7	(5)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

probation officer. Defense attorneys' responses also indicated that judges rely on probation officers. Two (in two separate districts) referred to the judge's reliance on information in the presentence report in religious terms: "The judge reads the presentence report like a Bible"; and "the presentence report is treated as 'gospel'." Probation officers see their ability to provide the court with an accurate, impartial report as an important source of influence. One said, "The greatest influence of the probation officer is in the presentation of information to the court in the presentence report, how well the information is presented to the court in each section, and the reason for specific recommendations."

Five prosecutors and five private defense attorneys specified that they view the probation officer's ability to communicate confidentially with the judge as an area of influence. It is noteworthy that no federal defender mentioned this as an area of influence.

3. Determining Appropriate Guideline Application

Assistant U.S. attorneys see probation officers' strengths mainly in terms of their control over guideline application. This is true for defense attorneys and probation officers as well, but is particularly pronounced for prosecutors. Some prosecutors responded in general terms, such as "working up the numbers." Other prosecutors cited specific guidelines, such as acceptance of responsibility (9 or 16%), role in the offense (10 or 18%), and relevant conduct (11 or 20%).

Defense attorneys were evenly split with respect to those who included specific guidelines in their responses and those who simply said they calculate the guidelines. Seven of the 48 (15%) mentioned relevant conduct, and five (10%) said that determining acceptance of responsibility is an important source of influence. Otherwise, defense attorneys' responses in this category are general and indicate only that the probation officers' calculation of the guidelines is the way (or among the ways) they influence the sentence.

Probation officers for the most part see their influence in terms of simply applying the guidelines. They generally do not elaborate except to say that judges depend on them for correct calculations. One probation officer said that "[t]he probation officer decides borderline issues in calculating the guidelines, which the courts tend to uphold. The judge relies on the probation officer and usually follows their recommendation."

4. Making Sentencing Recommendations

Probation officers typically make a sentence recommendation to the judge, just as they generally did prior to the guidelines. This recommendation typically consists of a documented recommendation of a sentence within the guideline range (or of a departure), including the appropriate alternative if options are available; a term and conditions of supervised release; a fine; a special assessment; and whether the offender should be permitted to surrender him/herself voluntarily. In most jurisdictions in which practitioners were interviewed, this recommendation is confidential. This responsibility of recommending a "sentencing package" for a given offender vests the probation officer with considerable influence. Most who identified recommendations as a source of influence did so in general terms, but a few respondents (one prosecutor, three defense attorneys, and three probation officers) mentioned making recommendations for departure. One probation officer said, "Making well-documented and well-justified recommendations for departure."

5. Other Responses

Other responses included five mentions of the probation officer's access to the defendant as a source of influence. Three defense attorneys and three probation officers feel that the probation officer has no significant influence. Two of the responses were made by probation officers interviewed in the non-random site. One of these respondents said, "We don't. We've been told by two judges that they'll always follow the plea agreement." One federal defender in another site said that in "this district they don't have tremendous influence.... The judge usually sides with the parties."

6. Summary

These data indicate that probation officers' increased responsibilities as "guideline experts and preliminary fact finders of the court" (AO, 1988) are seen by some as having significant influence. Mainly, their influence is seen to lie in preparing the presentence report, having access to the judge, and applying the guidelines.

D. Judges' Areas of Control Over the Sentencing Outcome

Table 43 contains a summary of the responses provided by assistant U.S. attorneys, defense attorneys, and probation officers to the question concerning the areas of control that judges have over the sentencing outcome.[180] It is immediately apparent from Table 43 that the ability to make decisions concerning guideline application, departure, and selection of a specific sentence within the guideline range are seen as the judges' main areas of control under the guidelines system.[181]

1. Guideline Application

Many respondents reported that they view guideline application in general and decisions concerning the application of specific guidelines in particular to be an important source of judicial control over the sentence. The responses of 15 of the 56 prosecutors (27%) and ten probation officers (21%) are included in this category. It is important to note that no defense attorneys mentioned this to be an area of control for judges.

Six of the 56 prosecutors (11%) and seven of the 47 probation officers (15%) gave very general responses, and the precise nature of the judges' control was indeterminable from the response as recorded. For example, one assistant U.S. attorney said, "Which way they go in the two or three areas in each case where there is some give." Other responses included "application issues" (from a probation officer) and "reviewing the guideline calculations by the probation officer" (from a prosecutor). The common thread in these responses is the identification of guideline application as being ultimately up to the judge.

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[180]This question was worded as follows: "What are the areas in which judges exercise the greatest control over the sentencing outcome?"

[181]It is noteworthy that the responses concerning the sources of judges' control over sentencing were generally more straightforward than those for prosecution and defense. Perhaps the actors are more accustomed to thinking about judges' control (or loss thereof) and are able to articulate it more succinctly.

Table 43

Judges' Areas of Control Over Sentencing

Area of Control	Respondent Type							
	AUSA (N=56)		Defense (N=48)		Probation Officer (N=47)		Total (N=151)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Guideline application	15	(27)	—	—	10	(21)	25	(17)
Fact finding (unspecified)	8	(14)	3	(6)	4	(9)	15	(10)
Dispute resolution	8	(14)	6	(13)	6	(13)	20	(13)
Deciding where (within the range) to sentence	16	(29)	10	(21)	6	(13)	32	(21)
Ability to depart	15	(27)	19	(40)	14	(30)	48	(32)
Acceptance of plea	2	(4)	3	(6)	10	(21)	15	(10)
Substantial assistance	2	(4)	4	(8)	1	(2)	7	(5)
Guideline manipulation	4	(7)	2	(4)	—	—	6	(4)
Other responses	1	(2)	2	(4)	—	—	3	(2)
Total substantive responses	71	(—)	49	(—)	51	(—)	171	(—)
No answer; unresponsive	4	(7)	11	(23)	8	(17)	23	(15)

[a] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

A second group of responses included within this category consists of those that mentioned a specific guideline issue, such as role or relevant conduct. Nine of the 56 prosecutors (16%) and three of the 47 probation officers (6%) gave responses that are included in this category. Most refer to the application of Chapter Three adjustments and relevant conduct.

2. Fact Finding

These data suggest that prosecutors may view fact finding as a more significant area of judicial control over sentencing than do defense attorneys (eight of the 56 prosecutors [14%] versus three of the 48 defense attorneys [6%]). Responses by assistant U.S. attorneys included "factual determinations" and "they have to buy onto the facts." One probation officer said, "They make findings relative to the guidelines" and one defense attorney said, "Judges have a great deal of power in fact-finding on relevant conduct."

3. Dispute Resolution

This area of control was mentioned by relatively few respondents (eight of 56 prosecutors [14%], six of 48 defense attorneys [13%], and six of 47 probation officers [13%]). The responses contained in this category range from explicit references to dispute resolution ("Ruling on exceptions" -- from a defense attorney) to oblique references ("To decide who computed them correctly" -- from a prosecutor).

4. Selecting a Sentence within the Range

This is seen as a significant source of discretion by prosecutors (16 of the 56 [29%]); but defense attorneys and probation officers are less inclined to see this as important (ten of 48 [21%] and six of 47 [13%], respectively). Responses in this category were straightforward, consisting of remarks such as "Deciding whether to sentence at the low end or the high end of the range" (from a defense attorney) and "Where to sentence within the range" (from an assistant U.S. attorney).

5. Ability to Depart

All three groups of practitioners -- prosecutors, defense attorneys, and probation officers -- view the judge's ability to depart as an important means of control. Most responses are straightforward and do not differ according to type of respondent.

6. Acceptance of Pleas

Only probation officers recognized the ability of judges to reject plea agreements as an important source of control under the guidelines (ten of the 47 probation officers interviewed [21%]). One probation officer said, "Accepting pleas. Accepting stipulations. Then probation officers have to use them." Another response was, "Routinely don't enter into [Rule 11] (e)(1)(C) pleas."

7. Other Responses

Other responses included seven mentions of the judges' ability to grant a reduction for substantial assistance as an important source of judicial discretion.

Four assistant U.S. attorneys and two defense attorneys indicate that judges attempt to gain control over sentencing through manipulating the guidelines. The four prosecutors' responses are as follows: "Judge 'H' is soft and tries to work the guidelines to what is an acceptable sentence to

him"; "The sentences are so long that the court tries to avoid the guidelines"; "One judge does not believe in the guidelines, and will circumvent the guidelines if given the opportunity"; and "You never know what the judge is thinking. They can manipulate the system. Sometimes you have to appeal to keep the judge honest." A private defense attorney said, "There was one case where a judge gave probation and not a guideline sentence. They can tinker with the guidelines to make it the way they want. Generally judges follow the guidelines to the letter." Finally, a federal defender said, "If he can't in good conscience give career offender, the judge will be creative and find grounds for departure." While these few responses indicate that some practitioners are aware of the potential for manipulation, most qualify their answers by saying that it is done only for extraordinarily long sentences, by a particular judge, or in career offender cases.

8. Summary

Prosecution and defense see judges' areas of control quite differently. Prosecutors see the judge's role as final arbiter of the guidelines and their ability to depart as an important source of influence, whereas defense attorneys see only departure as significant. Probation officers resemble prosecutors in the pattern of their responses, with the additional factor of the judges' ability to reject pleas cited as important.

VII. Summary and Conclusions

As was expected, the activities and roles of those involved in the sentencing process have changed under the guidelines system. While the general responsibilities have not shifted, the activities have become more formalized and oriented toward fact-finding that impacts on application of the guidelines.

These changes have placed the probation officer in a more independent role vis-à-vis the prosecution and defense attorneys. As preparers of the presentence report and independent guideline advisors to the court, they are more active in synthesizing information from the parties and other sources for purposes of guideline calculations. They also play a critical role in making tentative recommendations to the court in terms of disagreements by the parties with the presentence report.

Disputes over guideline calculations have now become a familiar occurrence among the participants in the sentencing process. Anticipating this circumstance, formal procedures for dispute resolution have been instituted as part of the sentencing and court structure. Variations among probation officers and sites are found in methods used to resolve objections with the presentence report prior to submission to the court for final resolution. These methods vary from merely the manner in which the disputes are presented to the court to extensive pre-hearing meetings with the parties.

Most responses indicate that plea agreements that do not adequately represent the seriousness of the actual offense conduct are infrequent in most sites, but a few probation officers find this issue troublesome, particularly in the preparation of presentence reports and guideline calculations. However, the great majority of probation officers feel that presentence reports reflect the total offense conduct and that U.S. attorneys are typically forthright in their presentation of facts.

Interactions were particularly troublesome in the one non-random site where some respondents indicate that the parties negotiate plea agreements that do not reflect the entire offense behavior. These plea agreements are generally accepted by the court, notwithstanding the probation officer's

efforts to apply the guidelines correctly, creating conflict among probation, prosecution, defense attorneys, and to some degree the court.

Table 44 contains a summary of data from the site survey that reflects the relative influence practitioners have over sentencing. Judges and practitioners were asked how much influence they and the others had. (For example, defense attorneys were asked how much influence they, prosecutors, probation officers, and judges have over the sentencing process.) Responses were scored from low (1) to high (5) according to how the respondent answered the question.[182] Assistant U.S. attorneys give judges and probation officers a very high rating, with themselves not too far behind; defense attorneys rate prosecutors and probation officers very high; and probation officers rate judges and prosecutors the highest, with themselves not far below that. Defense attorneys are rated lowest by everyone, and the lowest score of all is of defense attorneys by defense attorneys. In fact, it is perhaps most noteworthy that each group of practitioners rates themselves as having less power than other practitioners.

All parties are seen as having some influence over the sentencing process, although defense attorneys seem to feel most powerless at the sentencing stage. Responses indicate that prosecutors are generally seen to influence sentencing through charging, plea negotiations, advocacy of guidelines calculations, sentencing recommendations, and motions for substantial assistance. Defense attorneys are seen to be most influential in the areas of plea negotiations and advocacy for reductions in guidelines calculations. Probation officers are most influential in conducting the presentence investigation, providing information to the court, determining the appropriate guideline range, and making sentencing recommendations. Finally, judges have control in the areas of guideline application, fact-finding, dispute resolution, selecting a sentence within the range, departing, and acceptance of pleas.

[182]The questions about prosecutors, probation officers, and defense attorneys were worded as follows: "In your experience with the guidelines, how much influence do practitioners have over the sentencing process?" The wording of the question about judges was, "In your experience with the guidelines, how much control do judges exercise over the sentencing outcome?" The pre-coded answers were "very great," "great," "moderate," "some," and "little or none." Scores of 5, 4, 3, 2, or 1 were assigned, respectively. The answers of those few respondents who circled two responses were assigned a score midway between the two responses selected (*e.g.*, if "some" and "moderate" were both circled, a score of 2.5 was assigned).

Table 44

Average Amount of Influence Practitioners Have Over Sentencing[a]

Practitioner	Respondent Type			
	AUSA (N=52)	Defense (N=42)	Probation Officer (N=46)	Total (N=140)
Assistant U.S. attorney	3.4	4.2	3.6	3.7
Defense attorney	2.5	2.3	2.8	2.5
Probation officer	3.8	4.2	3.4	3.8
Judge	3.9	2.8	3.8	3.5

[a] Five pre-coded responses ranged from "very great," with an assigned score of five, to "little or none," with an assigned score of one.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Surveys.

Part F
Charging and Plea Practices

Introduction

During its lengthy consideration of the Sentencing Reform Act, Congress acknowledged that prosecutorial discretion to select charges and to negotiate limiting plea agreements could be the "Achilles' heel" of the sentencing guidelines system it was authorizing.[183] The concern was that the prosecutor could use one or more of the tools traditionally at his or her discretion to circumvent the guidelines and undermine the goals of the Act, thereby reintroducing unwarranted sentencing disparity. Without some check on plea bargaining, it was thought "prosecutorial decisions — particularly decisions to reduce charges in exchange for guilty pleas — could effectively determine the range of sentences to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system."[184]

This concern prompted Congress to direct the Sentencing Commission to promulgate policy statements to be used by federal courts in deciding whether to accept plea agreements.[185] The intention was that this approach provide "an opportunity for meaningful judicial review of proposed charge-reduction plea agreements, as well as other forms of plea agreements, ... while at the same time [guarding] against improper judicial intrusion upon the responsibilities of the Executive Branch."[186] Underscoring the importance of the interaction between the guidelines system and plea bargaining, Congress directed that the Commission's four-year evaluation report include "an evaluation of the impact of the sentencing guidelines on prosecutorial discretion [and] plea bargaining."[187] In furtherance of that objective, this section examines the prosecutorial charging process within the guidelines system. Chapter Six evaluates the impact of the guidelines on prosecutorial discretion and plea bargaining.

I. Commission Response to Congressional Concerns and Directives

Very early in its deliberations, the Commission recognized the critical relationship between sentencing guidelines and the exercise of prosecutorial discretion, including plea bargaining. The Commission made the general subject of plea agreements the focus of one of its five hearings in

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[183]*See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 63, 167 (1983).

[184]*Id.*, at 167.

[185]28 U.S.C. § 994(a)(2)(E) directs the Commission to issue policy statements to guide courts in exercising "the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1)."

[186]S. Rep. No. 225, at 167.

[187]Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §236, 98 Stat. 1837, 2033 (1984).

1986 on issues central to guidelines development.[188] It debated at length the relative advantages and disadvantages of a charge offense versus real offense sentencing guidelines system, developed alternative guidelines drafts and sought public comment on them,[189] and wrote and published for comment proposed policy statements on court review and acceptance of plea agreements to comply with the statutory mandate.[190]

The Commission ultimately decided on a multi-pronged strategy designed to minimize the likelihood that charging and plea practices would circumvent the guidelines and thereby impede the objectives of the Act. First, the Commission developed and implemented a guidelines model that, while starting with the offense of conviction, emphasizes determination of the applicable guidelines range according to the defendant's actual offense conduct and criminal history. One of the principal reasons for devising such a system is to limit the degree to which the prosecutor's choice of charge will ultimately dictate the guideline sentence. Chapter Two (Federal Sentencing Reform) more fully describes features of the guidelines model employed by the Commission. Particularly important from the standpoint of limiting the impact of the charge/offense of conviction are: (1) the use of "generic" guidelines organized by offense type (*e.g.*, fraud) that typically apply to any offense of that general type, regardless of the particular statute charged by the prosecutor; (2) a central "relevant conduct" guideline (U.S.S.G. §1B1.3) that defines the parameters of the real offense conduct and other information the court is to consider in determining the guideline range;[191] and (3) the use of cross-references from the guideline most applicable to the offense of conviction to another guideline that more appropriately sanctions the actual offense conduct.[192]

Second, the Commission issued policy statements, as directed by 28 U.S.C. § 994(a)(2)(E), governing the court's consideration and acceptance of plea agreements. The Commission viewed its initial four policy statements, as set forth in Chapter Six, Part B of the Guidelines Manual, as a substantial "first step" toward implementing the congressional goals of ensuring that plea practices appropriately function within, but do not undermine, the guidelines system. As suggested by the relevant legislative history, the policy statements are intended to reinforce judicial authority and responsibility to examine and reject, if necessary, proposed plea agreements.

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[188]At the public hearing on plea agreements held in Washington, D.C., on September 23, 1986, the Commission heard testimony from a variety of witnesses representing prosecutorial, defense, and academic viewpoints.

[189]*Compare* United States Sentencing Commission, Preliminary Draft Sentencing Guidelines (September 1986) (describing a proposed modified real offense guideline system) *with* United States Sentencing Commission, Revised Draft Sentencing Guidelines (January 1987) (describing a proposed offense-of-conviction guidelines system with some real offense features).

[190]*Id.*, Preliminary Draft at 166, Revised Draft at 173-74.

[191]For a discussion of the purposes and operation of this key guideline, *see* Wilkins and Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495 (1990).

[192]The Commission has used cross references to other guidelines for multiple reasons. This reference is only intended to point out that one effect, and sometimes one of the underlying rationales, is to limit the impact of charge bargaining.

The first policy statement governing plea agreement procedure, §6B1.1, requires "disclosure of the agreement in open court or, on a showing of good cause, *in camera*."[193] For non-binding recommendations pursuant to Federal Rule of Criminal Procedure 11(e)(1)(B), the court is required to advise the defendant of the non-binding nature of the agreement and that the defendant may not withdraw the guilty plea even if the court refuses to follow the recommendation agreed to by the parties.[194] Finally, this policy statement instructs the court to defer a decision on acceptance of Rule 11(e)(1)(B) non-binding recommendations and agreements pursuant to Rule 11(e)(1)(A) and (C) until consideration of the presentence report, if one is required under §6A1.1.[195] Thus, the salient features of this particular policy statement are full disclosure of any plea agreement and the assurance that the court will have the benefit of the presentence report before deciding whether to accept the recommendation or plea agreement.

Policy Statement 6B1.2 articulates the Commission standards for acceptance of plea agreements. If the agreement calls for a charge bargain — the dismissal of charges or an agreement not to pursue charges — the court may accept it if it determines "the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing."[196] If the agreement includes a Rule 11(e)(1)(B) non-binding recommendation or a Rule 11(e)(1)(C) binding sentence agreement, the court may accept it if it produces a sentence that is within the applicable range or it may depart from the applicable range "for justifiable reasons."[197] Justifiable reasons are those necessary under the statute and the guidelines to support a departure from the guideline range.[198]

Policy statement 6B1.3 restates the requirements under Rule 11(e)(4) of the Rules of Criminal Procedure that court rejection of a charge reduction (Rule 11(e)(1)(A)) or specific sentence (Rule 11(e)(1)(C)) agreement generates an opportunity for the defendant to withdraw his guilty plea.

Policy Statement 6B1.4 governs the use of stipulations of "facts relevant to sentencing" that will often be made as part of a plea agreement. Factual stipulations envisioned by §6B1.4 are not binding on the court and are only part of the relevant information the court will consider in imposing sentence. The Commission instructs that factual stipulations shall set forth the relevant facts of the actual offense conduct and offender characteristics, shall "not contain misleading facts," and shall "set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate."[199] Stipulations should also identify any facts that

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[193]U.S.S.G. §6B1.1(a), p.s. *See also* Rule 11(e)(2), Fed. R. Crim. P.

[194]U.S.S.G. §6B1.1(b), p.s.

[195]U.S.S.G. §6B1.1(c), p.s.

[196]U.S.S.G. §6B1.2(a), p.s.

[197]U.S.S.G. §6B1.2(b)(2) and (c)(2), p.s.

[198]The Commentary to §6B1.2 was amended effective November 1, 1989, to clarify that the meaning of "justifiable reasons" for a plea bargain departure is the same as that necessary for any other departure (*i.e.*, that such departure is authorized by 18 U.S.C. 3553(b)). *See generally* Chapter 1, Part A (4)(b)(Departures).

[199]U.S.S.G. §6B1.4(a)(1), (2) and (3), p.s.

remain in dispute and should ordinarily be in writing.[200] The Commission strongly emphasized that the "overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties."[201]

A third component of the Commission's strategy to ensure that prosecutorial charging and plea negotiation discretion properly mesh with the guidelines has been continued close cooperation with the Attorney General, through his *ex officio* representative on the Commission, in the implementation of appropriate Department of Justice policies on charge selection and plea bargaining practices. In meetings and discussions both before and after the implementation of the guidelines, the Commission has communicated to the Department of Justice its desire that the Department forcefully articulate to prosecutors plea policies that are consistent with the guidelines. In response, the Department has imposed, since the inception of guidelines sentencing, national plea bargaining standards. On November 1, 1987, the day the guidelines went into effect, the Department of Justice issued the "Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984." This so-called "Redbook" was followed two days later by a memorandum by then-Associate Attorney General Stephen S. Trott entitled "Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines." Attorney General Dick Thornburgh subsequently issued an updated memorandum on March 13, 1989 ("Memorandum to Federal Prosecutors"), and one dealing with firearm offenses on June 16, 1989 ("Plea Bargaining in Cases Involving Firearms").

The Justice Department's national plea bargaining policies require prosecutors to follow the letter and spirit of the Commission's policy statements on plea agreements by fully disclosing all relevant information to the court and by negotiating plea bargains that do not undermine the guidelines: "Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve."[202] Significantly, prosecutors must receive supervisory approval for deviations from the Department's plea bargaining policies.

The basic charge selection policy of the Department of Justice is that:

> *a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct.... The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability to prove a charge for legal or evidentiary reasons.*[203]

Regarding charge-reduction agreements, Department policy permits prosecutors to agree to the dismissal of any charges that do not change the guideline sentence. In addition, if circumstances change — the discovery of new evidence, the need to protect a witness' identity, or the like — the prosecutor may agree to change the plea agreement accordingly.

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[200]U.S.S.G. §6B1.4, p.s.

[201]U.S.S.G. §6B1.4, comment., p.s.

[202]Dick Thornburgh, Attorney General, Memorandum to Federal Prosecutors (March, 13, 1989).

[203]*Id.*

With respect to sentence bargains, the Justice Department instructs prosecutors, absent a defendant's assistance in the investigation or prosecution of other criminals under U.S.S.G. §5K1.1, p.s., to only make Rule 11(e)(1)(B) (recommendations of a sentence) and Rule 11(e)(1)(C) (binding sentence) agreements if the terms of the agreement conform to the appropriate guideline range or depart for a legitimate reason consistent with the Sentencing Reform Act. The incentives for the standard plea agreement permitted by the Department consist of the guidelines' reduction of two offense levels for acceptance of responsibility, a recommendation that the court sentence at the lower end of the guideline imprisonment[204] and fine ranges, and the least restrictive sentencing option permitted by the applicable guideline range (whether it be probation, home detention, or community confinement, as applicable based on the guideline range).

The policy also states that plea bargaining departures from the guideline range must be clearly revealed to the court:

> *It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.*[205]

In his "Plea Bargaining in Cases Involving Firearms" memorandum to prosecutors (prompted by the President's May 15, 1989, announcement of a program to combat violent crime), Attorney General Thornburgh generally reiterated the principles of the earlier plea bargaining policies "to ensure that federal charges always reflect both the seriousness of the defendant's conduct and the Department's commitment to statutory sentencing goals." The Attorney General further stated that

> *in all but exceptional cases... federal prosecutors will seek conviction for any offense involving the unlawful use of a firearm which is readily provable. This will implement the congressional mandate that mandatory minimum penalties be imposed by the courts upon violent and dangerous felons.*

A fourth component of the Commission's strategy to ensure consistency between the guidelines and plea practices has been the Commission's comprehensive, ongoing sentencing guideline education programs for judges, prosecutors, defense attorneys, probation officers, and others. These programs, described in greater detail in Part C of this chapter are regularly conducted in cooperation with the Federal Judicial Center, the Department of Justice's Advocacy Institute, the Criminal Divisions's Office of Professional Development, the Administrative Office of the U.S. Courts (especially its Probation and Defender Services Divisions), and other sponsors. Most programs, particularly sessions for judges and prosecutors, include components on plea practices and meaningful judicial review of plea agreements.

A fifth element of the Commission's strategy involves the use of the Commission's broad authority to conduct research and gather information on sentencing and related matters. Consistent with the

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[204]These two incentives translate into approximately a 35 percent reduction in sentencing exposure.

[205]*Id.*

Commission's decision to move incrementally into the arena of attempting to regulate plea practices,[206] and with the need to gain a more complete understanding of the plea negotiation process under the sentencing guidelines, the Commission requested Professor Stephen J. Schulhofer and Commissioner Ilene H. Nagel (both of whom have had extensive experience in studying and analyzing plea practices as they relate to sentencing) to conduct an in-depth study of plea practices under the guidelines.[207]

II. Examination of Charging and Plea Practices in the Implementation Study

The interviews conducted for the 1990 Implementation Study contained several questions relevant to charging and plea practices in the sites visited. For purposes of presentation, the charging process and the plea process are discussed separately.

Care should be taken in interpreting the responses to many of the questions asked in the interviews. The responses represent the verbal reporting of a description of respondents' and counterparts' behavior by the respondents themselves, rather than an independent observation of that behavior. For example, if the respondent indicates that the guideline adjustment for role in the offense is negotiated, the frequency and circumstances of the occurrence of that phenomenon do not necessarily emerge from the responses. Additionally, respondents varied in the way they interpreted the same question. When asked under what circumstances they would negotiate pre-indictment pleas, for example, some prosecutors mentioned the kinds of cases in which they were negotiated (*e.g.*, white-collar or nonviolent offenses), while others discussed the reasons for accepting a pre-indictment plea (*e.g.*, the willingness of the offender to plead to all of the charges, or the offender's cooperation).

The focus of this analysis is primarily on the overall responses to the questions rather than on the differences among the sites. Where there appear to be marked differences among the sites in their policies and/or practices, these differences are noted. In addition, responses from the federal defenders and private defense attorneys have been consolidated in this section because their answers to the questions tended to be similar.

In presenting the analysis, both the number and percent of respondents are referenced. It should be kept in mind that the percentages refer to proportions of respondents answering questions in a particular fashion, and not of cases resolved through pleas in any of the sites.

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[206] *See* U.S.S.G. Ch. 1, Pt. A 4(c), p.s.

[207] The Process of Plea Negotiation Under Federal Sentencing Guidelines: The Early Post Mistretta Experience 1991) (available at the Commission; expected public distribution, spring, 1992). *See* U.S.S.G. Ch. 1, Pt. A 4(c), p.s. *See also* Schulhofer & Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Amer. Crim. L. Rev. 231 (1989).

A. The Charging Process

The charging process includes three major substantive concerns: charging policies, factors that influence the charging decision, and exclusion of charges that might be supported by the evidence.

1. Charging Policies

Those respondents participating in a supervisory interview (eight U.S. attorneys and seven supervisory assistant U.S. attorneys) were asked about their offices' policies for making charging decisions. In 10 of the 12 sites visited, the Thornburgh memo was either specifically cited (nine sites) or at least substantially quoted (one site — "whatever the evidence will support") as the underlying basis for charging decisions. Two of the respondents who mentioned the Thornburgh memo said that it had been used as a basis for their own written policy. One respondent said that "cases are charged for what they are worth," and one reported that charging is handled "out of the district main office" but nothing about office policy regarding the charging decision.

2. Factors that Influence the Charging Decision

Questions concerning factors that influence the prosecutor's charging decisions were included in the self-administered survey. Respondents were provided with a list of factors (*e.g.*, evidentiary factors, criminal history) and asked to rate each factor according to the amount of influence it carries in the charging decision: the choices were "Little or none," "Some," "Moderate," "Great," and "Very great."

Table 45 shows in descending order factors indicated by prosecutors as having a great or very great influence on their charging decision. These factors are not mutually exclusive and can influence the charging decision in a variety of directions. A relatively large percentage of those who responded to the survey said that the Thornburgh memo and local charging policies influenced their charging decisions. Offense seriousness, as indicated by such factors as presence of a weapon or dollar loss, is also important, as are defendant characteristics (including career offender status and criminal history) and the defendant's cooperation. Sentencing considerations (guideline calculation and sentence exposure) are fairly low on the prosecutors' list. It is interesting to note that evidentiary factors receive a high rating by only 12 percent (n=6). According to the Thornburgh memo, this, along with seriousness of the offense (which is rated fairly high as measured in terms of presence of a weapon, victim injury, and dollar loss) should be a fundamental consideration. The relatively high rating of the Thornburgh memo, therefore, seems to be confirmation that evidentiary factors in fact are a critical consideration in prosecutors' charging decisions.

Data from the Pre-Guidelines Study suggest that charging considerations prior to the implementation of the guidelines were similar. Assistant U.S. attorneys in the earlier interviews reported that the charging decision was largely guided by concerns of offense seriousness and evidence considerations. Furthermore, in less serious cases, defendant characteristics, particularly prior record, could influence the charging decision. While it was agreed that sentencing exposure was important, in most cases it was not a major consideration in charging since maximum terms usually were sufficiently high to accomodate whatever sentence the judge thought warranted.

Table 45

Factors Having a "Great" or "Very Great" Effect on Prosecutors' Charging Decisions

Factor	AUSAs (N=52)	
	N	(%)[a]
Presence of a weapon	38[b]	(78)
Thornburgh memo	38	(73)
Local charging policy	30	(58)
Victim injury	21[c]	(57)
Dollar loss	21[d]	(45)
Cooperation	21	(40)
Career offender status	20	(38)
Criminal history	19	(37)
Guideline calculations	13	(25)
Defendant characteristics	13	(25)
Victim characteristics	11[e]	(24)
Sentence exposure	10	(19)
Evidentiary factors	6	(12)
Caseload/resources	3	(6)

[a] Column percents appear in parentheses and are based upon the number of respondents who answered the question. Percents will add up to more than 100 because of multiple responses.

[b] Three assistant U.S. attorneys reported that they have no cases involving weapons. Thus the N for purposes of calculating the percent is 49 rather than 52.

[c] Fifteen assistant U.S. attorneys reported that they have no cases involving victim injury. Thus the N for purposes of calculating the percent is 37 rather than 52.

[d] Five assistant U.S. attorneys reported that they have no cases involving monetary loss. Thus the N for purposes of calculating the percent is 47 rather than 52.

[e] Six assistant U.S. attorneys reported that they have no cases involving victims. Thus the N for purposes of calculating the percent is 46 rather than 52.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Surveys.

3. Willingness not to Include Charges that the Evidence Might Support

Assistant U.S. attorneys were asked in the survey to describe in their own words the circumstances under which they would not include a charge or pursue a guideline factor that the evidence might support. Table 46 contains a summary of the responses received. Of the 52 respondents who returned a survey, 11 (21%) said that they would always include a charge and pursue a guideline factor that the evidence might support, or that they were unable to think of any such circumstances where they might not. Others identified three types of circumstances in which they would be less aggressive in pursuing the maximum sentence attainable under the guidelines or the maximum provable charges. By far the most common response contained some reference to cooperation or substantial assistance. This was mentioned by 19 (37%) of the 52 respondents. Included in this category are witness protection — "The only time I would not charge or pursue a guideline factor that the evidence might support would be to protect life or safety of a witness"; significance of the assistance — "In a case of extreme substantial assistance"; and the borderline nature of the assistance — "When the defendant has provided some assistance but not sufficiently substantial for a §5K1.1 or 3553(c) motion."

A second type of circumstance is the prosecutor's belief that certain provable charges would be redundant and that the behavior would be taken into account under relevant conduct anyway. This was mentioned by 14 (27%) of the 52 respondents. A typical response included in this category was, "[If] the additional charges would be redundant or needlessly cumulative." Another prosecutor specifically referred to the possible effects on guideline calculation: "The only circumstance when I would not pursue a charge would be one in which there would be no effect on the offense level computation."

The third category of responses, mentioned by six (12%) of the 52 respondents, was comprised of answers indicating that the penalty in certain cases is not proportional to the seriousness of the offense or the culpability of the defendant. Examples of such responses are as follows: "If the penalty is too draconian for the defendant's behavior"; and "If justice required, such as if mandatory minimums were too severe for the crime, I might request permission of the U.S. attorney to deviate."

The interview data suggest that under certain circumstances prosecutors are willing to reduce charges, or include fewer charges in the indictment than the evidence might support. Assuming that such inconsistency in practice might result in sentencing disparity, a question was asked in the National Survey concerning how often prosecutors' charging decisions, in general, are a source of unwarranted sentencing disparity. Table 47 summarizes the responses to that question. Seventy-nine percent of judges (n=328), 81 percent of defense attorneys (n=306, both federal and private), and 83 percent of probation officers (n=470) identify this factor as a source of disparity in at least some cases. Few said that charging is never a source of disparity. (Respondents were more likely to say that they did not know how often it is a source of disparity than to say it is never a source.) Defense attorneys clearly perceive that it happens more often than do either judges or probation officers (*i.e.*, 39 percent (n=150) reported that it is a source of disparity in many or most cases, in contrast to 21 percent of judges (n=88) and 19 percent of probation officers (n=107)).

Table 46

Factors Mentioned by Assistant U.S. Attorneys as Affecting Their Willingness not to Include a Charge or not Pursue a Guideline Factor that the Evidence Might Support

Factor	AUSAs (N=52)	
	N	(%)[a]
Defendant's cooperation/substantial assistance	19	(37)
Redundant charges	14	(27)
Penalty would be too harsh for the circumstances of the offense	6	(12)
Other responses	4	(8)
No circumstances; would never do that	11	(21)
No answer; unresponsive	5	(10)

[a] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Supplemental Site Visit Surveys.

Table 47

Percent of Respondents Identifying Prosecutors' Charging Decisions as a Source of Unwarranted Sentencing Disparity[a]

Response	Respondent Type							
	Judge (N=415)		Federal Defender (N=140)		Private Attorney (N=240)		Probation Officer (N=571)	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
In many or most cases	88	(21)	62	(44)	88	(37)	107	(19)
In few or some cases	240	(58)	71	(51)	85	(35)	363	(64)
In no cases	22	(5)	2	(1)	12	(5)	16	(3)
Don't know	65	(16)	5	(4)	55	(23)	85	(15)

[a] Question not asked of Assistant U.S. Attorneys.

[b] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type.

SOURCE: U.S. Sentencing Commission, 1991 National Survey.

B. The Plea Process

The interviews for assistant U.S. attorneys and defense attorneys conducted as part of the 1990 Implementation Study addressed the issues of dropping charges, areas of negotiation, incentives to plead, effects of mandatory minimums and the guidelines on plea negotiations, circumstances under which pleas are not pursued, and types of plea agreements into which the parties enter.

1. Reasons not to Pursue a Plea Agreement

Both prosecutors and defense attorneys were asked the most important reason for taking a case to trial, and if there were circumstances under which they would choose not to negotiate a plea. Because defendants can always decide to plead guilty and forestall a trial, the more telling question is why would a defendant choose to go to trial; and because prosecutors have greater control over the plea process, the best information from them emerges from the question regarding circumstances under which they would not actively pursue a plea agreement.

In terms of the overall plea rate, the proportion of guideline defendants sentenced in 1990 subsequent to a plea of guilty or *nolo contendere* in a majority of the districts in which sites were visited was close to the national figure of 87.1 percent. The highest proportion of pleas for the selected districts was 95.8 percent, and the lowest rate was 78.3 percent.

a. Prosecution

According to the results reported in Table 48, approximately one-third of the prosecutors interviewed (n=18) stated that they are always open to negotiation. In the words of one prosecutor: "I will talk to anybody in this town." In a similar vein, others said they are "always open to suggestion" or that if "the defense attorney wants to talk, I'll talk." There seem to be some clear limits, however, to prosecutors' willingness to negotiate with the defense. A typical response is: "I have a floor below which I will not go in some cases." Another prosecutor stated that the plea "should represent the whole offense" and that he will agree to a plea with "a satisfactory disposition."

Most prosecutors, however, clearly identified circumstances in which they would not be open to negotiation. The most common reasons mentioned for refusing to negotiate are serious offense conduct (11 or 21%) and high profile, highly publicized offenses (9 or 17%). A typical response is: "On bad cases, we offer a plea straight up — no breaks." Another prosecutor noted: "There have been some political corruption cases which deserve a public hearing ... the public doesn't feel justice is done until there's been a jury trial."

Other circumstances reported by prosecutors are refusal of the defendant to negotiate (6 or 12% of respondents), the presence of an extensive or serious prior record (4 or 8%), and the inability or refusal to cooperate (4 or 8%), mentioned in only two sites. One prosecutor specified that plea negotiations would not be pursued with defendants "who would not be able to provide reliable information or are not useable as witnesses." Another prosecutor gave the additional rationale that cooperation must be required "because the defendant, once he has cooperated, can no longer go back into the drug business."

Table 48

Circumstances Mentioned by Prosecutors for Not Pursuing A Plea Agreement[a]

Circumstance	AUSAs (N=52)	
	N	(%)[b]
Will always pursue a plea agreement	18	(35)
Serious offense conduct	11	(21)
Highly publicized offense	9	(17)
Defendant refuses to negotiate	6	(12)
Extensive/serious prior record	4	(8)
Inability/refusal to cooperate	4	(8)

[a] Only circumstances mentioned by four or more respondents are included. Note that only 52 respondents were asked the relevant questions.

[b] Column percents appear in parentheses and will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

b. Defense

The defense faces the same issue of when to advise their clients to reject a plea and face the risks of a trial. Table 49 reports the most common circumstances mentioned by defense counsel for forcing a trial. Weak evidence and the high likelihood of winning at trial were mentioned by 25 (52%) of the defense attorneys. One defender stated it succinctly: "I go to trial if I can get an acquittal." One-half of the defense attorneys mentioned that applicable mandatory minimums and guideline ranges are so harsh that there is no incentive to plead. One defender noted: "The inflexibility of the guidelines forces some clients to go to trial because they are unwilling to accept the projected sentence." In the words of another defender discussing harsh mandatory minimums: "Even when the client is guilty, we'll take a shot at it." Five defenders (10%) specifically noted in a similar vein that the two-level reduction for acceptance of responsibility is not a sufficient incentive in many cases to plead and that the defendant might as well go to trial.

Other reasons mentioned for going to trial include innocence (21 or 44% of the defenders), insistence on the part of the defendant (18 or 38%), and refusal of the prosecution to negotiate in a meaningful way (15 or 31%).

A final reason given by defense attorneys for going to trial may be less obvious. Limiting relevant conduct even when the defendant is expected to lose at trial was given as a reason by eight defense attorneys (17%). Their explained rationale was that, since the standard of proof is higher at trial than at a sentencing hearing, they hoped that only the conduct proved at trial beyond a reasonable doubt would be considered by the judge in determining the guideline sentence.[208] An answer recorded in one of the interviews of a federal defender summarizes this sentiment:

> *If charged with conspiracy, I take a case to trial to limit exposure by defining offense conduct. I will go to trial expecting to lose, just to limit the exposure under the guidelines by a narrower definition of offense conduct. Because otherwise the probation officer will attribute to each defendant the total offense conduct.*

2. Negotiation of Pre-indictment Pleas

The Pre-Guidelines Study found considerable variation within sites on the frequency of pre-indictment pleas. Responses by assistant U.S. attorneys indicated that the frequency of pre-indictment pleas ranged from "sometimes" to "often." This variation for pre-guideline cases can be explained largely by the fact that almost every jurisdiction reported that the availability of pre-indictment pleas depended upon the type of case. Pre-indictment agreements were more frequent in tax, fraud, and white-collar cases and less likely in drug cases. In one jurisdiction, assistant U.S. attorneys noted that pre-indictment pleas were more likely in cases involving substantial investigation and less likely in reactive cases. In another office, it was noted that as much as 75 percent of fraud and white-collar cases involved a pre-indictment agreement. These pre-guideline

[208]Notwithstanding these responses of defense counsel (which may or may not reflect reality) it should be noted that the courts have generally held that conduct may be considered under the guidelines if supported by a preponderence of the evidence and that conduct of which a defendant was acquitted also may be considered if established under the preponderance standard.

Table 49

Circumstances Mentioned by Defense for Taking a Case to Trial[a]

Circumstance	Defense (N=48)	
	N	(%)[b]
Likely to win at trial	25	(52)
Penalties too harsh to accept a plea	25	(52)
Defendant is innocent	21	(44)
Defendant insists on a trial	18	(38)
Refusal of the prosecutor to negotiate	15	(31)
Attempt to limit relevant conduct	8	(17)
Acceptance of responsibility insufficient incentive	5	(10)

[a] Only circumstances mentioned by five or more respondents are included.

[b] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

data also showed that cooperating defendants were more likely to have pre-indictment pleas than non-cooperating defendants.

The Implementation Study contained questions concerning the U.S. attorney's policy on the use of pre-indictment pleas and their nature and frequency.

a. Prosecution

Interviews with the supervising assistant U.S. attorneys revealed that all of the sites use pre-indictment pleas. Three of the sites reported encouraging the use of pre-indictment pleas, two sites specifically mentioned using pre-indictment pleas for white-collar crime, and one site specifically mentioned cooperation cases. In addition, four of the sites stated that the policy on pre-indictment pleas is governed by the Thornburgh memo.

In response to the question concerning the circumstances under which pre-indictment pleas are negotiated, 16 prosecutors (30%) mentioned defendants admitting the offense behavior (*see* Table 50). In most cases the responses suggest that the defendant is willing to plead to all known offense behavior, but this is not always clear. A typical response is that of a prosecutor who noted: "We are always willing to talk but the policy is that they must plead to what they did. However, we know what we can prove." Another prosecutor said that he will accept a pre-indictment plea if "I have accurate information and the plea is the same as the indictment." A third prosecutor accepts pre-indictment pleas if the "defendant pleads to what you're likely to indict." A few responses, however, indicate that pre-indictment pleas are accepted if "the target acknowledges wrongdoing" or "everyone agrees a crime was committed and the only question becomes appropriate disposition." It is less clear from these last responses that the offender is pleading to the total offense behavior.

Cooperation was mentioned by 16 prosecutors (30%) as increasing the likelihood of a pre-indictment plea. A typical response is that pre-indictment pleas usually occur "when we need the guy as a witness." Another prosecutor noted that cooperation has more utility before indictment and before other codefendants become aware of it.

It was noted by ten prosecutors (19%) that white-collar offenders are more likely to plead prior to indictment. It appears that this is because these investigations are more likely to be completed prior to indictment (compared to drug offenses, for example), making it less likely that additional criminal behavior will come to light after accepting a pre-indictment plea.

Finally, five prosecutors (9%) indicated that pre-indictment pleas were rarely or never negotiated. This response was more likely to occur at Site 07, but it appears that at least some pre-indictment pleas are negotiated at each of the sites included in this study.

b. Defense

The responses of defense attorneys are similar to those of prosecutors (*see* Table 51). Admitting the offense (9 or 19%), cooperation (9 or 19%), and charging a white-collar crime (9 or 19%) are the most common circumstances mentioned by defenders as increasing the likelihood of pre-indictment plea negotiations. It appears from the responses that admitting the offense generally

Table 50

Circumstances Mentioned by Prosecutors for Negotiating Pre-Indictment Pleas[a]

Circumstance	AUSAs (N=53)	
	N	(%)[b]
Defendant admits the offense behavior	16	(30)
Defendant will cooperate	16	(30)
White-collar offenses	10	(19)
Pre-indictment pleas rarely negotiated	5	(9)

[a] Only circumstances mentioned by five or more respondents are included. Note that 53 respondents were asked the relevant questions.

[b] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 51

Circumstances Mentioned by Defense for Negotiating Pre-Indictment Pleas[a]

Circumstance	Defense (N=47)	
	N	(%)[b]
Defendant admits the offense behavior	9	(19)
Defendant will cooperate	9	(19)
White-collar offenses	9	(19)
Plea will limit relevant conduct	5	(11)
Pre-indictment pleas rarely negotiated	6	(13)

[a] Only circumstances mentioned by five or more respondents are included. Note that 47 respondents were asked the relevant questions.

[b] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

means admitting the entire offense behavior. One private defense attorney said that he negotiates pre-indictment pleas when "the client has already spilled his guts and there is no defense I can make." Other defenders responded that pre-indictment pleas are negotiated when "agents have already gotten him to confess," when "you might have a confession and you've reviewed all the evidence," or if "the defendant is already screwed."

Five defenders (11%) stated that they will pursue pre-indictment pleas if there is an opportunity to limit relevant conduct. One attorney noted that if the client is going to plead anyway, it is advantageous to plead prior to indictment "to cut everything short" and dampen "the enthusiasm of the agent."

Finally, six defenders (13%) stated that they rarely or never negotiate pre-indictment pleas.

3. Types of Plea Agreements Negotiated

Rule 11(e) of the Federal Rules of Criminal Procedure generally provides that a defendant and the government may enter into an agreement under which the defendant enters a plea of guilty or *nolo contendere* and the government does the following:

(1) moves for dismissal of other charges (an 11(e)(1)(A) charge reduction agreement);

(2) makes a recommendation, or agrees not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court (an 11(e)(1)(B) sentence recommendation agreement); or

(3) agrees that a specific sentence is the appropriate disposition of the case (an 11(e)(1)(C) specific sentence agreement).

The Rule further provides that if the plea agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or defer the decision to accept or reject the agreement until there has been an opportunity to consider the presentence report. If the court rejects such a plea agreement, the defendant has the right to withdraw the plea. On the other hand, if the plea agreement is of the type specified in Rule 11(e)(1)(B), the defendant has no right to withdraw the plea if the court does not accept the recommendations offered by the government.

Judges were asked about their willingness to accept the three types of plea agreements. Thirty-nine judges (80%) reported that they were willing to accept plea agreements that include charge reductions (Rule 11(e)(1)(A), binding on the court). Another 39 (80%) said they were willing to accept plea agreements that include sentence recommendations (Rule 11(e)(1)(B), nonbinding). Thirty-one judges (63%) said they were willing to accept agreements that include a specific sentence (Rule 11(e)(1)(C), binding on the court). There was no clear pattern among the sites on the willingness to accept different types of pleas; at least at the sites studied, this appears to be more an individual preference of the judge than a reflection of district policy.

In a related question, assistant U.S. attorneys were asked if they ever received instructions from the court about types of plea negotiations into which they may not enter. Thirty-nine prosecutors

(69%) reported that they received no instructions from the court. As noted by one prosecutor: "It's none of the court's business." Five prosecutors (8%) stated that they received no formal instructions from the courts, but judges have made it clear that binding pleas will not be accepted. Thirteen prosecutors (24%) reported that they had, at least on occasion, been given directions by the court on what to include or exclude from plea agreements. Two sites in particular stand out. Three of six prosecutors interviewed in Site 07 had been directed by the court not to include recommendations to sentence at the low end of the guideline range, and three of four prosecutors interviewed in Site 10 reported that they had been directed not to include recommendations for a specific sentence in plea agreements. Other reported instances of recommendations from the court tend to be case specific. For example, a judge in one case directed the prosecutor to enter into a "pretrial discussion" with a defendant, and in another case a judge reportedly invited a plea including a specific sentence (Rule 11(e)(1)(C)).

4. Typical Areas of Plea Negotiation

In the Pre-Guidelines Study, charge bargaining was noted as quite common. Prosecuting attorneys said that they dismissed counts only if exposure was adequate and if the remaining counts reflected the range of behavior involved in the instant offense. It was also reported that defendants were normally expected to plead to the most serious offense.

A number of the interview questions in the 1990 Implementation Study elicited information regarding what is negotiated. To focus the analysis, however, one specific question will be examined in this section. Prosecutors and defense attorneys were asked to describe the most typical areas of plea negotiation. While the question succeeds in identifying the typical areas of negotiation, care should be taken in drawing conclusions from the results. The parties' discussion of a particular factor does not necessarily suggest that it is adjusted or stipulated in the plea agreement. For example, role in the offense is identified as a frequent subject of discussion in plea negotiations, but it does not necessarily follow that prosecutors frequently agree to recommend a reduction for role solely to make the plea bargain more attractive to the defense.

As shown in Table 52, prosecution and defense are in agreement that the typical areas of discussion are the sentence (19 or 34% of the prosecutors, and 12 or 25% of the defenders),[209] guideline calculations (29 or 52% of the prosecutors, and 33 or 69% of the defenders), acceptance of responsibility (18 or 32% of the prosecutors, and 12 or 25% of the defenders), the charge itself (17 or 30% of the prosecutors, and 25 or 52% of the defenders), and a motion for substantial assistance (12 or 21% of the prosecutors, and 16 or 33% of the defenders).

In discussing the sentence, about two-thirds of the time the discussion focuses on where the sentence should be within the range, and about one-third of the time the focus is on the specific length of the sentence. For example, prosecutors state that they typically discuss "whether to recommend the low or mid-point in the range," "whether to sentence at the low end of the range,"

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[209]It should be noted that seven (37%) of the 19 federal prosecutors who cited this as a typical area of plea negotiation were from the one site selected to augment the random sample. Prosecutors at this site constitute 16 percent of the total number of prosecutors interviewed.

Table 52

Five Most Typical Areas of Plea Negotiation

Factor	Respondent Type			
	AUSA (N=56)		Defense (N=48)	
	N	(%)[a]	N	(%)[a]
Sentence	19	(34)	12	(25)
Guideline calculations	29	(52)	33	(69)
Acceptance of responsibility	18	(32)	12	(25)
Charging	17	(30)	25	(52)
Substantial assistance	12	(21)	16	(33)

[a] Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

and "sentencing at a particular point in the guideline range — high, low, or no position." Defense attorneys respond similarly that they typically discuss "high, middle, or low end of the guidelines." Less frequent is the response of a prosecutor who typically discusses a "recommendation of a specific sentence" or the defense attorney who states that "time in custody is the bottom line."

The most common area of discussion is the calculation of the guidelines, mentioned by 29 (52%) of the prosecutors, and 33 (69%) of the defenders. Guideline factors most often discussed are relevant conduct (14 or 25% of the prosecutors, and 22 or 46% of the defenders) and role in the offense (19 or 34% of the prosecutors, and 15 or 31% of the defenders).

Discussion of relevant conduct generally focuses on the amount of drugs in narcotics offenses or the amount of money in theft and fraud offenses. A common response is shown by the prosecutor who stated that he typically discusses "dollar amounts or amounts of drugs." Another prosecutor responded that he "most typically" discusses the amounts of drugs and that "I may state that a certain amount of drugs was not reasonably foreseeable but the court can accept or reject my recommendation." Defense attorneys respond in a similar vein that they typically discuss "stipulations to amounts and particular guideline levels," "quantities in drug or fraud cases," and stipulating that "the amount of charge (sic) in the indictment is the extent of the drugs covered by relevant conduct."

Respondents reported that the issue of role in the offense was commonly discussed. For example, one prosecutor says that "in multiple defendant cases we negotiate over role adjustments." A defense attorney notes that "role adjustment, especially for minimal or minor, is a major thing." Most prosecutors and defenders simply state that role in the offense is commonly negotiated without offering any further explanation.

As also noted in Table 52, the number and type of charges are reported to be typically negotiated, particularly in the view of defense attorneys (25 or 52%). Common responses by prosecutors are that "I may negotiate whether to charge every count," that in "negotiations, counts would have been dropped," or that the number of counts may be negotiated "where it makes no difference in guidelines." Defense attorneys respond similarly that they "drop some counts," they negotiate "specific charges," or that they "want to negotiate over specific charges and get a plea to a substantive count, not a conspiracy."

Finally, acceptance of responsibility and a motion for substantial assistance are identified as typical areas of negotiations. Mentioned infrequently (and not shown in Table 52) are guideline departures for reasons other than cooperation (4 or 7% of the prosecutors, and 2 or 4% of the defenders), the date of the offense (whether before or after November 1, 1987, the effective date of the guidelines) to make the offender eligible for parole (2 or 4% of the prosecutors, and 4 or 8% of the defenders), and diversion of the offense to state prosecution (one prosecutor and one defender).

5. Strongest Incentive to Plead

Prosecutors and defense attorneys were asked about a defendant's strongest incentive to plead. This provides a different focus from asking what is typically negotiated, and gives somewhat more insight into the impact of pleas on sentencing.

a. Prosecution

As shown in Table 53, prosecutors most often identify a motion for substantial assistance as an incentive to plead (26 or 46%). Typical responses from prosecutors are that "substantial assistance is the biggest factor," "acceptance and §5K1.1 in most cases can cut the sentence by one-third to one-half" and "I can't and won't offer anything else" beyond a motion for substantial assistance.

Less frequently mentioned by prosecutors are a recommendation for acceptance of responsibility (20 or 36%) and a recommendation for a lesser sentence (19 or 34%). Prosecutors tended to mention a recommendation for acceptance and a recommendation for a sentence near the bottom of the guideline range together as one package. Typical responses from prosecutors are that the greatest incentive to plead is the "combination of acceptance of responsibility and any position within the guideline range," a government agreement "not to oppose acceptance of responsibility and a sentence at the lower end of the range," and "acceptance and a recommendation of a sentence at the low end of the range."

Lower on the list of the five strongest incentives to plead identified by prosecutors is calculating the guidelines to favor the defendant (11 or 20%). The way the guidelines are calculated is less likely to be identified by prosecutors as a strong incentive to plead than it is to be identified as a topic of negotiation. Likewise, the two most frequently identified factors influencing the guideline calculations — relevant conduct (4 or 7%) and role in the offense (3 or 6%) — are less likely to be identified by prosecutors as areas offering an incentive to plead.

Finally, charging decisions are noted by 18 prosecutors (32%) as strong incentives to plead. In a representative response, one prosecutor stated that the strongest incentive is "avoiding more time and more charges." Another prosecutor noted: "My experience in the environmental arena makes me say that you can plead to a count that will give the defendant the opportunity to make a greater argument at sentencing."

b. Defense

Table 53 indicates that defense attorneys view charging decisions (17 or 35%) and a motion for substantial assistance (16 or 33%) as the strongest incentives to plead. It appears, therefore, that charging is seen as more important by defense attorneys than by prosecutors, although both groups tend to see substantial assistance as a strong incentive. With respect to charging, one defender identified the greatest incentives as being the ability to plead "to a misdemeanor rather than to a felony" and "to a lesser offense that doesn't involve a mandatory minimum." Other defenders identified "limiting the number of charges or the severity of charges," or the possibility of "controlling the indictable charge." Substantial assistance is also important; as stated by one defender, a substantial assistance motion is the "whole ball game."

Table 53

Five Strongest Incentives to Plead

Factor	Respondent Type			
	AUSA (N=56)		Defense (N=48)	
	N	(%)[a]	N	(%)[a]
Sentence	19	(34)	14	(29)
Guideline calculations	11	(20)	12	(25)
Acceptance of responsibility	20	(36)	2	(4)
Charging	18	(32)	17	(35)
Substantial assistance	26	(46)	16	(33)

Column percents appear in parentheses and are based upon the total number of respondents. Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Only somewhat less likely to be mentioned by defense attorneys as strong incentives to plead are sentence recommendations (14 or 29%) and guideline calculations (12 or 25%). As with prosecutors, guideline factors are more likely to be identified by defense counsel as a typical area of discussion during plea negotiation than as offering a strong incentive to plead. The response by defenders leaves the impression that guideline factors such as relevant conduct and role in the offense are frequently discussed in plea negotiations but may not have a strong impact on whether an agreement is reached or the content of the final plea agreement.

For those who did identify guideline calculations as a strong incentive, a typical response is that agreement "on the total offense conduct," or agreement "that the role is minimal or minor in a conspiracy case" are strong incentives. Another defender stated that "articulation of the offense conduct" is a strong incentive "to the extent that the probation officer allows it." With respect to sentence, the possibility of probation, the length of the projected incarceration, and a recommendation for the bottom of the range are seen as strong incentives.

It is interesting to note that only two defenders identified acceptance of responsibility as an incentive. It is possible that defenders do not view the two-level reduction as a sufficient incentive to plead, but it appears more likely from the context of the interviews that acceptance is assumed by defenders to be awarded after a plea and that "incentive" means an inducement over and above the granting of acceptance. This is difficult to quantify, however.

6. Do Pleas Reflect the Total Offense Behavior?

Results from the Pre-Guidelines Study indicate that defendants who cooperate with the government were often allowed to plead to reduced charges. The 1990 Implementation Study addresses cooperation and its relationship to reduced charges as it occurs under the guidelines through questions to prosecutors and defense attorneys.

a. Prosecution

As shown in Table 54, more than half of the prosecutors state that either the plea always reflects the total offense behavior (16 or 31%) or that evidentiary problems may be the only circumstance in which the plea does not reflect the total offense (14 or 27%). Typical responses are "We apply the Thornburgh memo here" and "I would not charge an offense that did not encompass the total offense behavior." Other prosecutors stated that they would not charge lesser offenses "when the offense behavior was provable," or if they do not "result in a sentence computation that does not reflect reality." Typical responses of those prosecutors noting evidentiary problems indicate that a plea that consists of counts reflecting less than the total offense behavior may be accepted if "witnesses were falling by the wayside," or if "we didn't have enough information from our investigation to indict on everything we knew about." It is recognized by some prosecutors, however, that "weak evidence" or what is "readily provable" is defined by the prosecutor and allows some maneuvering room in negotiating a plea. As noted by one prosecutor: "I admit that 'readily provable' depends on the eye of the beholder, or is somewhat 'slippery.'"

There are two major circumstances other than evidentiary problems discussed by prosecutors in which the plea might not reflect the total offense behavior. The first is the defendant's cooperation

Table 54

Responses Given by Prosecutors Concerning the Negotiation of Pleas Reflecting Total Offense Behavior[a]

Response	AUSAs (N=52)	
	N	(%)[b]
Pleas always reflect total offense behavior	16	(31)
Pleas may not if there are evidentiary problems[c]	23	(44)
Pleas may not if the offender cooperates	14	(27)
Pleas may not if the guideline sentence is inappropriate	12	(23)
Pleas may not because of heavy caseload	3	(6)
Pleas may not if the result is within six months of the guidelines	1	(2)

[a] Note that only 52 respondents were asked the relevant questions.

[b] Column percents appear in parentheses. Percents will add up to more than 100 because of multiple responses.

[c] Fourteen respondents (27%) mentioned evidentiary problems as the only circumstance in which a plea agreement may not reflect the total offense behavior. Another 9 respondents (17%) mentioned evidentiary problems in addition to other reasons such as cooperation.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

(14 or 27%). In the words of one prosecutor, the main reason for negotiating a plea to less than the total offense behavior is "obviously cooperation — that's number one." Another prosecutor said that he would drop a gun charge if "there was total and complete cooperation." A third prosecutor mentioned a willingness to negotiate relevant conduct if there is cooperation, because this "is a good way to get people to come in early." Another prosecutor allowed a defendant to plead to "running a drug establishment" because "that was the deal for cooperating."

Negotiating relevant conduct or accepting a lesser charge with a lower guideline appears to be an alternative method for rewarding cooperation used with or without a motion for substantial assistance. Use of guideline 1B1.8, which prohibits incriminating information provided by a defendant under a cooperation agreement from increasing the guideline range, provides a third method. It is questionable whether it is consistent with the Commission's policy statements on plea agreements and stated Department of Justice policies, discussed *supra*, for prosecutors to negotiate a plea to less than the total offense behavior in exchange for cooperation. Based on the interviews conducted for this study, however, it appears that at least some prosecutors are interpreting Department of Justice policy (as expressed in the two Thornburgh memoranda cited earlier) to mean that substantial assistance allows greater latitude in conducting plea negotiations.

The second major circumstance reported for which the plea might not reflect the total offense behavior is when the prosecutor feels the guideline range to be inappropraitely high considering the defendant's behavior (12 or 23%).[210] Examples are prosecutors who state that they might accept a plea reflecting less than the total offense behavior "if the guidelines are out of touch with the reality of the conduct" or so that "lesser defendants might get something better to plead to because it's inappropriate to give less-involved defendants exposure to the same sentence." Other examples are prosecutors who allow pleas to a "phone count" if the defendant is a "girlfriend having a limited role in the sale of drugs," a plea putting "a cap on the defendant's exposure" in the "case of a lower-level drug dealer," and a plea limiting relevant conduct "if the evidence shows a minor participant."

Finally, three prosecutors (6%) indicated that a plea to less than the total offense behavior might be accepted to expedite the processing of a heavy caseload. This response was most likely to occur in the non-random site in which significantly more cases are processed than in the other sites. As noted by one prosecutor: "Courts are jammed. Judges want us to dispose [of] cases as much as possible."

b. Defense

Table 55 contains the responses of defense attorneys. As with prosecutors, almost half the defense attorneys state that either the plea always reflects the total offense behavior (21 or 45%) or that evidentiary problems may be the only circumstance in which the plea does not reflect the total offense (6 or 13%). One defense attorney noted that "In this district, the government will not

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[210]Five (42%) of the 12 prosecutors who cited this as a circumstance were from the one site selected to augment the random sample. Prosecutors at this site represent 16 percent of all prosecutors interviewed.

Table 55

Responses Given by Defense Attorneys Concerning the Negotiation of Pleas that Reflect Total Offense Behavior[a]

Response	Defense (N=47)	
	N	(%)[b]
Pleas always reflect total offense behavior	21	(45)
Pleas may not if there are evidentiary problems[c]	9	(19)
Pleas may not if the offender cooperates	4	(9)
Pleas may not if the guideline sentence is inappropriate	3	(6)
Pleas may not but reason is unspecified	13	(28)

[a] Note that only 47 respondents were asked the relevant questions.

[b] Column percents appear in parentheses. Percents will add up to more than 100 because of multiple responses.

[c] Six respondents (13%) mentioned evidentiary problems as the only circumstances in which a plea agreement may not reflect the total offense behavior. Another 3 respondents (6%) mentioned evidentiary problems in addition to other reasons such as cooperation.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

dismiss a readily provable count." Another defender complained that the federal prosecutor "hides behind the Thornburgh memorandum."

Four defense attorneys (9%) noted that the plea may not reflect the total offense behavior if the defendant cooperates. As one defender stated, the prosecutors may drop counts but this "is all predicated on cooperation, and they're getting more because of the guidelines." Three defense attorneys (6%) also noted that the plea may not reflect the total offense behavior if the guideline range appears inappropriately high considering the defendant's criminal conduct. One defender stated that he was able to negotiate a plea to a "telephone count" in a methamphetamine manufacturing case because the defendant suffered from "battered wife syndrome."

Finally, 13 defense attorneys (28%) related that they are able to negotiate pleas reflecting less than the total offense behavior but did not specify the circumstances under which this occurs.

c. Judges

Judges were asked under what circumstances they would accept a plea to less than the total offense behavior (*see* Table 56). The responses to this question can be used to draw inferences about the judges' active examination of plea agreements, as directed under the Commission's policy statements, to ascertain whether prosecutors are using plea bargaining to undermine the guidelines.

Most judges stated either that the pleas they accept always reflect the total offense behavior (21 or 50%) or that the plea may not reflect the total behavior only if there are evidentiary problems (7 or 17%). Judges who stated that they only accept pleas reflecting the total offense behavior generally did so without elaboration. Concerning evidentiary problems, a typical response is that of one judge who noted that he would accept a plea that did not reflect the total offense behavior "where the government has a difficult case."

Another circumstance is cooperation, noted by four (10%) of the judges. One judge explained that "cooperation is the obvious reason" for accepting a plea reflecting less than the total offense behavior. Even less frequently mentioned are circumstances in which the guidelines produce an inappropriate result (3 or 7%) and a heavy caseload (2 or 5%). Examples of these two circumstances are seen in the response of one judge who said that he would accept a lesser plea "where you have a first time offender who has been a good community servant" and that of another judge who accepts a lower guideline calculation to "move more cases through the court."

Finally, five judges (12%) stated that they accept pleas not reflecting the total offense behavior but did not articulate the circumstances in which this occurs.

Looking at the individual sites, in only two sites did all the judges state that they would not accept a plea that fails to reflect the total offense behavior. In the other ten sites, the judges were divided on whether, and under what circumstances, they would accept a plea to less than the total offense behavior.

Table 56

Responses Given by Judges Concerning the Acceptance of Pleas Reflecting Total Offense Behavior[a]

Response	Judges (N=42) N	(%)[b]
Pleas always reflect total offense behavior	21	(50)
Pleas may not if there are evidentiary problems[c]	8	(19)
Pleas may not if the offender cooperates	4	(10)
Pleas may not if the guideline sentence is inappropriate	3	(7)
Pleas may not because of heavy caseload	2	(5)
Pleas may not but reason is unspecified	5	(12)

[a] Note that only 42 respondents answered the relevant questions.

[b] Column percents appear in parentheses. Percents will add up to more than 100 because of multiple responses.

[c] Seven respondents (17%) mentioned evidentiary problems as the only circumstance in which a plea agreement may not reflect the total offense behavior. Another respondent (2%) mentioned evidentiary problems in addition to other reasons.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

III. Control of Information

In discussing the reporting of offense conduct, some probation officers report difficultly in securing relevant information from prosecutors when that information contradicts the plea agreement. In response to the direct question of whether the presentence report reflects the total offense conduct, all 47 probation officers interviewed answered in the affirmative (either by "Yes" or responses such as "I think so"), although nine officers (19%) qualified their answer by saying it was true most of the time. However, the responses given to the questions of whether stipulations or other restrictions limit the reporting of the total offense conduct reveal that probation officers do experience some difficulty in acquiring information on the offense conduct by virtue of stipulations contained in the plea agreement, as well as other factors. The reasons given in these responses, taken together, tell a story that is more revealing about the process of presentence investigations.

Within the context of the responses to three related questions, the majority of officers (37 or 79%) reported that presentence reports generally reflect the total offense conduct (*see* Table 57). Of these, 31 respondents gave unqualified affirmative responses to the question of whether the presentence reports represent the total offense behavior (included in this number are seven respondents who noted that in accordance with §1B1.8, self-incriminating evidence is not provided by the prosecutor). Of the remaining six respondents whose answers were generally affirmative, albeit with certain qualifications, three reported that prosecutors' unwillingness to provide complete information made it necessary to conduct an in-depth independent investigation to get the entire story. Two other officers reported that, while they personally had no problem ascertaining and reporting the entire offense conduct, they knew of other officers who did have problems. Finally, one stated that although probation officers report all the facts as they find them and are unconstrained by stipulations in the plea, the ambiguity of the notion of relevant conduct causes confusion in reporting offense conduct.

In six of the twelve sites, at least one respondent indicated that the presentence report sometimes does not contain a complete description of the total offense behavior. These ten respondents identified prosecutors as the source of these problems. In eight cases the reason was the government's withholding, controlling, limiting, or manipulating the information used in the probation officer's reporting of offense conduct. One officer stated, for example: "We have had a number of drug cases where we felt we weren't in control of getting all the information we'd like to put in." Another officer reported that "one case agent was forbidden by a prosecutor to talk to the probation officer." In a similar vein, an officer reported: "The probation officer depends on what the government provides and in some cases they will put limitations on what the local police will give us." Finally, an officer stated: "One office in particular keeps a lot oi information hidden, and sometimes it is necessary to go into court blind." Two probation officers reported that the stipulations in the plea agreement, besides restricting the guideline calculations, also restrict the reporting of offense conduct.

It is not possible to determine how often presentence reports inaccurately or incompletely report the offense conduct. All that can be reported with certainty is that some of the probation officers interviewed in a number of different sites felt that the presentence report does not always represent the entire offense conduct, and they provided some specific examples of instances in which the report did not tell the whole story.

Table 57

Responses Given by Probation Officers That Indicate Whether the Information in the Offense Conduct of the Presentence Report Accurately Reflects Defendants' Offense Conduct

Response	Probation Officers (N=47)	
	N	(%)[a]
Yes, unqualified; or mentioned only §1B1.8	31	(66)
Yes, despite the government's unwillingness to provide information	3	(6)
Yes, personally, although respondent knew of some USPOs who have problems	2	(4)
Yes, despite the fact that relevant conduct is ambiguously defined	1	(2)
No, because of the government limiting information	8	(17)
No, because of stipulations in the plea agreement	2	(4)

[a] Column percents appear in parentheses and are based upon the total number of respondents.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

IV. Results of the National Survey Concerning the Plea Process

The National Survey contained a question as to whether plea agreements should be formally regulated in some manner in addition to current standards for judicial review and acceptance of plea agreements. The responses to this question are reported in Table 58. The majority of judges, prosecutors, and defense attorneys agreed that there should be no additional regulation of plea agreements (73% of 415, 87% of 436, and 65% of 380, respectively). One-half of the probation officers (n=283), on the other hand, believed that plea agreements should be further regulated. This may reflect the fact that judges, prosecutors, and defense attorneys have an interest in avoiding the time and expense of a trial or, in the case of defense attorneys, avoiding a longer sentence. Probation officers, for the most part, have no great incentive to expedite plea agreements and are sometimes placed in the position of contradicting the statement of facts as outlined in a plea agreement in calculating the applicable sentencing guideline for the court. Given this situation, it is understandable that probation officers would show more interest in further regulating plea agreements.

It may be argued that the failure of plea agreements to reflect the entire offense behavior may serve to perpetuate the unwarranted sentencing disparity of the pre-guidelines system. The National Survey contained questions as to whether plea agreements, in general, and pre-indictment pleas, in particular, are perceived to be sources of unwarranted disparity. Tables 59 and 60 contain a summary of the responses to these questions. A substantial majority of the judges, defense attorneys (both federal and private), and probation officers identify pre-indictment pleas and plea agreements in general as sources of unwarranted disparity in at least some cases. Few judges, defense attorneys, or probation officers said that these factors were never a source of unwarranted disparity.

V. Summary

Prosecutorial decisions on what to charge and what to negotiate are part of the larger process under which prosecutors seek to secure a conviction with the least expenditure of government resources.

In terms of the interaction between sentencing guidelines and plea negotiations, probably the two most critical areas are the incentives to plead, or negotiable areas under the guidelines, and whether the plea agreement adequately reflects the seriousness of the actual offense behavior. Concerning the incentive to negotiate a plea, at least one-third of the prosecutors interviewed identified either a motion for a departure based upon substantial assistance, a recommendation for awarding acceptance of responsibility, or a recommendation for a sentence at the low end of the guideline range (or, less often, a specific sentence) as the foremost incentives they can offer defense attorneys in negotiating a plea. For the most part, defense attorneys agree with this assessment, although they tend to see acceptance of responsibility as an incentive much less frequently and place more emphasis on dismissing counts or being allowed to plead to a reduced charge.

The issue of whether negotiated pleas reflect the total offense behavior is difficult to assess. The interview data provide respondents' perceptions as to estimates of the number or proportion of pleas that fail to reflect all readily provable offense behavior. The most that can be said is that some

Table 58

Respondents Who State that Plea Agreements Should be Regulated in Addition to Current Standards for Judicial Review

Response	Respondent Type: Judge (N=415)		AUSA (N=436)		Federal Defense (N=140)		Private Attorney (N=240)		Probation Officer (N=571)	
	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]	N	(%)[a]
Yes	59	(14)	28	(6)	32	(23)	47	(20)	283	(50)
No	303	(73)	380	(87)	100	(71)	148	(62)	177	(31)
Don't know	53	(13)	28	(6)	8	(6)	45	(19)	111	(19)

[a] Column percents appear in parentheses and are based on the total number of respondents within each respondent type.

SOURCE: U.S. Sentencing Commission, 1991 National Survey.

Table 59

Respondents Identifying Preindictment Plea Agreements as a Source of Unwarranted Sentencing Disparity[a]

Response	Respondent Type					
	Judge (N=415)		Federal Defender (N=140)		Private Attorney (N=240)	
	N	(%)[b]	N	(%)[b]	N	(%)[b]
In many or most cases	61	(15)	12	(9)	48	(20)
In few or some cases	226	(54)	97	(69)	95	(40)
In no cases	44	(11)	16	(11)	20	(8)
Don't know	84	(20)	15	(11)	77	(32)

[a] Question not asked of Assistant U.S. Attorney or U.S. Probation Officers.

[b] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type.

SOURCE: U.S. Sentencing Commission, 1991 National Survey.

Table 60

Respondents Identifying Plea Agreements as a Source of Unwarranted Sentencing Disparity[a]

Response	Respondent Type							
	Judge (N=415)		Federal Defender (N=140)		Private Attorney (N=240)		Probation Officer (N=571)	
	N	(%)[b]	N	(%)[b]	N	(%)[b]	N	(%)[b]
In many or most cases	84	(20)	26	(19)	62	(26)	161	(28)
In few or some cases	264	(64)	102	(73)	122	(51)	352	(62)
In no cases	35	(8)	8	(6)	15	(6)	30	(5)
Don't know	32	(8)	4	(3)	41	(17)	28	(5)

[a] Question not asked of Assistant U.S. Attorneys.

[b] Column percents appear in parentheses and are based upon the total number of respondents within each respondent type.

SOURCE: U.S Sentencing Commission, 1991 National Survey.

prosecutors in some situations will accept a plea to less than the total offense behavior. Apart from evidentiary problems, about one-fourth of prosecutors interviewed indicate they sometimes will not charge all known criminal behavior if the offender is cooperating with authorities in the investigation of other offenders or if the resulting guideline appears to sanction the offense conduct inappropriately (*e.g.*, offenders with a limited role in the offense).

A comparison of sites sheds some light on the issue of how often negotiated pleas reflect the total offense behavior. It is clear that charging and plea bargaining practices vary among the sites (*see* Appendix A). While there are individual cases in each site in which the offender was allowed to plead to less than the most serious, readily provable offense, this appears to be systematic in only one of the sites studied, the non-randomly selected site chosen as a representative of large districts with relatively high departure rates. In this site, the judges appear to be strongly opposed to the guidelines and, as a matter of practice, have endorsed a system in which guideline calculations are based solely on the facts outlined in the plea agreement. Probation officers at this site report that they attempt to apply the guidelines based on their own independent assessment of facts, but typically are overruled by the judges, who generally accept the guideline calculations resulting from the plea agreement. Another indication of the uniqueness of this site is that five out of seven prosecutors interviewed stated that they are willing to accept a plea reflecting less than the total offense behavior if they believe the guideline sentence to be inappropriate. While the numbers are small, this is by far the highest proportion in any of the sites visited.

The other 11 sites are less extreme. In four of the sites, some conflicts between prosecutors and probation officers over the application of relevant conduct were reported. Prosecutors complain that probation officers are sometimes overly aggressive in applying relevant conduct, and in some cases there is evidence that prosecutors are withholding some information from probation officers. In two sites (including one in which reportedly there are conflicts between prosecutors and probation officers over relevant conduct), judges are divided over the application of the guidelines, and one judge in each of the two sites reportedly accepts plea agreements without question, prompting probation officers to complain that these judges are "manipulating" the guidelines.

In the other six sites, there is no evidence of any systematic problem with including total offense behavior in the guideline calculations. There do not appear to be consistently recurring disputes between prosecutors and probation officers over the application of relevant conduct. The judges in these sites generally appear to be committed to advancing the goals of the guidelines system and typically review plea agreements to ensure that the agreements adequately reflect the seriousness of the offense behavior.

There are some differences among the sites in the use of fact stipulations in plea agreements, binding plea agreements, and pre-indictment pleas. While these are potential sources of abuse on the part of prosecutors, the fact that they are used is not in itself evidence of abuse. In general, their use tends to be a continuation of pre-guidelines practice and tends to be the accepted convention if they were the accepted procedure in the past.

Within the structure now provided by the guidelines, charging and plea practices have a more visible impact, for some types of cases, on the severity of a defendant's punishment than under the previous indeterminate sentencing system. Prior to the guidelines, the sentencing judge was bound

only by the statutory maximum for the charges of conviction, while the Parole Commission determined the amount of time to be served based on its independent assessment of the seriousness of the defendant's actual offense conduct and extensiveness of criminal history. For all but the least serious sentences, it made potentially less difference under the indeterminate sentencing system what offense the defendant was charged with, what facts were stipulated, or the number of offenses or counts charged.

Under the current determinate sentencing guidelines system, the potential exists for closer association between charging and plea practices and sentence severity than in the former sentencing system. This is particularly true for offenses such as bank robbery that are treated by the guidelines as separate and distinct instances of criminal conduct. Although the relevant conduct guideline takes into account criminal behavior beyond the elements of the offense of conviction for all offenses, plea negotiation practices and, in the case of separate and distinct offenses, charging practices by the prosecutor have the potential to influence the applicable guideline range.

In many ways, the data suggest that judges and attorneys attempt to make charging and plea practices under the guidelines mirror similar practices under the pre-guidelines system. Rather than relying exclusively on tools available under the guidelines system (*e.g.*, using a motion for substantial assistance to reward a cooperating offender), judges and court practitioners are tempted to limit available information so as to constrain sentencing exposure under the guidelines for that cooperating offender. In general, the court reaches the same result using either method; however, limiting sentencing information tends to keep the plea process behind closed doors, whereas using the visible tools available through open disclosure in court allows for monitoring of court practices and review upon appeal.

Courts may view the plea negotiation process as outside the confines of its responsibilities, and for that reason be reluctant to disturb an agreement reached by the parties. In fact, it is interesting to note that nearly three-fourths of the judges interviewed (n=30) indicated that they accept plea agreements when presented, rather than defer acceptance until they have reviewed the presentence report. Moreover, approximately two-thirds of the judges (n=28) indicated that they felt bound to honor the terms of plea agreements. These responses indicate a reluctance on the part of judges to disrupt the plea process, perhaps even when the seriousness of the offense is in question.

In summary, the implementation study of charging and plea practices portrays a system in transition. Judges, prosecutors, and defense attorneys are experimenting with means of operating within the structure of sentencing guidelines. That experimentation period is in no way complete and suggests the importance of continued monitoring of the plea negotiation process.

Other issues related to charging, plea negotiation, and prosecutorial discretion are discussed further in Chapter Six, Impact of the Guidelines on Prosecutorial Discretion and Plea Bargaining.

Part G
Statement of Reasons for Sentence

Introduction

The objective of this section of the process evaluation is to describe briefly the implementation of one of the most important changes brought about by the Sentencing Reform Act — the requirement that the court state in open court the reasons for its sentence. This section describes the multiple purposes for which statements of reasons are used, some of the problems experienced in obtaining adequate statements of reasons, and steps taken to overcome these problems.

I. Purposes and Content of Statement of Reasons for Sentence

Contrary to pre-guideline practice, sentences under the Sentencing Reform Act must be imposed in conjunction with an explicit statement of reasons made in open court.[211] In addition to a general requirement that the court state reasons "for its imposition of the particular sentence,"[212] the law requires that if the court sentences within a guideline range of imprisonment whose width exceeds 24 months, it must state its reasons for selecting the particular point within the range.[213] Finally, if the court imposes a sentence that is outside the applicable guideline range, it must state "the specific reason" for the departure.[214] The court's statement of reasons, whether in the form of a transcript of the sentencing hearing or "other appropriate public record,"[215] must be furnished to the probation system, the Federal Bureau of Prisons (if the defendant is sentenced to prison), and to the Sentencing Commission.[216]

The legislative history of the Act indicates that Congress had in mind multiple purposes for the statement of sentencing reasons, including:

- to inform the defendant and the public of the reasons why the particular sentence was applicable;

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[211]18 U.S.C. § 3553(c).

[212]*Id.*

[213]18 U.S.C. § 3553(c)(1).

[214]18 U.S.C. § 3553(c)(2). If the court does not order full restitution, this paragraph also requires that the court must state its reasons for that decision.

[215]Pursuant to Pub. L. No. 100-690, Title VII, §7102, Nov. 18, 1988, 102 Stat. 4416, the law was modified to permit courts to substitute an abbreviated statement of reasons for sentence in lieu of a transcription of the entire sentencing hearing. The change was made to reduce burdens on court reporters and enhance compliance with the requirement that a statement of reasons be sent to various agencies, including the Sentencing Commission.

[216]Section 994(w) of title 28, United States Code, instructs sentencing courts to submit to the Commission a written report of each sentence imposed under the guidelines. Through the Director of the Administrative Office of the U.S. Courts, the Commission has requested that the statement of reasons be included in this report.

- to guide probation officers and prison officials in developing programs suitable for the defendant's needs;

- to assist the court of appeals in evaluating the reasonableness of a departure sentence or, to a lesser extent, in determining whether the guidelines were correctly applied;

- to provide "information to criminal justice researchers evaluating the effectiveness of various sentencing practices"; and

- to assist "the Sentencing Commission in its continuous reexamination of the guidelines and policy statements."[217]

In reviewing appeals of guideline sentences, the courts of appeals generally have rigorously enforced the requirement of providing a statement of reasons. Following the appellate review statute's mandate to give due deference to the sentencing court's application of the guidelines to the facts of a case, the appellate courts have not been willing to rationalize or speculate as to the reasons for a departure or the explanation for the extent of departure.[218] The circuit courts repeatedly have taken the position that appellate review is hampered without an adequate statement of reasons, particularly when a departure is contested. Consequently, cases have often been remanded for an explanation of the sentence.[219] On the other hand, the appellate courts have been less exacting in their requirements of reasons when the court sentenced within the guideline range (and the issue on appeal was whether the guidelines were correctly applied). In such cases, it generally has been held sufficient for the court simply to state clearly its findings with respect to application of disputed guideline factors; a detailed rationale for the findings is not necessary because the appellate court can review the court's determinations in the context of the record.[220] Confirming the "safe harbor" that a within-guideline sentence provides, the appellate courts uniformly have rejected defendant contentions that the sentence was erroneous because the sentencing judge did not state reasons for selecting a particular sentence within an applicable guideline range not exceeding 24 months.[221]

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[217]S. Rep. No. 225, 98th Cong., 1st Sess. 79-80 (1983).

[218]*See, e.g.*, U.S. v. Jackson, 921 F.2d 985, 989-93 (10th Cir. 1990) (*en banc*).

[219]*See, e.g.*, U.S. v. Ocasio, 914 F.2d 330, 336 & n.1 (1st Cir. 1990); U.S. v. Cervantes, 878 F.2d 50, 54 (2d Cir. 1989); U.S. v. Newsome, 894 F.2d 852, 856-57 (6th Cir. 1990); U.S. v. Michel, 876 F.2d 784, 786 (9th Cir. 1989); U.S. v. Jackson, *supra*.

[220]*See, e.g.*, U.S. v. Beaulieu, 900 F.2d 1531 (10th Cir.), *cert. denied*, 110 S. Ct. 3252 (1990); U.S. v. Fuentes-Mareno, 895 F.2d 24 (1st Cir. 1990). *Cf.* U.S. v. Williams, 891 F.2d 921, 924 (D.C. Cir. 1989) ("To facilitate review of a sentence imposed under the guidelines, the sentencing judge must address the defendant's arguments in a manner that is understandable when the sentencing hearing is viewed in the context of the record, including the presentence report. [Citation omitted.] In particular, to aid this court in determining the propriety of a sentence, the district court should refer by section to the Guidelines upon which it relies, or expressly state that it is imposing a sentence in accordance with the Guidelines sections identified in the presentence report.").

[221]U.S. v. Williams, 891 F.2d 921 (D.C. Cir. 1989); U.S. v. Zinc, 906 F.2d 776 (D.C. Cir. 1990) (noting that 18 U.S.C. § 3553(c)(1) only requires reasons for picking the point within the range (continued...)

II. Efforts to Encourage Court Compliance with Statement of Reasons Requirements

The statement of reasons for sentencing is critical in providing a record that allows the Sentencing Commission to monitor application of the guidelines by the courts, the relationship of sentences to the guidelines, and reasons for departure from the guideline range. Without this record, the Commission cannot assess, in a given case, the final decisions made by the courts. Consequently, it cannot adequately monitor guideline sentences and amend the guideline structure as needed, consistent with the expressed intent of Congress.

The format and rate of submission of court findings and reasons have changed from initial guideline implementation to the present. The original statutory language requiring preparation of a transcript of each statement of reasons made by the court was amended by Congress in November 1988 to facilitate other, simpler means of providing the essential information.[222] Recognizing the importance of a standardized format for this information and its significance to the Sentencing Commission, the Judicial Conference Committee on Criminal Law and Probation Administration developed a form (the AO-247) for use by the court in recording this information.

Unfortunately, the courts were slow to embrace these new sentencing and reporting requirements. Throughout 1987 and 1988, the Sentencing Commission received transcripts or other reports on sentencing hearings for only 40 percent of the cases. This rose to 65 percent of cases received by the Commission in 1989. Probation officers and other court personnel explain the failure to provide these statements of reasons by noting insufficient resources and court refusal to prepare the documents. The latter may reflect continued resistance on the part of some to complying with the terms of the Sentencing Reform Act.

Throughout 1990, the Sentencing Commission and the Judicial Conference Committee on Criminal Law and Probation Administration continued to urge the courts to prepare and submit these documents. On their own initiative, several districts began to use shortened reporting forms in lieu of the four-page, AO-247 form. In fiscal year 1990, the Sentencing Commission received sentencing reports for 79 percent of guidelines cases.

In an effort to further bolster reporting of this critical information, the Administrative Office of the U.S. Courts and the Sentencing Commission jointly developed a one-page form, "Report on the Sentencing Hearing." In July 1990, the Administrative Office distributed a revised "Judgment in a Criminal Case" order (AO-245 S) that included this one page form. Inclusion of this sentencing form in the required Judgment in a Criminal Case order has increased reporting to 90 percent of all cases in the first four months of 1991. Only two districts (Eastern Missouri and Southern Texas) continue to submit transcripts, as opposed to forms, at a significant rate.

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[221](...continued)
when the span of the range, as opposed to a sentence permitted by the range, exceeds 24 months); U.S. v. Duque, 883 F.2d 43 (6th Cir. 1989); U.S. v. Ehret, 885 F.2d 441 (8th Cir. 1989); U.S. v. Howard, 894 F.2d 1085 (9th Cir. 1990); U.S. v. Jones, 899 F.2d 1097 (11th Cir.), *cert. denied*, 111 S. Ct. 275 (1990).

[222]*See supra*, note 215.

Despite continuing efforts by the Sentencing Commission to encourage full reporting, courts in a few districts still fail to submit all required sentencing information to the Sentencing Commission. For example, reports on sentencing hearings in the first four months of 1991 were received for less than 30 percent of guideline cases in the Central District of California, less than 50 percent in the Middle District of Tennessee, and less than 80 percent in Middle Georgia, Southern New York, and Southern Texas.

III. Commission Use of Statements of Reasons

The sentencing judge's statement of reasons is critical to a complete and correct understanding of the court's determination of the applicable guideline range and imposition of sentence. Without a statement summarizing the court's decision, the Commission cannot readily determine whether a sentence that is outside the range recommended by the probation officer in the presentence report reflects a departure from the guideline range or a determination at the sentencing hearing that a different range was applicable.

In a larger sense, it is not simply that the statement of reasons is essential to the Commission's understanding of how the court applied the guidelines that is of concern in the guideline implementation process. Rather, it is the uses to which the Commission puts that information that matter. As required by its governing statute,[223] the Commission must systematically collect, analyze, publish and disseminate information on sentences imposed under the guidelines system. The users of these data, be they criminal justice researchers, practitioners, sentencing or appellate courts, Congress, or others, necessarily must depend on the accuracy and completeness of the information submitted to and compiled by the Commission.

The Commission relies on the information it receives from courts on sentences imposed under the guidelines in its ongoing guideline revision process. Judicial statements of reasons have encompassed a number of suggestions for amending the guidelines that the Commission has found especially helpful.[224] Accordingly, the Commission has established a special screening process to identify and separate for Commission attention judicial recommendations for guideline changes or particular application problems experienced.[225] Even when statements of reasons do not specifically identify recommended guideline changes, the Commission finds such statements helpful in the guideline amendment process, both in assessing guideline application and in identifying case factors that courts believe the guidelines do not adequately address (*i.e.*, departure factors).

The Commission has used and expects to continue to use court statements of reasons in carrying out its statutory research mission, as well as in conducting particular studies requested by Congress. For example, Congress recently required the Commission to amend the child pornography offense guidelines and to conduct a follow-up study comparing application of the amended guidelines to

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[223]*See* 28 U.S.C. §§ 995(a)(12)-(16), 997.

[224]The AO-247 form contained a distinct section, box 11, in which judges could identify specific problems and/or recommendations for Commission attention.

[225]The Judicial Conference Committee on Criminal Law and Probation Administration has strongly endorsed the need for careful Commission review of court statements of reasons, especially in departure cases.

earlier versions. Court statements of reasons will be among the documents that the Commission expects to examine in preparing this report.

IV. Summary

Court statements of sentencing reasons are essential both to the process of appellate review of sentences and to the Commission's multiple purposes in reviewing guideline application. They represent one important part of Congress' plan for increasing accountability in the sentencing process. Yet, despite the importance of these statements of reasons for guideline implementation and system improvement, some courts do not provide justification for sentencing decisions adequate to the purposes of appellate review; and, there has been some persistent reluctance to submit statements of sentencing reasons to the Commission despite the clear directive in the statute. It should be recognized that over time, as the courts of appeals have clarified their needs and as the Commission has worked with the Administrative Office to simplify the reporting process, court compliance with requirements for statements of reasons has improved. Nevertheless, some districts continue to have inordinately low reporting rates. This hinders the Commission's work, including the ability of the Commission to report accurately important guidelines system indicators (*e.g.*, departure rates) for which statements of reasons are essential.

Part H
Departures and Sentences Within the Guideline Range

Introduction

This section of the evaluation report describes the nature and extent of departures and the role that departures play in the guideline system. In addition to summarizing the frequency of departures based on data in the Commission's sentence monitoring files, this section reports departure information relating to the 12 sample sites. Because of the large number of departures based upon a defendant's substantial assistance in the investigation or prosecution of other persons, this area of departures is discussed separately. Finally, this section summarizes and discusses the treatment of departures by the courts of appeals, which have developed distinct criteria to assess the propriety and reasonableness of departure sentences.

I. Background and Purposes of Departure Sentences Within the Guideline System

Although clearly rejecting various suggestions that would have made the guidelines system more advisory than mandatory,[226] Congress nevertheless provided a carefully crafted "escape valve" in the statute that permits courts to sentence outside the otherwise binding guideline range in appropriate cases. In particular, 18 U.S.C. § 3553(b) provides that a court may depart from the guideline range if it finds "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 legislative history indicates that Congress had high expectations for the capability of a detailed guidelines structure that had flexibility within the applicable guideline range to adequately account for sentencing variations in most cases. Congress expected that "the use of sentencing guidelines would actually enhance the individualization of sentences as compared to current law,"[227] and that the overall frequency of departures would be relatively low. At the same time, Congress realistically recognized that no workable guidelines system could account for all possible variations in individual cases. Consequently, the guidelines scheme provided that the sentencing judge could, and indeed should, impose a sentence outside the guideline range as necessary to take into account important factors not adequately encompassed within the applicable guidelines.

The guidelines model developed by the Commission endeavored to closely follow the congressionally-envisioned plan in its accommodation of departures. As explained in Chapter Two of this report, the Commission believed that, at least initially, it should absolutely prohibit departures for only those factors which the statute commanded that the guidelines be "entirely neutral"[228] (race, sex, national origin, creed, religion, and socio-economic status) and a few others (drug or alcohol dependence, personal financial difficulties or business economic hardship).[229]

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[226]*See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 79 (1983).

[227]*Id.*, at 52-53.

[228]*See* 28 U.S.C. § 994(d).

[229]*See* U.S.S.G. §§5H1.4, 5K2.12.

Otherwise, it treated the guidelines as describing a "heartland" of typically-covered conduct, leaving to the courts the determination of whether a departure was warranted in an atypical or extraordinary case.

One reason for the Commission's approach was its expectation that it would learn from court experiences in applying and departing from the guidelines. The Commission's system of sentence monitoring and its comprehensive review of appellate case law are integral means by which the Commission evaluates, on an ongoing basis, departure determinations. In turn, this information becomes a part of the Commission's amendment process, in which the Commission may react to significant departure decisions in many different ways, including:

- building a departure factor into the guideline scheme;[230]
- leaving a departure factor outside the guidelines as a potential basis for future departure decisions;
- expressing its view that a departure factor should only be used in extraordinary cases;[231] and
- prohibiting a departure factor absolutely.[232]

II. Monitoring Data Concerning Departures and Sentences Within the Guideline Range

In order to assess trends in guideline sentencing practices, the Commission annually conducts a special study to determine: (1) the rate at which defendants are sentenced within the guideline range as determined by the court; and (2) rates and reasons for departure from that range. The study is based on a 25-percent random sample of all cases sentenced within a particular time period.

The information presented here is derived from 11,170 guideline cases sentenced between January 19, 1989, and September 30, 1990. In order to facilitate the analysis, cases in which documentation was missing or inadequate were supplemented with follow-up phone calls to the field. Cases that involved sentences outside the guideline range were coded as departures and the relevant reasons given by the court were noted. For cases in which a Report on the Sentencing Hearing was not provided or the information contained therein was incomplete, the sentence from the Judgment in a Criminal Case order was compared to the guideline range recommended by the probation officer in the Presentence Report. When the sentence fell within the range recommended

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[230]The Commission to date has done this in a number of cases (*e.g.*, extending the drug quantity tables by adding higher offense levels to take into account very large scale drug enterprises (*see* U.S.S.G. App. C., amend. 125); including additional specific offense characteristics in the extortion guideline (*see* U.S.S.G. App. C., amend. 366)).

[231]The Commission recently followed this course with respect to downward departures for a defendant's "prior good works" (*see* U.S.S.G. App. C., amend. 386) and a defendant's "physical appearance" or "physique" (same).

[232]To date the Commission has not specified any additional factors for which it intends that courts should never, under any circumstances, sentence outside the guideline range.

by the probation officer, a departure was not assumed.[233] Following a staff review of this data, 10,805 of the 11,170 cases contained sufficient information to make a departure determination.

A. Departure Rates

Sentences were within the guideline range established by the court in 83.1 percent (n=8,980) of the 10,805 cases. In 7.0 percent (n=756) of the cases, courts made a downward departure based on the defendant's substantial assistance to the government. In another 7.3 percent (n=785) of the cases, the courts made downward departures for other reasons. In 2.6 percent (n=284) of the cases, the courts sentenced above the applicable guideline range.

Departure Rates	
83.1% •	Sentences Within Guideline Range
7.0% •	Sentences Below Guideline Range for Substantial Assistance on Motion of Government
7.3% •	Sentences Below Guideline Range
2.6% •	Sentences Above Guideline Range

Tables 61 and 62 provide reasons given by the courts for upward and downward departures. The most frequently-cited reasons for upward departures included inadequacy of criminal history category (42.6%), quantity of drugs (6.3%), pursuant to a plea agreement (6.0%),[234] and the guidelines do not adequately reflect the seriousness of the offense (5.6%).

Substantial assistance to the government was cited in 49.1 percent of all downward departures. Other frequently cited reasons for downward departures included pursuant to a plea agreement (9.9%), mule/role in the offense (4.2%), and family ties and responsibilities (4.3%).

Departure rates varied substantially by offense category. Offenses involving the importation and distribution of drugs had a higher rate of downward departure based on substantial assistance and other factors as compared to other categories of offenses. Simple drug possession, firearms,

[233]This assumption was tested in a previous USSC departure study analyzing a sample of cases sentenced between November 1, 1987, and March 31, 1989. A random 25-percent sample of cases for which no Report on the Sentencing Hearing was available, but for which the sentence fell within the range recommended by the probation officer, was further investigated by telephone calls to the field. Of the 196 cases for which calls were made, none involved a departure from the guideline range. As a result, all such cases were considered within-guideline sentences for the purposes of that study as well as for the present study.

[234]Although "pursuant to a plea agreement" is frequently cited as the basis for a downward departure, it should be noted that the governing statute, 18 U.S.C. § 3553(b), requires that the court base its departure decision on a specific "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." Thus, there is some question as to whether this is a proper reason for departure within the meaning of the statute and Policy Statement §6B1.2(c)(2). In any event, court acceptance of a plea agreement and imposition of sentence in accord with the agreement means, as a practical matter, that no appeal will occur and that the sentence will stand.

Table 61

Reasons Given by Sentencing Courts for Upward Departures*

REASON	Number	Percent
Adequacy of criminal history	121	42.6
Drug amount	18	6.3
Pursuant to plea agreement	17	6.0
Guidelines do not reflect the seriousness of the offense	16	5.6
Weapons and dangerous instrumentalities	15	5.3
Public welfare	14	4.9
Disagree with guideline enhancements	12	4.2
No reason given	12	4.2
High speed chase	11	3.9
General aggravating circumstance	11	3.9
Nature/Seriousness of the offense	10	3.5
Dollar amount involved in crime	8	2.8
Deterrence	7	2.5
Factors not incorporated in guidelines	7	2.5
Property damage or loss	7	2.5
Disruption of governmental function	6	2.1
Defendant's propensity for violence	6	2.1
Charge/Plea does not reflect seriousness of the offense	6	2.1
Criminal purpose	5	1.8
Minors involved	4	1.4
Several persons injured	4	1.4
Large number of aliens	4	1.4
Extreme psychological injury	4	1.4
Punishment	4	1.4
To put the defendant's sentence in line with co-defendants	4	1.4
Unusually high drug purity	3	1.1
Mule/Role in the offense	3	1.1
Loss substantially exceeds maximum from loss table	3	1.1
Abduction or unlawful restraint	3	1.1
Rehabilitation	3	1.1
Terrifying the victim	3	1.1
Death	3	1.1
Dangerous or inhumane treatment	3	1.1
Extreme conduct	3	1.1
Deportation	3	1.1
Bodily injury	3	1.1
On-going nature of activity	2	0.7
Untruthful testimony	2	0.7
Guidelines too low	2	0.7
Coercion and duress	2	0.7
Degree of injury falls between two categories	2	0.7
Convictions on related counts	2	0.7
Other	51	17.9

* Based on 284 upward departure cases for which Reports on the Sentencing Hearing were available or reasons for departure were obtained through a telephone call to the field. Information on reasons was unavailable in 20 cases involving upward departures. Courts often provided more than one reason for departure; consequently, the percentage across all reasons for departure adds up to more than 100 percent. The "Other" category includes all reasons given only one time among relevant cases.

SOURCE: U.S. Sentencing Commission, 1989 & 1990 Departure Study Data File.

Table 62

Reasons Given by Sentencing Courts for Downward Departures*

REASON	Number	Percent
Substantial assistance	756	49.1
Pursuant to a plea agreement	152	9.9
No reason given	74	4.8
Family ties and responsibilities	66	4.3
Mule/Role in the offense	65	4.2
Cooperation without motion	54	3.5
Further demonstration of acceptance of responsibility	51	3.3
Adequacy of criminal history	46	3.0
Physical condition	46	3.0
Adequate punishment to meet the purposes of sentencing	45	2.9
Age	39	2.5
To put defendant's sentence in line with co-defendants	38	2.5
No prior record/first offender	33	2.1
General mitigating circumstance	25	1.6
Mental and emotional conditions	24	1.6
Deterrence	22	1.4
Rehabilitation	21	1.4
Diminished capacity	21	1.4
Cooperation motion unknown	20	1.3
Factors not incorporated in guideline	16	1.0
Restitution	12	0.8
Coercion and duress	12	0.8
Nature/Seriousness of the offense	12	0.8
Guidelines too high	12	0.8
Drug amount	12	0.8
Local conditions	10	0.7
Victim's conduct	9	0.6
Lack of culpability/accountability of defendant	9	0.6
Punishment	9	0.6
Drug dependence and alcohol abuse	8	0.5
Community ties	8	0.5
Military record	7	0.5
Previous employment record	6	0.4
Education and vocational skills	5	0.3
Dollar amount	5	0.3
Defendant's positive background/good character	5	0.3
Incapacitation	5	0.3
First felony conviction	5	0.3
Deportation	4	0.3
Lack of available facilities/overcrowding	4	0.3
Not representative of the "heartland"	4	0.3
Currently receiving punishment	4	0.3
Limited/minor prior record	3	0.2
Lesser harm	3	0.2
Death of a family member	3	0.2
Disagree with enhancements under guidelines	3	0.2
Counseling/treatment	3	0.2
Indigent background	2	0.1
Offense did not involve profit nor physical force or coercion	2	0.1
Not capable of providing negotiated amount	2	0.1
Other	123	8.0

* Based on 1,541 downward departure cases for which Reports on the Sentencing Hearing were available or reasons for departure were obtained through a telephone call to the field. Information on reasons was unavailable in 125 cases involving downward departures. Courts often provided more than one reason for departure; consequently, the percentage across all reasons for departure adds up to more than 100 percent. The "Other" category includes all the reasons given only one time among relevant cases.

SOURCE: U.S. Sentencing Commission, 1989 & 1990 Departure Study Data File.

immigration, and fraud cases had relatively lower departure rates. Table 63 provides departure rates by primary offense categories.

III. Use and Views of Departures in Sample Site Districts

The Sentencing Commission's monitoring system collected information on 3,781 cases from the district courts in the 12 evaluation sample sites for the period January 18, 1989, to September 30, 1990. The case files contain information on departures and the statement of reasons for the departures. Table 64 shows that 85 percent of the cases were sentenced within the recommended guideline range, and approximately 15 percent (n=588) of the cases received departure sentences. These figures are consistent with the national data, which indicate that 83.1 percent of the guideline cases were sentenced within the recommended guideline range. Further review of Table 64 reveals that 2.7 percent of the departures were upward, 5.6 percent were downward departures for substantial assistance, and 7.2 percent were downward departures for reasons other than substantial assistance. The results indicate that: (1) the vast majority (more than 80%) of departures were downward, and (2) that more than 40 percent of the downward departures were for substantial assistance. Upward departures made up only 17 percent (n=103) of the total departures for the 12 sample sites. In general, these figures are almost identical to the national departure data. The only notable difference is in the percentage of departures for substantial assistance. The national data indicate that 7.5 percent of the cases received a downward departure for substantial assistance, but only 5.6 percent of the cases from the 12 sample sites received such a departure.

While the rate of departure in the 12 sample site districts on the whole resembles the national data, there are some variations among these districts. Four of the districts had departure rates of 20 percent or greater (compared to the overall 12-site rate of 15%). The highest departure rate for any of the 12 sample sites was greater than 25 percent, while the lowest departure rate was close to 10 percent. In the district with the highest departure rate, the types of departures differ from most of the other sample sites. Over half the departures in the site with the highest departure rate were for reasons other than substantial assistance. In almost 40 percent of the downward departure cases in this site, the reasons given by the court were "pursuant to a plea agreement." This site also has a rate of upward departure considerably higher than the national rate. Here again a single reason accounts for a substantial percentage (approximately 25%) of these upward departures. The two most common reasons combined account for approximately 35 percent of the upward departures in this site. Because no other individual site contains a substantial number of departures, of any type, it is impossible to make any general or comparative statements. However, examining the few cases that do exist within each site indicates that none of the other sites appear to differ substantially from the national departure data.

In one of the other sites with a departure rate greater than 20 percent, the most frequent type of downward departure was for substantial assistance. At this site a federal defender and a supervising probation officer noted that the U.S. attorney's office frequently used substantial assistance motions to avoid mandatory minimum sentences in drug cases (implying that the government employed a low threshold for the level of assistance a defendant had to provide in order to merit a government motion for a reduction below the minimum guideline sentence based on substantial assistance).

At the other end of the spectrum, two districts had fairly low departure rates of approximately 10 percent each. At one of these sites, only one of the judges interviewed said that he had departed either upward or downward (other than for substantial assistance), and that was only in a "few"

Table 63

GUIDELINE DEPARTURE RATE BY PRIMARY OFFENSE CATEGORY*
(Jaunary 19, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL	DEPARTURE RATE (Based on 25% Random Sample)							
		Sentenced Within Guideline Range		Departure for Substantial Assistance		Other Downward Departure		Upward Departure	
	Number	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	10,070	8,238	81.8	691	6.9	858	8.5	283	2.8
Homicide	32	24	75.0	1	3.1	3	9.4	4	12.5
Kidnapping	22	17	77.3	1	4.6	1	4.6	3	13.6
Robbery	437	371	84.9	11	2.5	34	7.8	21	4.8
Assault	97	72	74.2	0	0.0	23	23.7	2	2.1
Burglary/B&E	35	30	85.7	0	0.0	3	8.6	2	5.7
Larceny	651	592	90.9	18	2.8	23	3.5	18	2.8
Embezzlement	420	369	87.9	7	1.7	41	9.8	3	0.7
Tax Offenses	37	31	83.8	3	8.1	2	5.4	1	2.7
Fraud	944	836	88.6	30	3.2	56	5.9	22	2.3
Drug Offenses									
-Importation and Distribution	4,445	3355	75.5	528	11.9	501	11.3	61	1.4
-Simple Possession	321	301	93.8	1	0.3	6	1.9	13	4.1
-Communication Facility	122	90	73.8	10	8.2	9	7.4	13	10.7
Auto Theft	54	50	92.6	3	5.6	0	0.0	1	1.9
Forgery/Counterfeiting	329	291	88.5	20	6.1	12	3.7	6	1.8
Sex Offenses	73	57	78.1	3	4.1	7	9.6	6	8.2
Bribery	37	29	78.4	4	10.8	4	10.8	0	0.0
Escape	150	123	82.0	5	3.3	18	12.0	4	2.7
Firearms	631	533	84.5	13	2.1	36	5.7	49	7.8
Immigration	621	557	89.7	9	1.5	22	3.5	33	5.3
Extortion/Racketeering	116	84	72.4	6	5.2	18	15.5	8	6.9
Gambling/Lottery	39	36	92.3	2	5.1	1	2.6	0	0.0
Money Laundering	23	18	78.3	2	8.7	3	13.0	0	0.0
Other	434	372	85.7	14	3.2	35	8.1	13	3.0

*Of the 11,170 cases in the sample, 117 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 983 cases were excluded due to one or both of the following conditions: missing or not applicable departure information (215) or missing primary offense category (806).

SOURCE: U.S. Sentencing Commission, 1989 & 1990 Departure Study Data File.

Table 64

Departure Rate 12 Sample Sites

Type	Total Cases (N=3,781)	
	Frequency	
	N	(%)[a]
Upward departure	103	(2.7)
Downward departure (other than for substantial assistance)	273	(7.2)
Substantial assistance	212	(5.6)
No departure	3,193	(84.5)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

cases. Some judges at this site mentioned that they would like more flexibility in the guidelines for downward departures but were concerned about the possibility of reversal on appeal.

In the 12 sample sites, the inadequacy of the defendant's criminal history category, the most common reason for an upward departure, was a factor in 22.3 percent (n=23) of the upward departure cases (*see* Table 65). The only minor difference in the sample data compared to the national data is the relative frequency of high speed chases in the site data as a factor for upward departure (*see* Table 66).

Other than substantial assistance, which is the basis for more than 40 percent (n=212) of the downward departure cases, there is considerable variation in the departure factors. The second most frequent factor, found in 13 percent (n=63) of the cases, was to reflect a plea agreement. Of the next five most frequent factors, two involve cooperation, and two involve individual characteristics and circumstances, for example, age, family ties and responsibilities (*see* Table 67). In the 12 sample sites, the hierarchy of reasons for downward and upward departures is generally similar to that in the national data (*see* Table 68).

A. Judges' Policies on Departure

The Commission questioned judges about their practices and attitudes regarding departures. The questions were: "What is your policy regarding departure?" and "Are there circumstances in which you would like to depart, but feel constricted or constrained by the guidelines?" Judges' responses to these questions are summarized in Tables 69 and 70.

When asked about their policy on departures, judges most frequently (17 of 45, or 38%) stated that they seldom departed and therefore had no policy on departures (*see* Table 70). For example, one judge said, "There is virtually no discretion regarding departures according to the guidelines. I have not had a case in which I departed upward, and the area given for departure is so narrow that departure is rare." Another judge stated, "I don't do enough to have a policy." A third judge reported, "I'm not sure I've ever departed; I stay in the guideline range where I'm fairly comfortable."

The judges' second most frequent reply (9 respondents or 20%) to the question on departure policy was that they depart downward — either mostly or solely — for reasons of substantial assistance. The following is a representative response: "I have never yet departed upward. I only depart downward if there's a recommendation by the U.S. attorney." Describing the use of substantial assistance as a means of departure, one judge remarked, "If I feel that a guideline sentence is unfair, I will see if there's a valid basis for departure. If the assistant U.S. attorney recommends one, it opens the door. In that case departure is not a problem."

Eight judges (18%) reported that they have departed (or would if presented with a case) in a variety of circumstances. These circumstances included high speed chases,[235] white-collar offenses, age, health, family considerations, a heinous crime, lying, failure to cooperate, and where the guidelines were considered too harsh or too lenient.

A few judges stated that there had to be a significant reason for departure, but they did not define what that reason might be. Five judges (11%) stated that they would depart under circumstances not anticipated by the Commission. Another five (11%) answered in a rather general

[235]Three judges who were all from the same district referred to this factor.

Table 65

Reasons Given for Upward Departure for 12 Sample Sites

Reason	Departures (N=103) Frequency N	(%)[a]
Adequacy of criminal history	23	(22.3)[a]
High speed chase	14	(13.6)
Pursuant to plea agreement	4	(3.9)
General aggravating or mitigating circumstances	3	(2.9)
Prior criminal record, risk of future criminal conduct	3	(2.9)
Other	52	(50.0)
Missing; indeterminable	4	(3.9)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 66

Reasons Most Frequently Given for Upward Departures: National Data

Reason[a]	Departures (N=284) Frequency N	(%)[b]
Adequacy of criminal history	121	(42.6)
Drug amount	18	(6.3)
Pursuant to a plea agreement	17	(6.0)
Guidelines do not reflect seriousness of the offense	16	(5.6)
Weapons and dangerous instrumentalities	15	(5.3)
Public Welfare	14	(4.9)
Disagree with guideline enhancements	12	(4.2)
High speed chase	11	(3.9)

[a] Courts often provided more than one reason for departure; consequently, the percentages across all reasons for departures add up to more than 100 percent.

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1989 & 1990 Departure Study Data File.

Table 67

Reasons Given for Downward Departures for 12 Sample Sites

Reason	Departures (N=485)	
	Frequency	
	N	(%)[a]
Substantial assistance	212	(43.7)
Pursuant to plea agreement	63	(12.9)
Cooperation (motion unknown)	12	(2.5)
General aggravating or mitigating circumstances	12	(2.5)
Age	11	(2.3)
Cooperation without motion	11	(2.3)
Family ties and responsibilities	10	(2.1)
Acceptance of responsibility at sentencing	7	(1.4)
Adequacy of criminal history	6	(1.2)
Departure known, no specific reason given	6	(1.2)
Role/mule in the offense	5	(1.0)
Sentenced at statutory minimum	5	(1.0)
No reason given	24	(4.9)
Other	82	(16.9)
Missing; indeterminable	19	(3.9)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Post-Mistretta Data File, MON91.

Table 68

Reasons Most Frequently Given for Downward Departures: National Data

Reason[a]	Departures (N=1,541)	
	Frequency	
	N	(%)[b]
Substantial assistance	756	(49.1)
Pursuant to plea agreement	152	(9.9)
Family ties and responsibilities	66	(4.3)
Mule/role in the offense	65	(4.2)
Cooperation without motion	54	(3.5)
Further demonstration of acceptance of responsibility	51	(3.3)
Adequacy of criminal history	46	(3.0)
Physical condition	46	(3.0)
Adequate to meet the purpose of sentencing	45	(2.9)
Age	39	(2.5)
To put defendant's sentence in line with codefendants'	38	(2.5)
No prior record/first offender	33	(2.1)
General mitigating circumstance	25	(1.6)

[a] Courts often provided more than one reason for departure; consequently, the percentages across all reasons for departures add up to more than 100 percent.

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1989 & 1990 Departure Study Data File.

Table 69

Judges' Opinions on Departure

Are there circumstances in which you would like to depart, but feel constricted or constrained by the guidelines?	Judges (N=45)	
	N	(%)[a]
Yes	39	(86.6)
Rarely	3	(6.6)
No	3	(6.6)
If yes, what are those circumstances?		(N=39)[b]
Types of cases	14	(35.9)
Non-violent	3	(7.7)
Drugs	3	(7.7)
White-collar	3	(7.7)
Child pornography	2	(5.1)
Bank robbery	2	(5.1)
High speed chases	1	(2.6)
Personal background/family/age/health	12	(30.7)
First offenders/minimal participants	8	(20.5)
Mandatory minimum cases	8	(20.5)
Too harsh sentences	5	(12.8)
Good rehabilitative prognosis	4	(10.2)
Case by case basis	3	(7.7)
Career offender	2	(5.1)
Adequacy of criminal history	2	(5.1)
Other	4	(10.2)
Nonresponsive	2	(5.1)

[a] Column percents appear in parentheses.

[b] Percents will add up to more than 100 because of multiple responses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

Table 70

Judges' Policies on Departure

What is your policy regarding departure?	Judges[a] (N=45)	
	N	(%)[b]
Seldom depart--no policy	17	(37.7)
Depart for substantial assistance	9	(20.0)
Would or have departed in certain situations	8	(17.7)
For good or significant reason (unspecified)	6	(13.3)
Depart under circumstances not anticipated by Commission	5	(11.1)
Follow what Commission suggests	5	(11.1)

[a] Percents will add up to more than 100 because of multiple responses.

[b] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, 1990-91 Site Visit Interviews.

way that they follow whatever the Commission suggests. As one judge stated, "My policy is the same as the Commission's. Rarely is departure warranted, and I have only departed one or two times."

B. Judges' Views on Departures

When asked if there are circumstances in which they would like to depart but felt constricted or constrained by the guidelines, the overwhelming majority (87%) of the 45 judges said "yes"[236] (*see* Table 69). Of those judges stating they would have liked to depart, 14 (36%) specified certain types of cases, such as non-violent offenses, drugs, white-collar, child pornography, and bank robbery. The responses of these 14 judges were spread approximately evenly, with two or three judges mentioning each type of case. For example, one judge reported, "In drug cases I would say 75 percent of the time [I wished to depart]; bank robbery, one-third of the time; general white-collar crime, most of the time.... Drugs, I would usually want to depart down; in a bank robbery case, I would usually want to depart up." Another judge mentioned cases involving first offenders in nonviolent situations, saying he would like "more flexibility regarding jail versus no jail when you're at the margin."

The second most frequently mentioned set of circumstances (12 respondents or 31%) that judges said were appropriate for departure included various personal characteristics of the defendant such as age, health, and family background. One judge stated that he felt restricted in cases "mostly involving factors we're told not to consider, such as age, health, family circumstances, and community circumstances. Non-prison sentences are more appropriate and adequate for many offenders. There should be more alternatives." Similarly, another judge reported that he is sentencing "a lot heavier than before" and is not able to take into account such factors as personal background and family situations.

First-time offenders and minimal participants were identified by eight judges (20.5%) as defendants whom they thought should receive lighter sentences. As one judge told interviewers, "You're getting into a philosophy that many of us don't like. For first-time offenders the mandatory minimums are too harsh, and the guidelines too." Another judge expressed frustration, saying

> *The person at the low end of the totem pole in a drug operation is a big problem in this district. The poor Mexican woman who drives five blocks ... for $1,000, which is enough to feed her whole family for a year ... I can't do anything but send her to jail based on the quantity of drugs. I hate that. We all believe she has to do the time, but ... It's a waste of the taxpayers' resources. There are lots of poor criminals here driven by desperation and poverty, but they won't be back in the system. They're jolted and mortified.*

Eight judges (20.5%) said they wanted to depart in mandatory minimum cases. As one judge observed, "The most dramatic [impact] aren't the guidelines but mandatory minimums. Sometimes departure isn't appropriate. [It can] only [be done] through the prosecutor." Another judge noted, "It's hard to sort out guidelines and mandatory minimums. Mandatory minimums are excessive. The court of appeals has made it clear that we cannot circumvent the guidelines."

A few judges indicated that they believed the guideline ranges were generally too harsh, and they would like to impose lighter sentences. For example, a judge said that it was hard to articulate, but

[236] Due to the way the question was phrased, it invited the recall of circumstances in which judges felt constricted or constrained by the guidelines.

he has a general sense that sentences under the guidelines are heavier than necessary. He added that he will not depart unless there is an "intellectually honest reason" to do so.

Judges were asked to respond based on a 5-point scale ranging from "no cases" to "many." When asked directly about their frequency of upward and downward departures, judges' answers varied from "no departures" to "30 to 40 percent of the time." More judges (14) said they did not depart upward than did those who said they did not depart downward (5). Only a handful of judges indicated that they departed in either direction more frequently than "in some cases," and these were scattered across three sites. A substantial majority of the judges said that they departed "in few cases," and a somewhat smaller number said "in some cases." One site in particular stood out as more uniform than others in that four of the five judges from that site said that they never departed.

Four judges said that they would like to depart where defendants (in the judge's opinion) have the potential for rehabilitation. One judge gave an example of a young sailor who fit this category, saying, "... the guy is technically guilty, but you know they will not be back again. When you believe you can help the person."

The other situations in which judges said they would like to depart, but felt restricted, were identified by three or fewer of the 45 judges interviewed. Such situations included downward departures from the career offender category, upward departures because of the inadequacy of criminal history category, cooperation that does not qualify for a substantial assistance motion, and other unspecified circumstances that call for departure to be decided on a case-by-case basis.

Three judges indicated they rarely wanted to depart, and three others reported they had not found themselves in circumstances warranting a departure. One judge in the latter category said, "No. There are too many ways [within the range.] If I need to go up, I can, or if I need to go down, I can." Another judge commented, "The guidelines are pretty good. There is a need for departure in a very limited number of cases."

C. Reasons for Not Departing

Despite the intent of the question[237] regarding judges' departure policies, 17 of the 45 judges (38%) took the opportunity to say that they seldom or never departed, and a number of these judges proceeded to explain why. Five judges indicated, with some variation in wording, that they did not find "acceptable" reasons in the guidelines for departure. One judge described himself as a "follower-of-the-law judge," and noted that he had not had the opportunity to depart, although he had wanted to do so in some cases. Another judge stated that, "The guidelines have become a very rigid system. It has not turned out to have the avenue of flexibility that it was sold to the judges with." Five judges stated they tended not to depart because they did not want to be appealed. One judge stated, "I rarely depart. I'm having difficulty on what is a valid departure that won't be appealed and create problems for everyone. The things I think would call for departure have allegedly already been considered." Two judges stated without equivocation that they did not want to depart.

D. Judges' Views Compared with Nationwide Departure Statistics

A review of the judges' comments on departure yields the following observations:

[237]The question was intended to elicit descriptions by judges of their policy on departures.

1. Other than those judges who said they seldom or never departed, the most common response given by judges was that they departed downward for substantial assistance. This correlates to nationwide data on judges' reasons for departure.

2. Predictably, there is little or no similarity between judges' stated reasons for downward departures across the country and the circumstances describing when they wished to depart, but felt constrained by the guidelines. According to the Guidelines Manual, offender characteristics such as age, physical condition, family ties and responsibilities, and community ties are "not ordinarily relevant" in determining whether a sentence should be outside the guidelines. The national departure data in Table 68 reflects few departures for those circumstances. "Family ties and responsibilities" is reported as a reason in only 4.3 percent (n=66) of departures; and "physical condition" and "age," 3.0 percent and 2.5 percent, respectively (n=46, 39). When judges were asked in the interviews if they had encountered circumstances in which it was difficult to depart, they frequently gave examples of cases having to do with defendants' personal background and family, age, and health considerations. Thus there is a potential conflict between considerations "not ordinarily relevant" for departure under the guidelines and the circumstances judges indicate they believe are appropriate reasons for departure. This is a probable source of the frustration reflected in the responses of some judges to the questions on departure.

3. From the analysis of both the quantitative and interview data addressing the general issue of departures, it is clear that downward departures for substantial assistance play a critical role in the sentencing process. Given this finding, additional and more elaborate analysis of this issue is warranted. The following section attempts to more fully explain the dynamics of the operation of substantial assistance within the federal courts.

IV. Substantial Assistance Departure Studies

As part of the Anti-Drug Abuse Act of 1986,[238] Congress enacted a provision permitting a court, upon motion of the government, to sentence a defendant below an otherwise applicable mandatory minimum sentence[239] "to reflect a defendant's substantial assistance in the investigation of another person who has committed an offense."[240] At the same time, Congress directed the Sentencing Commission to ensure that the sentencing guidelines then in the process of being developed "reflect the general appropriateness of imposing a lower sentence than otherwise would be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance ... "[241] The Commission responded to this directive by issuing a policy statement, U.S.S.G. §5K1.1, which sets forth the circumstances under which a court may sentence a defendant below an otherwise applicable

[238]Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[239]Note that the provision applies to any offense carrying a mandatory minimum term of imprisonment (*i.e.*, it is not limited to controlled substance offenses).

[240]18 U.S.C. § 3553(e), effective November 1, 1987. The reduced sentence is to be imposed "in accordance with the guidelines and policy statements issued by the Sentencing Commission...."

[241]28 U.S.C. § 994(n).

minimum guideline sentence for substantial assistance.[242] Consistent with the statutory provision in 18 U.S.C. § 3553(e) permitting sentences below a mandatory minimum, the Commission's policy statement conditions a court's authority to depart below a minimum sentence on a motion of the government. The appellate courts have strictly enforced the government motion requirement, both in the case of departures below a mandatory minimum and in the case of departures below the guideline range where no statutory minimum was involved.[243]

Defendants have attacked the government motion requirement on the theory that due process and separation of powers principles are violated when discretion to make the motion rests entirely with the prosecutor without a method for judicial review. All circuits that have addressed these arguments have rejected them and upheld the constitutionality of the government motion requirement.[244] In the absence of such a government motion, the defendant may furnish the court with information concerning cooperation and assistance in an effort to receive a sentence at the low end of the applicable guideline range. In rare circumstances, courts have noted that judicial intervention may be necessary in the absence of a government motion where the failure to make the motion breaches a plea agreement or where the refusal is arbitrary, capricious, or in bad faith.[245]

A. Use of Substantial Assistance Departures

As a part of its implementation studies in the 12 sample districts, the Commission asked a series of questions regarding substantial assistance departures. To supplement the interview findings, the Commission analyzed a random sample of substantial assistance cases from its sentence monitoring files. The following discussion summarizes principal findings from these studies.

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[242]It should be noted that the Commission's policy statement is applicable to departure from any guideline minimum sentence, whether or not a statutory minimum is involved, predicated upon a defendant's substantial assistance.

[243]*See, e.g.*, U.S. v. Romolo, 937 F.2d 20 (1st Cir. 1991); U.S. v. Huerta, 878 F.2d 89 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990); U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990); U.S. v. Francois, 889 F.2d 1341 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1822 (1990); U.S. v. White, 869 F.2d 822 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989); U.S. v. Levy, 904 F.2d 1026 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 974 (1991); U.S v. Lewis, 896 F.2d 246 (7th Cir. 1990); U.S. v. Justice, 877 F.2d 664 (8th Cir.), *cert. denied*, 493 U.S. 958 (1989); U.S. v. Ayarza, 874 F.2d 647 (9th Cir. 1989); U.S. v. Alamin, 895 F.2d 1335 (11th Cir.), *cert. denied*, 111 S. Ct. 196 (1990).

[244]*See, e.g.*, U.S. v. Jane Doe, 934 F.2d 353 (D.C. Cir. 1991); U.S. v. Romolo, 937 F.2d 20 (1st Cir. 1991); U.S. v. Huerta, 878 F.2d 89 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990); U.S. v. Francois, 889 F.2d 1341 (4th Cir. 1989); U.S. v. Harrison, 918 F.2d 30 (5th Cir. 1990); U.S. v. Grant, 886 F.2d 1513 (8th Cir. 1989); U.S. v. Ayarza, 874 F.2d 647 (9th Cir. 1989); U.S. v. Musser, 856 F.2d 1484 (11th Cir. 1988), *cert. denied*, 489 U.S. 1022 (1989).

[245]*See, e.g.*, U.S. v. Rexach, 896 F.2d 710 (2d Cir.), *cert. denied*, 111 S. Ct. 433 (1990) (plea agreement); U.S. v. Khan, 920 F.2d 1100 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1606 (1991) (procedure for alleging prosecutorial bad faith); U.S. v. Conner, 930 F.2d 1073 (4th Cir. 1991); U.S. v. Bayles, 923 F.2d 70 (7th Cir. 1991) (*dicta* suggesting review of refusal to file motion may be reviewable "to insure that the prosecutor did not base a decision on prohibited criteria such as race or speech."); U.S. v. Smitherman, 889 F.2d 189 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1493 (1990) (question of arbitrariness or bad faith on part of government may raise due process issue).

1. Type of Assistance

The first issue to be addressed is the type of assistance that qualifies an offender for a departure motion. Interview data from the site visits indicate that the kinds of assistance required for a substantial assistance motion are not standardized among districts. One prosecutor said that "as long as the defendant is candid and cooperative, even if it's not too helpful, he gets the motion." A prosecutor in another district said that the cooperation must include a "full debriefing on all activity in the case, testifying before a grand jury, and in court against co-defendants, and cooperating with state and local jurisdictions." Several prosecutors referred to the importance of the timeliness of the information.

In order to document more systematically the types of cooperation that result in a substantial assistance motion, a 20 percent subsample totalling 51 substantial assistance departure cases, randomly selected by district and representing 39 judicial districts, was chosen from 276 cases identified by the Commission's monitoring staff as having been sentenced below the guideline range for substantial assistance during the first nine months of calendar year 1990. In five cases, the Commission's case sentencing file alone sufficiently documented the defendant's cooperation. For the remaining 46 cases it was necessary to contact the probation officer by telephone, and in 27 of those cases the probation officer essentially knew everything the court knew about the extent of the assistance (*e.g.*, the officer had a copy of the cooperation letter from the prosecutor). In the remaining 19 cases, however, it was necessary to contact the prosecutor for additional information, and in one case it was necessary to contact the U.S. magistrate judge. In conducting the telephone interviews, the respondent was asked to describe in general terms the assistance provided by the offender.

The data suggest five general types of assistance that result in a substantial assistance motion from the government:

Type A Information Concerning the Offender's Own Activities (n=2)

One offender helped authorities locate stolen funds, and another offender essentially admitted guilt.

Type B Information (not under oath) Already Known to Authorities Concerning Other Offenders (n=18)

This is the largest type of assistance. In many ways, Type B is problematic because its usefulness to the government is often somewhat ambiguous. Essentially, this group is made up of offenders who provide information to authorities on the criminal activities of their co-defendants. They also have agreed to testify against their co-defendants, but their testimony was not required. This type of assistance can be useful to the government in encouraging co-defendants to plead, but it may not provide any new information.

Type C Information (not under oath) Concerning New Offenders Not Previously Known to Authorities (n=5)

These offenders provided information on the criminal activities of others that was otherwise unknown to the government. In three of the five cases, the information led to new convictions, and in one case the government chose not to pursue the evidence.

Type D Testimony (under oath) Against Other Offenders (n=15)

The second largest group involves offenders who testified under oath at either grand jury proceedings or at the trial of another individual.

Type E Undercover Activity Under the Direction of Authorities (n=11)

Finally, 11 offenders worked as undercover informants, sometimes at danger to themselves.

B. Eligibility for a Departure Motion

One issue that has been raised frequently about departures for substantial assistance involves situations in which reportedly only the most culpable offenders are able to benefit from the departure. While there are undoubtedly instances where the most culpable offenders provide information on underlings in large conspiracies, this appears to be the exception rather than the rule. In only 2 out of 51 cases did an offender benefit from a substantial assistance departure by providing information or testifying exclusively against an offender who seemed clearly less culpable.[246]

General interview evidence and specific empirical evidence from the substantial assistance sample describing the kinds of information provided by defendants that results in a government motion for substantial assistance indicate that there is considerable discretion in this provision for the government to define "substantial" according to the particular circumstances of the case. There is also some anecdotal evidence indicating that government motions made under §5K1.1 do not consistently meet the policy statement criteria.

C. Extent of Departure

Another issue frequently raised involves the extent of departures for substantial assistance. The interview data reveal little standardization on this issue. Information provided in the interviews suggests that the extent of the departure, described as a "crap shoot" by one prosecutor, ranges from limited reductions to generous ones, such as "going from 46 months to probation." One probation officer said that the penalty is reduced to "whatever the prosecutor feels is reasonable."

Data from the Commission's monitoring files allow more precision in the assessment of the extent of the departure. A departure was defined as the percent reduction below the bottom of the guideline range or the mandatory minimum, whichever was greater. For example, if the guideline

[246]Another way to examine this issue is to identify those cases that received adjustments for role in the offense (*see* Chapter Three, Part B in the Guidelines Manual). While role is an inexact measure of culpability, it may be of interest to note that only five defendants out of the 51 cases reviewed received an upward adjustment for role (one of the defendants acted alone), and nine cases received a downward role adjustment.

range was 10-16 months and the offender was sentenced to eight months, that was identified as a 20-percent departure. Where the case involved a consecutive mandatory minimum, the mandatory minimum was added to the bottom of the guideline range and the sentence was compared to the combined figure. For example, if the guideline range was 24-30 months with a 60-month consecutive mandatory minimum, a total of 84 months was compared to the actual sentence to measure the extent of the departure.

From a 25 percent random sample of offenders sentenced between January 19, 1989, and September 30, 1990, 694 offenders were identified as having received a sentence below the guidelines based on a motion from the government for substantial assistance. The data indicate that the extent of departure below the minimum guideline range averages 54 percent. The extent of departure ranges from a high of 100 percent (*i.e.*, departure down to a sentence of probation) to as low as five percent. When the bottom of the guideline range is less than or equal to 20 months, the extent of departure tends to be nearly 75 percent. For higher guideline ranges the extent of departure is consistently about 50 percent.

The data also show that 74 percent (n=511) of the offenders receiving a departure for substantial assistance were convicted of distributing drugs. Another nine percent were convicted of fraud, forgery, or theft.

V. Appellate Review of Departure Sentences

A. In General

An assessment of departures would be incomplete without an examination of the appellate consideration of departure sentences for which review is sought.[247] In a sense, a departure might be said to be *unwarranted* if the court of appeals reverses the sentence imposed by the district court. In reality, of course, it must be kept in mind that the government, by statutory design and policy, very selectively appeals downward departures, while defendants much more frequently appeal upward departures. Consequently, case law on departures may provide a more complete view of warranted/unwarranted upward departures rather than of downward departures.

Additionally, it should be recognized that, when reviewing a sentence outside the guideline range, the appellate court is typically required to assess not only whether *any* departure is warranted for the grounds stated by the sentencing court, but also whether the *extent* of a departure, if permissible, is reasonable. As the case law reveals, in many instances the courts of appeals have indicated that a sentence outside the applicable guideline range may be *warranted*, but the extent of deviation from the range is *unreasonable*, at least for the reasons given by the district court. In such cases, remand to the sentencing judge is necessary. A brief summary of the scheme employed by appellate courts in reviewing departure sentences is useful in understanding how such courts determine whether an appealed departure is warranted or unwarranted.

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[247] 18 U.S.C. § 3742 provides that either the defendant or the government (with high-level Department of Justice approval) may seek appellate review of a sentence that is outside the guideline range.

The statutory scheme for appellate review of departure sentences involves the interplay of 18 U.S.C. § 3742, the appellate review statute, and 18 U.S.C. § 3553(b),[248] the provision that sets out the bases for sentencing court departure decisions. These statutes, in combination with the sentencing guidelines and previously established case law, are used to determine when a departure is appropriate and whether the extent of the departure is reasonable.

Indicating that review of departure decisions under section 3742 is limited, the appellate courts have held that a district court's discretionary refusal to make a downward departure is not appealable.[249] Neither is the extent of a downward departure appealable by the defendant.[250]

Most circuits have adopted a three-step procedure for appellate review of departures, as first set forth in United States v. Diaz-Villafane.[251] Under the three-step procedure, a reviewing court will (1) "assay the circumstances relied on by the district court in determining that the case is sufficiently 'unusual' to warrant departure"; (2) "determine whether the circumstances ... actually exist in the particular case"; and (3) review "the direction and degree of departure ... by a standard of reasonableness."[252] In reviewing these questions, the appellate courts have applied a *de novo*

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[248]The relevant portion of 18 U.S.C. § 3553(b) provides as follows:

> Application of guidelines in imposing a sentence. -- The court shall impose a sentence of the kind, and within the range referred to in subsection (a)(4) unless the court finds that there exists 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission . . . .

[249]*See, e.g.*, U.S. v. Ortez, 902 F.2d 61 (D.C. Cir. 1990); U.S. v. Ocasio, 914 F.2d 330 (1st Cir. 1989); U.S. v. Adenyi, 912 F.2d 615 (2d Cir. 1990); U.S. v. Denardi, 892 F.2d 269 (3d Cir. 1989); U.S. v. Bayerle, 898 F.2d 28 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990); U.S. v. Rojas, 868 F.2d 1409 (5th Cir. 1989); U.S. v. Draper, 888 F.2d 1100 (6th Cir. 1989); U.S. v. Franz, 886 F.2d 973 (7th Cir. 1989); U.S. v. Evidente, 894 F.2d 1000 (8th Cir.), *cert. denied*, 110 S. Ct. 1956 (1990); U.S. v. Morales, 898 F.2d 99 (9th Cir. 1990); U.S. v. Davis, 900 F.2d 1524 (10th Cir.), *cert. denied*, 111 S. Ct. 155 (1990); U.S. v. Fossett, 881 F.2d 976 (11th Cir. 1989).

[250]*See, e.g.*, U.S. v. Hazel, 928 F.2d 420 (D.C. Cir. 1991); U.S. v. Pighetti, 898 F.2d 3 (1st Cir. 1990); U.S. v. Daly, 883 F.2d 313 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2622 (1990); U.S. v. Gant, 902 F.2d 570 (7th Cir. 1990); U.S. v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990); U.S. v. Bromberg, 933 F.2d 895 (10th Cir. 1991); U.S. v. Wright, 895 F.2d 718 (11th Cir. 1990) (*per curiam*).

[251]874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989)

[252]*Id.*, at 49. For application of this tripartite test by other circuits, see U.S. v. Ogbeide, 911 F.2d 793 (D.C. Cir. 1990); U.S. v. Lara, 905 F.2d 599 (2d Cir. 1990); U.S. v. Kikumura, 918 F.2d 1084 (3d Cir. 1990); U.S. v. Joan, 883 F.2d 491 (6th Cir. 1989); U.S. v. Terry, 930 F.2d 542 (7th Cir. 1991); U.S. v. Lang, 898 F.2d 1378 (8th Cir. 1990); U.S. v. Lira-Barraza, 941 F.2d 75 (9th Cir. 1991); U.S. v. White, 893 F.2d 276 (10th Cir. 1990); *see also* U.S. v. Valle, 929 F.2d 629 (11th Cir. 1991) (similar three-step analysis).

standard of review to the first question, a clearly erroneous standard of review to the second question, and a deferential standard in assessing the reasonableness of the extent of the departure.[253] The Fourth Circuit uses a similar, four-part "test of 'reasonableness.'"[254] In the Fifth Circuit, a departure from the guidelines "will be affirmed if the district court offers 'acceptable reasons' for the departure and the departure is 'reasonable.'"[255]

There is a split in the circuits on the issue of whether a court of appeals may uphold a departure sentence after finding that one or more of the grounds is invalid. The Tenth and Eleventh circuits have held that such sentences must be remanded for resentencing.[256] Other circuits have held that such departures may be upheld if the proper ground warrants the departure and it appears the same sentence would have been imposed absent the improper factors.[257] The Supreme Court, in United States v. Williams, 910 F.2d 1574 (7th Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), has recently heard argument on this issue (November 6, 1991 oral argument calendar).

The Supreme Court has resolved one split among the circuits involving departure procedure by holding that

> *before a district court can depart on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the grounds on which the district court is contemplating an upward departure.*[258]

This general background of the manner in which the courts of appeals review the propriety of departure sentences provides a context for examining specific departure issues.

B. Specific Departure Grounds Considered on Appeal

A comprehensive analysis of appellate consideration of specific departure issues is beyond the scope of this evaluation report; however, in order to provide some sense of appellate treatment of

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[253] A few circuits have held that the degree of the departure must be linked to the structure of the guidelines. *See, e.g.*, U.S. v. Gaddy, 909 F.2d 196 (7th Cir. 1990); U.S. v. Lira-Barraza, 941 F.2d 75 (9th Cir. 1991).

[254] U.S. v. Summers, 893 F.2d 63 (4th Cir. 1990).

[255] U.S. v. Valasquez-Mercado, 872 F.2d 632 (5th Cir.), *cert. denied*, 493 U.S. 866 (1989).

[256] U.S. v. Zamparrippa, 905 F.2d 337 (10th Cir. 1990); U.S. v. Hernandez-Vasquez, 884 F.2d 1314 (9th Cir. 1989) (*per curiam*). *See also* U.S. v. Michael, 894 F.2d 1457 (5th Cir. 1990) (appellate court could not determine whether the improper factor was a "necessary part of the basis for [the] departure").

[257] *See, e.g.*, U.S. v. Jones, No. 89-3266 (D.C. Cir. Oct. 25, 1991); U.S. v. Diaz-Bastardo, 929 F.2d 798 (1st Cir. 1991); U.S. v. Alba, 933 F.2d 1117 (2d Cir. 1991); U.S. v. Rodriguez, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990); U.S. v. Franklin, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); U.S. v. Glick, No. 91-5505 (4th Cir. Oct. 23, 1991).

[258] Burns v. United States, 111 S. Ct. 2182 (1991).

these issues, an effort was made to catalogue the principal departure factors discussed in reported appellate court decisions during the period from January 1989 through August 7, 1991.[259] The results of this descriptive categorization effort are set forth below in tables listing specific departure factors and the case names and citations of the decisions that discuss the particular issue. Table 71 lists factors that appellate courts have determined warrant downward departure. Table 72, in contrast, lists those factors that appellate courts have determined do not warrant downward departure. Tables 73 and 74 list factors that warrant upward departure and that do not warrant upward departure, respectively. Table 75 catalogues reported appellate case decisions that discuss the various methods suggested to compute the extent of departures. A summary of the departure issues on which the appellate courts tend to agree and disagree precedes the tables.

A review of the reported cases reveals that the appellate courts have generally held that the extent of the departure should take into account the general structure and reasoning of the sentencing guidelines, when the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct[260] and when the guidelines do not adequately take into consideration the presence of aggravating circumstances. Some reviewing courts are flexible on this issue and only recommend that the guidelines be used as a reference or analogy.[261] Other circuits have required a reasoned explanation of the extent of the departure more strictly tied to analogous structure and policies of the guidelines to help facilitate appellate review of the "reasonableness" of the sentence.[262] This broad agreement among the circuit courts on computing the extent of departures based, at least in part, on the structure of the guidelines leads

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[259]For this purpose, Commission staff surveyed departure cases summarized in the Commission legal staff compilations of Selected Guidelines Application Decisions, 1989, 1990, Jan.-June 1991 (available at the Commission), as well as any additional departure cases discussed in the Federal Judicial Center's publication: Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues (September 13, 1991). The latter publication covers court decisions reported before August 8, 1991.

[260]U.S. v. Allen, 898 F.2d 203 (D.C. Cir. 1990); U.S. v. Cervantes, 878 F.2d 50 (2d Cir. 1990); U.S. v. Summers, 893 F.2d 63 (4th Cir. 1990); U.S. v. Lopez, 871 F.2d 513 (5th Cir. 1989); U.S. v. Kennedy, 893 F.2d 825 (6th Cir. 1990); U.S. v. Anderson, 886 F.2d 215 (8th Cir. 1990); U.S. v. Richison, 901 F.2d 778 (9th Cir. 1990) (*per curiam*); U.S. v. Cantu-Dominguez, 898 F.2d 968 (9th Cir. 1990). *See* Table 75.

[261]U.S. v. Aymelek, 926 F.2d 64 (1st Cir. 1991); U.S. v. Kim, 898 F.2d 678 (2d Cir. 1990); U.S. v. Kikumura, 918 F.2d 1084 (3d Cir. 1990); U.S. v. Hummer, 916 F.2d 186 (4th Cir. 1991); U.S. v. Landry, 903 F.2d 334 (5th Cir. 1990); U.S. v. Jackson, 921 F.2d 985 (10th Cir. 1990); U.S. v. Shuman, 902 F.2d 873 (11th Cir. 1990). *See* Table 75.

[262]U.S. v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1990) (*en banc*); U.S. v. Ferra, 900 F.2d 1057 (7th Cir. 1990). *See* Table V.

Table 71

Factors Warranting a Downward Departure

FACTORS	CASES
Career offender category overrepresents the seriousness of the defendant's prior criminal history	United States v. Adkins, 937 F.2d 947 (4th Cir. 1991) United States v. Smith, 909 F.2d 1164 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 691 (1991) United States v. Brown, 903 F.2d 540 (8th Cir. 1990) United States v. Senior, 935 F.2d 149 (8th Cir. 1991) United States v. Lawrence, 916 F.2d 553 (9th Cir. 1990)
First-time offender's aberrant behavior	United States v. Dickey, 924 F.2d 836 (9th Cir. 1991) United States v. Takai, 941 F.2d 738 (9th Cir. 1991) United States v. Pena, 930 F.2d 1486 (10th Cir. 1991)
Defendant's tragic personal history	United States v. Lopez, 938 F.2d 1293 (D.C. Cir. 1991) United States v. Deigert, 916 F.2d 916 (4th Cir. 1990)
Defendant's vulnerability to victimization in prison because of youthfulness and bisexuality	United States v. Lara, 905 F.2d 599 (2d Cir. 1990)
Defendant's excellent employment history in combination with other factors	United States v. Alba, 933 F.2d 1117 (2d Cir. 1991) United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990)
Defendant's "youthful lack of guidance"	United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991)
Defendant's assistance to the administration of justice	United States v. Garcia, 926 F.2d 125 (2d Cir. 1991)
Defendant's efforts at drug rehabilitation	United States v. Sklar, 920 F.2d 107 (1st Cir. 1990) United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989)
Defendant's minimal role	United States v. Restrepo, 936 F.2d 661 (2d Cir. 1991) United States v. Alba, 933 F.2d 1117 (2d Cir. 1991) United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990)
Co-defendant disparity	United States v. Nelson, 918 F.2d 1268 (6th Cir. 1990) United States v. Ray, 930 F.2d 1368 (9th Cir. 1990)
Defendant's voluntary surrender to officials after failing to report for service of sentence	United States v. Crumb, 902 F.2d 1337 (8th Cir. 1990)
Defendant's lack of sophistication in committing offense	United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990)
Defendant's physical handicap	United States v. Greenwood, 928 F.2d 645 (4th Cir. 1991)
Defendant's diminished capacity was a contributing factor to the commission of offense -- need not be sole cause	United States v. Lauzon, 938 F.2d 326 (1st Cir. 1991)
Victim's conduct "substantially provoked" assault	United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989)
Defendant's "exemplary" citizenship	United States v. Turner, 915 F.2d 1574 (6th Cir. 1990)
Prison official's "ill-advised decision" to send an alcoholic on an unsupervised furlough	United States v. Whitehorse, 909 F.2d 316 (8th Cir. 1990)

Table 72

Factors Not Warranting a Downward Departure

FACTORS	CASES
Co-defendant disparity	United States v. Adonis, 891 F.2d 300 (D.C. Cir. 1989) United States v. Wogan, 938 F.2d 1446 (1st Cir. 1991) United States v. Williams, 891 F.2d 962 (1st Cir. 1989) United States v. Joyner, 924 F.2d 454 (2d Cir. 1991) United States v. Alba, 933 F.2d 1117 (2d Cir. 1991) United States v. Schular, 907 F.2d 294 (2d Cir. 1990) United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) United States v. Goff, 907 F.2d 1441 (4th Cir. 1990) United States v. Bolden, 889 F.2d 1336 (4th Cir. 1989) United States v. Brewer, 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990) United States v. Parker, 912 F.2d 156 (6th Cir. 1990) United States v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990) United States v. Russell, 917 F.2d 512 (11th Cir.), *cert. denied*, 111 S. Ct. 1427 (1991)
Defendant's alcohol or drug abuse	United States v. Rushby, 936 F.2d 41 (1st Cir. 1991) United States v. Creed, 897 F.2d 963 (8th Cir. 1990) United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) United States v. Lowden, 905 F.2d 1448 (10th Cir.), *cert. denied*, 111 S. Ct. 206 (1990)
Defendant's pregnancy	United States v. Pozzy, 902 F.2d 133 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990)
Impact of defendant's incarceration on minor children	United States v. Carr, 932 F.2d 67 (1st Cir. 1991) United States v. Brand, 907 F. 2d 31 (4th Cir.), *cert. denied*, 111 S. Ct. 585 (1990) United States v. Brewer, 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990)
The passive nature of a defendant who was convicted of receiving child pornography	United States v. Deane, 914 F.2d 11 (1st Cir. 1990) United States v. Studley, 907 F.2d 254 (1st Cir. 1990)
Defendant's family ties and responsibilities	United States v. Guerrero, 894 F.2d 261 (7th Cir. 1990) United States v. Neil, 903 F.2d 564 (8th Cir. 1990)
Defendant's good behavior in prison and involvement in half-hearted robbery	United States v. Williams, 891 F.2d 962 (1st Cir. 1991)
Defendant's military service	United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990) United States v. Neil, 903 F.2d 564 (8th Cir. 1990)
Low purity of drugs	United States v. Davis, 868 F.2d 1390 (5th Cir. 1989)
Defendant's age	United States v. Summers, 893 F.2d 63 (4th Cir. 1990) United States v. Carey, 895 F.f2d 318 (7th Cir. 1990)
Sentence received by defendant's husband	United States v. Pozzy, 902 F.2d 133 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990)
Drug dealer who made charitable contributions to community	United States v. McHan, 920 F.2d 244 (4th Cir. 1990)

Table 72 (cont'd.)

Corrupting influence of defendant's family history	United States v. Vela, 927 F.2d 197 (5th Cir. 1991)
Defendant's rehabilitation attempts between date of arrest and date of sentencing	United States v. Sklar, 920 F.2d 107 (1st Cir. 1990) United States v. Pharr, 916 F.2d 129 (3d Cir. 1990) United States v. VanDyke, 895 F.2d 984 (4th Cir.), *cert. denied*, 111 S. Ct. 112 (1990)
Guideline penalty too high	United States v. Reina, 905 F.2d 638 (2d Cir. 1990)
Payment of restitution	United States v. Brewer, 899 F.2d 503, *cert. denied*, 111 S. Ct. 127 (1991) United States v. Carey, 895 F.2d 318 (7th Cir. 1990)
Possibility of defendant's deportation in the future	United States v. Alvarez-Cardenas, 902 F.2d 734 (9th Cir. 1990) United States v. Ceja-Hernandez, 895 F.2d 544 (9th Cir. 1990)
Victim committed adultery with defendant's wife	United States v. Shortt, 919 F.2d 1325 (8th Cir. 1990)
Diminished capacity when defendant commits a crime of violence	United States v. Poff, 926 F.2d 588 (7th Cir. 1991) *(en banc)* United States v. Russell, 917 F.2d 512 (11th Cir. 1990)
Defendant was a bi-racial adopted child.	United States v. Prestemon, 929 F.2d 1275 (8th Cir. 1991)
Assault on a federal marshal	United States v. Riviere, 924 F.2d 1297 (3d Cir. 1991)
Jury's request for leniency	United States v. Mickens, 926 F.2d 1323 (2d Cir. 1991)
Defendant's "unstable upbringing"	United States v. Daly, 883 F.2d 313 (4th Cir. 1989)
Defendant's education, sophistication, and socio-economic status	United States v. Burch, 873 F.2d 765 (5th Cir. 1989)
Defendant subjected to "run-of-the-mill persuasion"	United States v. Russell, 917 F.2d 512 (11th Cir. 1990)
Small quantity of drugs, lack of violence	United States v. Hays, 899 F.2d 515 (6th Cir.), *cert. denied*, 111 S. Ct. 385 (1990)
Victim's strong-arm tactics to collect debts	United States v. Bigelow, 914 F.2d 966 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1077 (1991)
Defendant's lack of a prior record	United States v. Brewer, 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1991) United States v. Carey, 895 F.2d 318 (7th Cir. 1990) United States v. Neil, 903 F.2d 564 (8th Cir. 1990) United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990)
Defendant's compulsive gambling	United States v. Rosen, 896 F.2d 789 (3d Cir. 1990)
Defendant's race	United States v. Lowden, 905 F.2d 1448 (10th Cir.), *cert. denied*, 111 S. Ct. 206 (1990)
Alleged government misconduct	United States v. Dickey, 924 F.2d 836 (9th Cir. 1991)
Parole deferral	United States v. Wright, 924 F.2d 545 (4th Cir. 1991)

Table 73

Factors Warranting an Upward Departure

FACTORS	CASES
Consolidation of prior sentences	United States v. Ocasio, 914 F.2d 330 (1st Cir. 1990) United States v. Roberson, 872 F.2d 597 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989) United States v. Gonzales, 929 F.2d 213 (6th Cir. 1991) United States v. Williams, 922 F.2d 578 (10th Cir. 1990) United States v. White, 893 F.2d 276 (10th Cir. 1990) United States v. Jackson, 883 F.2d 1007 (11th Cir. 1989) (*per curiam*)
Criminal History Category VI did not sufficiently reflect the seriousness of defendant's criminal past.	United States v. Roberson, 872 F.2d 597 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989) United States v. Joan, 883 F.2d 491 (6th Cir. 1989) United States v. Jordan, 890 F.2d 968 (7th Cir. 1989) United States v. Wells, 878 F.2d 1232 (9th Cir. 1989) United States v. Christopher, 923 F.2d 1545 (11th Cir. 1991)
Criminal conduct while awaiting sentencing	United States v. George, 911 F.2d 1028 (5th Cir. 1990) United States v. Sanchez, 893 F.2d 679 (5th Cir. 1990) United States v. Geiger, 891 F.2d 512 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1825 (1990) United States v. Franklin, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990) United States v. White, 893 F.2d 276 (10th Cir. 1990) United States v. Fayette, 895 F.2d 1375 (11th Cir. 1990)
Similarity of prior offense to offense of conviction	United States v. DeLuna-Trujillo, 868, F.2d 122 (5th Cir. 1989) United States v. Barnes, 910 F.2d 1342 (6th Cir. 1990) United States v. Dzielinski, 914 F.2d 98 (7th Cir. 1990) (*per curiam*) United States v. Gaddy, 909 F.2d 196 (7th Cir. 1990) United States v. Rodriguez-Castro, 908 F.2d 438 (9th Cir. 1990) United States v. Jackson, 903 F.2d 1313 (10th Cir. 1990)
Defendant's remote convictions	United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991) United States v. Williams, 910 F.2d 1574 (7th Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991) United States v. Leake, 908 F.2d 550 (9th Cir. 1990)
Uncharged criminal conduct	United States v. Thomas, 914 F.2d 139 (8th Cir. 1990) United States v. Spraggins, 868 F.2d 1541 (11th Cir. 1989)
Defendant's disciplinary problems while in prison for a prior offense	United States v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990) United States v. Keys, 899 F.2d 983 (10th Cir.), *cert. denied*, 111 S. Ct. 160 (1990)

Table 73 (cont'd.)

FACTORS	CASES
Dangerousness of venture; inhumane treatment of illegal aliens; large number of illegal aliens	United States v. Diaz-Bastardo, 929 F.2d 798 (1st Cir. 1991) United States v. Velasquez-Mercado, 872 F.2d 632 (5th Cir.), *cert. denied*, 110 S. Ct. 187 (1989) United States v. Lopez-Escobar, 884 F.2d 170 (5th Cir. 1989) United States v. Gomez, 901 F.2d 728 (9th Cir. 1990)
Acquitted conduct	United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990) United States v. McKenley, 895 F.2d 184 (4th Cir. 1990) United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989)
Substantial loss	United States v. Scott, 915 F.2d 774 (1st Cir. 1990) United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990) United States v. Benskin, 926 F.2d 562 (6th Cir. 1991) United States v. Roth, 934 F.2d 248 (10th Cir. 1991)
Use of explosives	United States v. Michael, 894 F.2d 1457 (5th Cir. 1990) United States v. Huddelston, 929 F.2d 1030 (5th Cir. 1991) United States v. Loveday, 922 F.2d 1411 (9th Cir. 1991) United States v. Baker, 914 F.2d 208 (10th Cir. 1990)
Use, possession, or nature of weapon	United States v. Schular, 907 F.2d 294 (2d Cir. 1990) United States v. Mahler, 891 F.2d 75 (4th Cir. 1989) United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) United States v. Otero, 868 F.2d 1412 (5th Cir. 1989) United States v. Williams, 901 F.2d 1394 (7th Cir. 1990) United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990) United States v. Thomas, 914 F.2d 139 (8th Cir. 1990) United States v. Carpenter, 914 F.2d 1131 (9th Cir. 1990)
Large number of victims	United States v. Johnson, 931 F.2d 238 (3d Cir. 1991) United States v. Benskin, 926 F.2d 562 (6th Cir. 1991)
Amount of drugs involved when defendant is convicted of a telephone count	United States v. Citro, 938 F.2d 1431 (1st Cir. 1991) United States v. Correa-Vargas, 860 F.2d 35 (2d Cir. 1988) United States v. Perez, 915 F.2d 947 (5th Cir. 1990) United States v. Anders, 899 F.2d 570 (6th Cir.), *cert. denied*, 111 S. Ct. 532 (1990) United States v. Feekes, 929 F.2d 334 (7th Cir. 1991) United States v. Williams, 895 F.2d 435 (8th Cir. 1990) United States v. Bennett, 900 F.2d 204 (9th Cir. 1990) United States v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991) United States v. Asseff, 917 F.2d 502 (11th Cir. 1991)

Table 73 (cont'd.)

FACTORS	CASES
Involving minors in drug offenses	United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989) United States v. Wylie, 919 F.2d 969 (5th Cir. 1990) United States v. Shuman, 902 F.2d 873 (11th Cir. 1990)
High purity of drugs	United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989) United States v. Ryan, 866 F.2d 604 (3d Cir. 1989) United States v. Kinnard, 884 F.2d 581 (6th Cir. 1989) (unpub.)
Amount of drugs involved when defendant is convicted of simple possession or operating a crack house	United States v. Ryan, 866 F.2d 604 (3d Cir. 1989) United States v. Sardin, 921 F.2d 1064 (10th Cir. 1990) United States v. Crawford, 883 F.2d 963 (11th Cir. 1989)
"Astronomical" quantity of drugs	United States v. Vasquez, 909 F.2d 235 (7th Cir. 1990)
Defendant convicted of misprision of a felony may be guilty of underlying offense	United States v. Warters, 885 F.2d 1266 (5th Cir. 1989) United States v. Pigno, 922 F.2d 1162 (5th Cir. 1991)
High-speed chase or other dangerous conduct while fleeing arrest	United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990) United States v. Bates, 896 F.2d 912 (5th Cir.), *cert. denied*, 110 S. Ct. 3227 (1990) United States v. Salazar-Villarreal, 872 F.2d 121 (5th Cir. 1989) *(per curiam)* United States v. Jordan, 890 F.2d 968 (7th Cir. 1989) United States v. Ramirez-deRosas, 873 F.2d 1177 (9th Cir. 1989) United States v. Rodriguez-Castro, 908 F.2d 438 (9th Cir. 1990)
Refusal to return almost $1.7 million from a robbery	United States v. Valle, 929 F.2d 629 (11th Cir. 1991)
Guideline sentence would be less than that received for a prior conviction for the same offense	United States v. Barnes, 910 F.2d 1342 (6th Cir. 1990)
Defendant's intent to keep and marry a kidnapped 3 year old child	United States v. Patrick, 935 F.2d 758 (9th Cir. 1991)
Defendant urged son to rob bank for money for defendant's bail.	United States v. Porter, 924 F.2d 395 (1st Cir. 1991)
Defendant vowed to return to United States even after deportation	United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991)
Guideline adjustment inadequate: --role in the offense --enhancement for kidnapping during robbery --multiple count adjustment for 15 robbery counts --obstruction of justice inadequate when defendant attempted to murder witness	 United States v. Crawford, 883 F.2d 963 (11th Cir. 1989) United States v. Pridgen, 848 F.2d 1003 (5th Cir. 1990) United States v. Chase, 894 F.2d 488 (1st Cir. 1990) United States v. Drew, 894 F.2d 965 (8th Cir.), *cert. denied*, 110 S. Ct. 1830 (1990)

Table 73 (cont'd.)

FACTORS	CASES
Death of victim; multiple and extreme injuries	United States v. Melton, 883 F.2d 336 (5th Cir. 1989) United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991) United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991)
Extreme psychological injury to victim(s)	United States v. Ellis, 935 F.2d 385 (1st Cir. 1991) United States v. Pergola, 930 F.2d 216 (2d Cir. 1991) United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991) United States v. Lucas, 889 F.2d 697 (6th Cir. 1989) United States v. Benskin, 926 F.2d 562 (6th Cir. 1991) United States v. Perkins, 929 F.2d 436 (8th Cir. 1991) United States v. Zamparripa, 905 F.2d 337 (10th Cir. 1990)
Property loss or damage	United States v. Hummer, 916 F.2d 186 (4th Cir. 1990) United States v. Garcia, 900 F.2d 45 (5th Cir. 1990)
Disruption of governmental function	United States v. Garcia, 900 F.2d 45 (5th Cir. 1990) United States v. Hatch, 926 F.2d 381 (5th Cir. 1991) United States v. Murillo, 902 F.2d 1169 (5th Cir. 1990) United States v. Pulley, 922 F.2d 1283 (6th Cir. 1991)
Extreme conduct: --sexual abuse of minors	United States v. Ellis, 935 F.2d 385 (1st Cir. 1991) United States v. Cofer, 916 F.2d 713 (6th Cir. 1990)
Criminal purpose	United States v. Cofer, 916 F.2d 713 (6th Cir. 1990) United States v. Culver, 929 F.2d 389 (8th Cir. 1991) United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991)
Public welfare: --selling guns to drug traffickers --county sheriff manufacturing drugs	 United States v. Schular, 907 F.2d 294 (2d Cir. 1990) United States v. Wade, 931 F.2d 300 (5th Cir. 1991)

Table 74

Factors Not Warranting an Upward Departure

FACTORS	CASES
A history of arrests, without additional evidence of misconduct	United States v. Cantu-Dominguez, 898 F.2d 968 (5th Cir. 1990) United States v. Williams, 910 F.2d 1574 (7th Cir. 1990), *cert. granted,* 111 S. Ct. 1305 (1991) United States v. Cota-Guerrero, 907 F.2d 87 (9th Cir. 1990)
Acquitted conduct	United States v. Brady, 928 F.2d 844 (9th Cir. 1991)
Charges dismissed or not charged as part of a plea bargain	United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991) United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990)
Extreme psychological injury to murder victim's family	United States v. Hoyungawa, 930 F.2d 744 (9th Cir. 1991)
Community's intolerance to drug trafficking	United States v. Aguilar-Pena, 887 F.2d 347 (1st Cir. 1989) United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990)
Co-defendant disparity	United States v. Parker, 912 F.2d 156 (6th Cir. 1990) United States v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990)
Defendant's need for psychiatric treatment	United States v. Doering, 909 F.2d 392 (9th Cir. 1990)
Sentencing court's opinion that guideline sentence is "weak and ineffectual" for the offense; personal disagreement with guidelines; guideline sentence too lenient	United States v. Lopez, 875 F.2d 1124 (5th Cir. 1989) United States v. Jones, 905 F.2d 867 (5th Cir. 1990) United States v. Lassiter, 929 F.2d 267 (6th Cir. 1991)
Drug purity	United States v. Contractor, 926 F.2d 128 (2d Cir. 1991) United States v. Martinez-Duran, 925 F.2d 453 (9th Cir. 1991)
Numerous falsehoods in the defendant's testimony	United States v. Goodrich, 919 F.2d 1365 (9th Cir. 1990)
Deterrence	United States v. Newsome, 894 F.2d 852 (6th Cir. 1990)
Quantity of guns	United States v. Uca, 867 F.2d 783 (3d Cir. 1989) United States v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990)
Defendant made a profit	United States v. Mendoza, 890 F.2d 176 (9th Cir. 1989) United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989)
Defendant distributed drugs near school	United States v. McDowell, 902 F.2d 451 (6th Cir. 1990)
Magnitude of thievery	United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990)
Discharge of firearm	United States v. Brady, 928 F.2d 844 (9th Cir. 1991)

Table 74 (cont'd.)

FACTORS	CASES
Propensity for violence and use of guns	United States v. Robison, 904 F.2d 365 (6th Cir.), *cert. denied*, 111 S. Ct. 360 (1990) United States v. Missick, 875 F.2d 1294 (7th Cir. 1989) United States v. Hawkins, 901 F.2d 863 (10th Cir. 1990)
Defendant's role in the offense	United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989)
Effect of grouping rules	United States v. Cox, 921 F.2d 772 (8th Cir. 1990)
"Near miss" on career offender status	United States v. Colon, 905 F.2d 580 (2d Cir. 1990) United States v. Robison, 904 F.2d 365 (6th Cir.), *cert. denied*, 111 S. Ct. 360 (1990) United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991) United States v. Hawkins, 901 F.2d 863 (10th Cir. 1990) United States v. Delvecchio, 920 F.2d 810 (11th Cir. 1991)
Defendant's socio-economic status; educational opportunities	United States v. Barone, 913 F.2d 46 (2d Cir. 1990) United States v. Hatchett, 923 F.2d 369 (5th Cir. 1991)
Defendant's age	United States v. Hatchett, 923 F.2d 369 (5th Cir. 1991)
Defendant's national origin	United States v. Rodriguez, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990) United States v. Onwuemene, 933 F.2d 650 (8th Cir. 1991)
Defendant's connection to organized crime where there was insufficient corroboration of agent's testimony	United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990)
A police officer's ordinary scratches, scrapes, and bruises; police officers dispatched twice to capture defendant	United States v. Singleton, 917 F.2d 411 (9th Cir. 1990)

Table 75

Computation of Extent of Departures

METHOD	CASES
In making a departure pursuant to §4A1.3, the court should use as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable.	United States v. Allen, 898 F.2d 203 (D.C. Cir. 1990) United States v. Cervantes, 878 F.2d 50 (2d Cir. 1990) United States v. Summers, 893 F.2d 63 (4th Cir. 1990) United States v. Lopez, 871 F.2d 513 (5th Cir. 1989) United States v. Kennedy, 893 F.2d 825 (6th Cir. 1990) United States v. Anderson, 886 F.2d 215 (8th Cir. 1990) United States v. Richison, 901 F.2d 778 (9th Cir. 1990) (*per curiam*) United States v. Cantu-Dominguez, 898 F.2d 968 (9th Cir. 1990)
In departing above criminal history category VI, the sentencing ranges should increase approximately 10-15%.	United States v. Schmude, 901 F.2d 555 (7th Cir. 1990) United States v. Jackson, 921 F.2d 985 (10th Cir. 1990) (*en banc*)
In departing above criminal history category VI, the courts need not follow a "bright-line" rule for determining reasonableness.	United States v. Ocasio, 914 F.2d 330 (1st Cir. 1990) United States v. Bernhardt, 905 F.2d 343 (10th Cir. 1990)
In departing above category VI, courts may consider using the career offender guideline as a reference.	United States v. Williams, 922 F.2d 578 (10th Cir. 1990) United States v. Gardner, 905 F.2d 1432 (10th Cir.), *cert. denied*, 111 S. Ct. 202 (1990)
When defendant's prior conduct does not technically meet requirements of the career offender guidelines, it is improper to depart to career offender guideline.	United States v. Colon, 905 F.2d 580 (2d Cir. 1990) United States v. Robison, 904 F.2d 365 (6th Cir. 1990) United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991) United States v. Hawkins, 901 F.2d 863 (10th Cir. 1990) United States v. Delvecchio, 920 F.2d 810 (11th Cir. 1991)
When making a departure based on criminal activity that did not result in conviction, courts should use multiple count procedure in §3D1.1 as a guide.	United States v. Kim, 896 F.2d 678 (2d Cir. 1990) United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990)
Court should look to the guidelines for guidance or use an analogy to closely related conduct in characterizing the seriousness of the aggravating circumstances to determine the proper degree of departure.	United States v. Hummer, 916 F.2d 186 (4th Cir. 1991) United States v. Landry, 903 F.2d 334 (5th Cir. 1990) United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990) United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) United States v. Jackson, 921 F.2d 985 (10th Cir. 1990) (*en banc*) United States v. Shuman, 902 F.2d 873 (11th Cir. 1990)
Departure by analogy should not be "mechanically applied."	United States v. Aymelek, 926 F.2d 64 (1st Cir. 1990) United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990)
Similar offenders, with similar criminal conduct with respect to the reason for their upward departure, should receive "equivalent" upward departures.	United States v. Sardin, 921 F.2d 1064 (10th Cir. 1990)

to more uniform treatment of similarly-situated, atypical cases, consistent with the key purposes of the Sentencing Reform Act.[263]

The appellate courts also tend to agree that co-defendant disparity is not a proper basis for a downward departure.[264] Of the two circuits that have recognized co-defendant disparity as a basis for a downward departure, one involved a defendant who was sentenced during the period that the guidelines were found to be unconstitutional in that circuit.[265] In the other case, the court found in principle that co-defendant disparity warranted a downward departure; but in that particular case, because of the dissimilarity of the co-defendants' criminal backgrounds and the manner in which they assisted the government, a departure was not warranted.[266]

The appellate courts tend to disagree on whether the lack of a criminal record is a proper basis for a departure. A few circuit courts have held that it is not a proper basis for a downward departure,[267] while other circuit courts have held that the lack of a criminal record, in combination with other factors, tends to show aberrational behavior and can be a proper basis for a departure.[268] A similar trend of circuit division can be seen with the issue of acquitted conduct. The Ninth Circuit has held that acquitted conduct cannot be used as a basis for an upward departure,[269] while the Second, Fourth and Fifth Circuits have all recognized acquitted conduct as a basis for an upward departure.[270]

In reviewing convictions for use of a communications facility to further drug trafficking (telephone counts), several circuit courts have upheld upward departures based on the quantity of drugs

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[263]*See, e.g.*, 28 U.S.C. § 994(f).

[264]U.S. v. Adonis, 891 F.2d 3 (D.C. Cir. 1989); U.S. v. Wogan, 938 F.2d 144 (1st Cir. 1991); U.S. v. Williams, 891 F.2d 962 (1st Cir. 1989); U.S. v. Joyner, 924 F.2d 454 (2d Cir. 1991); U.S. v. Alba, 933 F.2d 1117 (2d Cir. 1991); U.S. v. Schular, 907 F.2d 294 (2d Cir. 1990); U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990); U.S. v. Goff, 907 F.2d 1441 (4th Cir. 1990); U.S. v. Bolden, 889 F.2d 1336 (4th Cir. 1989); U.S. v. Brewer, 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990); U.S. v. Parker, 912 F.2d 156 (6th Cir. 1990); U.S. v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990); U.S. v. Russell, 917 F.2d 512 (11th Cir.), *cert. denied*, 111 S. Ct. 1427 (1991). *See* Table 72.

[265]U.S. v. Ray, 930 F.2d 1368 (9th Cir. 1990). *See* Table 71.

[266]U.S. v. Nelson, 918 F.2d 1268 (6th Cir. 1990). *See* Table 71.

[267]U.S. v. Brewer, 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1991); U.S. v. Corey, 895 F.2d 318 (7th Cir. 1990); U.S. v. Neil, 903 F.2d 564 (8th Cir. 1990); U.S. v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). *See* Table 71.

[268]U.S. v. Dickey, 924 F.2d 836 (9th Cir. 1991); U.S. v. Takai, 941 F.2d 738 (9th Cir. 1991); U.S. v. Pena, 930 F.2d 1486 (10th Cir. 1991). *See* Table 71.

[269]U.S. v. Brady, 928 F.2d 844 (9th Cir. 1991). *See* Table 74.

[270]U.S. v. Stephenson, 921 F.2d 438 (2d Cir. 1990); U.S. v. McKenley, 895 F.2d 184 (4th Cir. 1990); U.S. v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989). *See* Table 73.

involved.[271] In response to concerns implicit in these departures, the Commission amended §2D1.4 in 1990 by relating the base offense level to the quantity of drugs in the underlying offense.

VI. Summary

Properly understood and used, a court's departure authority is a critical component in the successful implementation of the guidelines system. Departures are sometimes appropriate and necessary to achieve a just sentence in a particular case where an important factor is not reflected in the guidelines that "should result" in a different sentence from that prescribed by the guidelines. Concomitantly, departures are central to the improvement of the guidelines system; hence, the Commission is continuously engaged in monitoring, analyzing, and appropriately responding to the exercise of court departure authority.

With respect to substantial assistance, the studies suggest that variations in both the criteria used by prosecutors in determining whether to make the motions and the extent of the departures may require the Department of Justice and the Commission to carefully monitor and perhaps address these issues in the future. On the other hand, Commission studies do not bear out the criticism that leaders of major conspiracies often receive lesser sentences than their less culpable co-defendants as a result of substantial assistance departures.[272]

The implementation studies and the body of departure case law that has developed to date suggest that court departure authority is not uniformly understood or exercised by sentencing judges. A categorical unwillingness to depart or a departure on questionable grounds may reflect, in part, a judicial disagreement with either the overall philosophy and purposes of the guidelines or with the appropriateness of a guidelines sentence in an individual case. The courts of appeals have developed a sophisticated body of case law to guide sentencing judges in their departure decisions, which should lead to more uniformity in this area.

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[271] U.S. v. Citro, 938 F.2d 1431 (1st Cir. 1991); U.S. v. Correa-Vargas, 860 F.2d 35 (2d Cir. 1988); U.S. v. Perez, 915 F.2d 947 (5th Cir. 1990); U.S. v. Anders, 899 F.2d 570 (6th Cir.), *cert. denied*, 111 S. Ct. 532 (1990); U.S. v. Feekes, 929 F.2d 334 (7th Cir. 1991); U.S. v. Williams, 895 F.2d 435 (8th Cir. 1990); U.S. v. Bennett, 900 F.2d 204 (9th Cir. 1990); U.S. v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991). *See* Table 73.

[272] *See* discussion of sample of substantial assistance cases, *supra*; also *see generally*, U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991).

Part I
Appeals and the Development of Sentencing Case Law

Introduction

This section of the process evaluation describes the system of appellate review of guideline sentences, the role that system plays in implementing the guidelines in the manner Congress and the Commission intended, and the significant results to date emanating from the appeals process. The section also discusses how the Commission incorporates appellate court decisions into the evolving guideline amendment process.

Among the landmark changes instituted by the Sentencing Reform Act was the provision of a limited system of appellate review of sentences.[273] Under the former sentencing regime, appellate courts generally reviewed sentences only for violations of law (statutory or constitutional).[274] Thus, as a practical matter, sentencing court discretion not only was largely unfettered (within the statutory limits prescribed by Congress for the offense(s) of conviction), but also was largely unreviewable. After years of careful consideration,[275] Congress decided that both the defendant and the government should be afforded opportunities to seek appellate review of sentences.[276] In general, the statute provides for review of sentences for any of three reasons: (1) errors of law; (2) incorrect application of sentencing guidelines; (3) the sentence is outside the applicable guideline range and unreasonable. Congress believed that appellate review of sentences was

> *essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the Sentencing Commission in refining the guidelines as the need arises.*[277]

Thus, the scheme of limited appellate review of sentences was designed both to ensure a correctly determined, reasonable, and just sentence in individual cases, and to promote the larger purposes of the Sentencing Reform Act, including the continued improvement of the guidelines system.

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[273]*See* 18 U.S.C. § 3742.

[274]The Dangerous Special Offender statute, 18 U.S.C. §§ 3575-76 (1970) (repealed by the Sentencing Reform Act) was an exception to the general policy of not disturbing sentencing court decisions.

[275]The legislative history reflects that the United States Senate unanimously passed a bill authorizing appellate review of sentences in 1970, fourteen years before the concept became law as part of the Sentencing Reform Act. *See generally*, S. Rep. No. 225, 98th Cong., 1st Sess. 149 (1983); Wilkins, William W., Jr., Sentencing Reform and Appellate Review, 46 Washington and Lee Law Review 429 (1989).

[276]The government, however, may initiate a sentence appeal only upon personal approval of the Attorney General or Solicitor General. *See* 18 U.S.C. § 3742(b). Subsequently, this subsection was amended to permit government appeal approval by a deputy solicitor general designated by the Solicitor General.

[277]S. Rep. No. 225, *supra* note 275, at 151.

Since the initial implementation of the sentencing guidelines, a large body of case law has developed, both at the district and appellate court levels. The guidelines system initially spawned widespread litigation concerning the constitutionality of the Sentencing Reform Act and the guidelines, culminating with the United States Supreme Court decision in Mistretta v. United States.[278] Both preceding that decision and subsequently, the courts of appeals, in accordance with 18 U.S.C. § 3742, have rendered hundreds of decisions interpreting and applying the guidelines and related provisions of sentencing law.[279] These decisions not only form the basis for a growing, common-law body of sentencing jurisprudence, they also have been used by the Sentencing Commission on an ongoing basis as a principal source of recommendations to improve the guidelines system.

It is beyond the scope of this report to assess comprehensively, in either quantitative or qualitative terms, the system of appellate review of sentences and the body of case law that has developed to date under that system; however, as part of the process evaluation, this report describes several facets of appellate review of sentencing, including aggregate indicators of the number and types of sentence appeals, a more detailed examination of guideline issues typically raised on appeal (as revealed in a randomly selected sample of appealed cases), and a discussion of appellate court resolution of some of the more frequently-appealed guideline issues.

I. Results from Appeals Database

To provide a descriptive overview of the federal appeals process, data from the Administrative Office of the U.S. Courts were obtained and analyzed. These data represent the known population of appeals, as submitted to the Administrative Office by the Clerks of Court, U.S. Courts of Appeals, from November 1987 to December 1990. The dataset contains selected variables describing the general type of appeal, whether the appeal went to the sentence or the conviction, and court processing and case information, including dates of initiation, termination, and final disposition of the appeal. These data provide a descriptive outline of cases moving through the appellate process but provide little background information concerning the underlying defendant or offense. The total number of appeals cases present in this source file is 15,299 and includes appeals by individuals of non-guideline and guideline cases and appeals by organizations of non-guideline cases.

A series of procedures was undertaken to match each appeals case to the corresponding record compiled by the Commission's monitoring unit that describes the underlying case. The monitoring database used in the search for underlying cases contained only cases sentenced post-Mistretta (on or after January 1, 1989) under the Sentencing Reform Act.

Matching was performed by computer searches with on-screen verification, and was based primarily upon original sentencing district, docket number, and defendant name. As necessary for match verification and search criteria enhancement, data describing the originating probation office, defendant number, original sentencing date, judge, and offense code were also used.

[278] 488 U.S. 361 (1989).

[279] *See, e.g.*, Federal Judicial Center, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues, September 13, 1991; Haines, Roger W., Jr., Federal Sentencing and Forfeiture Guide, 2d Ed. (1990), Supp. (February 8, 1991); U.S. Sentencing Commission, Selected Guidelines Application Decisions, 1989, 1990, Jan.-June 1991 (available at the Commission).

Approximately 7,100 of the appeals records were coded as involving Sentencing Reform Act cases, and a total of 5,270 matches were produced between appeals cases and post-Mistretta Commission monitoring case files. Approximately 70 percent of the unmatched appeals cases were cases in which notices of appeals were filed prior to February 19, 1989; hence they are likely to involve cases sentenced prior to the Mistretta decision.

A. Initiation and Disposition of Appeals

Table 76 shows that substantially more appeals are initiated by the defense (n=4150) than by the prosecution (n=94). Taking first the appeals filed by the defense, a breakdown by type reveals that approximately 53 percent involve appeals of both the conviction and the sentence. Thirty-three percent involve appeals of only the sentence; and about 14 percent involve appeals only of the conviction (or other non-sentencing issues).

Although defendants generate the vast majority of appeals, examining the disposition of these appeals reveals that they are not often successful in changing the outcome through the appellate process.[280] Table 77 reveals that slightly less than six percent of the defendant-initiated appeals are directly reversed or vacated, while in almost 85 percent the lower court's rulings are affirmed. Combining the reversed, partially reversed, and remanded categories shows that defendants receive something other than complete rejection of their appeal in 12 percent of the cases.

In comparison Table 76 also shows that overall, the prosecution generates considerably fewer appeals. During this time period, U.S. attorneys appealed only 94 cases, whereas defendants appealed 4,150 cases. U.S. attorneys are almost twice as likely to initiate appeals based on the sentence only compared to appeals for both the sentence and other issues.

Examining the disposition of appeals, it appears that prosecution appeals are more likely to result in a reversal of the lower court decision (almost 40 percent of the time), compared to less than six percent for the defense. Combining the categories of reversed, reversed in part, and remanded indicates that the government is at least partially successful in more than 50 percent of cases it appeals.

Some minor differences emerge if the disposition of appeals by the specific type of appeal are examined. Taking first defendant-initiated appeals of only the sentence, Table 78 shows that they are affirmed in almost 80 percent of the cases (*i.e.*, less than a 20 percent success rate). Overall, defendant-initiated appeals are affirmed in almost 85 percent of the cases (*i.e.*, 15 percent success rate). Defendant-initiated appeals of only the conviction, or the conviction and sentence, are affirmed in 90 and 87 percent of the cases respectively, slightly higher than the overall rate of affirmation for defendant appeals. It appears, therefore, that defendants are somewhat more successful when appealing the sentence than they are in other circumstances.

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[280]Excluded from the disposition of appeals table are 883 defendant appeals and 23 government appeals. These cases are excluded because they were disposed of through procedural termination (such as a request by the appellant to dismiss the appeal) and therefore did not become a part of the final appellate process. Inclusion of these cases would not substantively alter the results as presented. Their inclusion would, however, artificially decrease the percentage of defendant appeals affirmed while not altering the percentage of defendant appeals reversed.

Table 76

Appeals Initiated by Defendants and U.S. Attorneys

Type	Appeals Initiated			
	Defendant		U.S. Attorney	
	N	(%)[a]	N	(%)[a]
Sentence	1358	(32.7)	58	(61.7)
Conviction	601	(14.5)	4	(4.3)
Conviction and sentence	2191	(52.8)	32	(34.0)
Total	4150	(100.0)	94	(100.0)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission Monitoring Data File, January 18, 1989 to September 30, 1989; Administrative Office of the U.S. Courts, Appeals Data File.

Table 77

Disposition of Appeals Initiated by Defendants and U.S. Attorneys

Type	Appeals Disposed: Defendant N	Defendant (%)[a]	U.S. Attorney N	U.S. Attorney (%)[a]
Affirmed, enforced	2758	(84.4)	28	(39.4)
Reversed, vacated	182	(5.6)	27	(38.0)
Affirmed in part and reversed in part	133	(4.1)	4	(5.6)
Remanded	74	(2.3)	7	(9.9)
Other dismissed	120	(3.6)	5	(7.0)
Total	3267	(100.0)	71	(100.0)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission Monitoring Data File, January 18, 1989 to September 30, 1989; Administrative Office of the U.S. Courts, Appeals Data File.

Table 78

Appeals by Type, Disposition, and Appellant

Type and Disposition	Appellant: Defendant N	(%)[a]	Appellant: U.S. Attorney N	(%)[a]
Sentence				
Affirmed, enforced	773	(77.8)	19	(40.4)
Reversed, vacated	82	(8.3)	21	(44.7)
Affirmed in part and reversed in part	42	(4.2)	2	(4.3)
Remanded	37	(3.7)	1	(2.1)
Other (dismissed)	59	(5.9)	4	(8.5)
Total	993	(100.0)	47	(100.0)
Conviction or other non-sentencing issues and sentence				
Affirmed, enforced	1536	(86.6)	9	(39.1)
Reversed, vacated	84	(4.7)	5	(21.7)
Affirmed in part, and reversed in part	73	(4.1)	2	(8.7)
Remanded	28	(1.6)	6	(26.1)
Other (dismissed)	53	(3.0)	1	(4.3)
Total	1774	(100.0)	23	(100.0)
Conviction or other non-sentencing issues[b]				
Affirmed, enforced	449	(89.8)	—	(—)
Reversed, vacated	16	(3.2)	—	(—)
Affirmed in part, and reversed in part	18	(3.6)	—	(—)
Remanded	9	(1.8)	—	(—)
Other (dismissed)	8	(1.6)	—	(—)
Total	500	(100.0)	—	(—)

[a] Column percents appear in parentheses.

[b] The four government appeals in the conviction or other non-sentencing issues category are excluded from the table, thus reducing the total government appeals reversed or vacated by one. The information on appeal disposition is missing for the other three cases in this category.

SOURCE: U.S. Sentencing Commission Monitoring Data File, January 18, 1989 to September 30, 1989; Administrative Office of the U.S. Courts, Appeals Data File.

Examining the same breakdown of disposition by appeal type for prosecution-initiated appeals, it appears that sentence only appeals are affirmed in only 40 percent of the cases and reversed in slightly more than 40 percent of the cases. These figures are somewhat higher than the overall rates of affirmation and reversal for prosecution-initiated appeals. Finally, fewer government appeals addressing both the sentence and other issues are directly reversed (20 percent), but substantially more such appeals are remanded (26 percent) compared to the rate for all appeal types combined.

B. Summary

Extrapolating from this brief analysis, certain basic features of the appeals process begin to emerge. Perhaps the most predictable finding is that defendants initiate the vast majority of appeals, but typically experience low success rates. However, in general, they appear somewhat more likely to find support for those appeals based on sentencing issues. It seems clear from these data that defendants who challenge only their conviction are very rarely successful. Although the government initiates substantially fewer sentencing appeals, it has a considerably higher success rate, especially with respect to sentence appeals.

Overall, appeals are taken by either defendants or the government in only a small proportion of all criminal cases. Appeals based exclusively on sentencing issues, however, are a substantial proportion of all appeals for both the defense (33%) and the government (62%).

II. Results from the Supplemental Sample

To provide a more detailed profile of the appeals process, and in particular the substantive bases for appeal, a sample of 200 cases was selected for a more detailed analysis.[281] The following picture of sentence appeals emerges based upon the information obtained from the cases analyzed.

A. Outcome of Issues Appealed

Of the 200 cases in which an appeal was taken on a sentencing-related issue, 355 sentencing or statutory issues were raised.[282] Generally, the appellate court affirmed the decision of the sentencing court and denied the appeal of the party bringing the action. More specifically, the decision of the lower court was affirmed on 302 of 355 issues raised on appeal (85.1%).

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[281]A randomly generated sample of 355 appealed cases was initially reviewed in order to obtain the cases and issues ultimately examined in this report. For practical reasons, the analysis ultimately included only cases in which the court rendered a written opinion, either published or unpublished, that was available on LEXIS or WESTLAW. Thus, because summary disposition cases were not reviewed, the sample cannot be said to necessarily reflect the entire population of cases in which an appeal of sentence occurred. The 200 cases analyzed represent appeals taken by 200 appellants. In some instances, the appeals of multiple defendants were treated within the same printed opinion. For purposes of this analysis, each appellant was considered as a separate case.

[282]Because the focus of this sample study is primarily on appeals of guideline issues, the unit of analysis is an appealed issue, and the population analyzed is the population of appealed issues in the sample cases.

The matter in dispute was remanded for reconsideration in 37 instances (10.4%). Rulings of sentencing courts were reversed, or reversed and remanded for 12 issues (3.3%).[283] For three issues (0.8%), the appellate court dismissed the appeal for lack of jurisdiction to hear the matter. Finally, the appellate court granted a *writ of mandamus* in one of the disputes.

B. Analysis of Issues by Appellant: Defendant's Claims

The defendant appealed a sentencing decision 344 times in the 200-case sample, accounting for 96.9 percent of all issues appealed. Of all issues appealed by a defendant, the district court's decision was affirmed 86.3 percent of the time (297 of 344 defendant-appealed issues).

The appellate court refused to entertain the issue appealed for lack of jurisdiction in three instances, or 0.85 percent of the defendant-appealed issues. These cases were ones in which the appellant raised the district court's refusal to grant a downward departure.

In 32 appealed issues (9.3% of the sample), the defendant succeeded in obtaining a remand on the issue. The appellate court reversed the district court or reversed and remanded the case for resentencing with respect to 12 issues (3.3%). The appellate court completely reversed the district court's decision on the sentencing issue in only two instances (0.6%). Therefore, the defendant was successful in obtaining relief on 13 percent of the issues appealed (slightly better than one of every eight times an issue was appealed by the defendant).

C. Analysis of Issues by Appellant: Government's Claims[284]

The government appealed a sentencing decision nine times,[285] accounting for 2.5 percent of the appealed issues studied. The government's appeal was successful with respect to four issues (44% of government appealed issues), unsuccessful in four instances (44%), and a *writ of mandamus* was successfully obtained in one instance (12%).

Similarly, the government was successful in obtaining a remand on one of the two issues for which it cross-appealed. It was unsuccessful on the other. The cross-appealed issues brought by the government made up 0.6 percent of the sample of appealed issues. Together, government appeals and cross appeals totaled 3.1 percent of the issues appealed, and the government prevailed in respect to 47 percent of the total issues for which it sought relief.

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[283]Section 3742(f) of title 18, U.S. Code, generally provides that if the appellate court determines that a sentence was imposed in violation of law, as a result of an incorrect application of the guidelines, or is an unreasonable departure from the guideline range, it shall "remand the case for further sentencing proceedings."

[284]Section 3742(b) of title 18, U.S. Code, provides that the government may seek appellate review of a sentence only upon personal approval of the Attorney General, the Solicitor General, or a Deputy Solicitor General designated by the Solicitor General. Thus, it should be expected that the government would appeal adverse sentencing decisions more selectively.

[285]Because of the very small number of government appeals in the sample, caution should be advised in attempting to draw any generalizations from these data.

D. Most Frequently Appealed Guideline Sections and Sentencing Issues

The study indicated that the most frequently appealed guideline section is §3E1.1, Acceptance of Responsibility. Appellants raised this issue on appeal 28 times, or 7.9 percent of all appealed issues. The next most frequently appealed guideline section is §3B1.2, Mitigating Role, which was raised 27 times (7.6% of all appealed issues). Table 79 lists the issues appealed in order of descending frequency, while Table 80 shows the appellant (defendant or government) and outcome for the ten most frequently appealed guideline or other sentencing issues.

E. Summary

In summary, within the parameters of the 200 cases examined, defendants most frequently raised the appeal of a sentencing issue, and the district court's decision was rarely disturbed. When the government appealed, it was successful in almost half of its appealed issues, but these constituted a very small number of the overall issues analyzed.

III. Overview of Significant Case Law Developments in Guideline Sentencing

A. Introduction

Since the Supreme Court's decision in Mistretta v. United States, 488 U.S. 361 (1989), rejecting constitutional challenges to the Sentencing Reform Act, the federal courts have interpreted key provisions of the guidelines in numerous opinions. This summary briefly highlights several of the significant trends in guideline implementation and focuses on some of the most frequently litigated guideline sections and important related sentencing issues. This overview is not intended to be a comprehensive discussion of guideline case law.

B. Due Process

The guidelines have been held constitutional in all 12 circuits on general due process grounds. The courts have held that a defendant does not have a due process right to an individualized sentence based on his or her particular characteristics.[286]

C. *Ex Post Facto*

Congress has provided that courts are to apply the guidelines, including "any pertinent policy statement issued by the Commission," that are in effect on the date the defendant is sentenced.[287] This is one area where the courts have differed with the statutory scheme prescribed by Congress.

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[286]*See, e.g.*, U.S. v. Henry, 893 F.2d 400 (D.C. Cir. 1990); U.S. v. Seluk, 873 F.2d 15 (1st Cir. 1989); U.S. v. Vizcaino, 870 F.2d 52 (2d Cir. 1989); U.S. v. Frank, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989); U.S. v. Bolding, 876 F.2d 21 (4th Cir. 1989); U.S. v. White, 869 F.2d 822 (5th Cir.) (*per curiam), cert. denied*, 490 U.S. 1112 (1989); U.S. v. Allen, 873 F.2d 963 (6th Cir. 1989); U.S. v. Pinto, 875 F.2d 143 (7th Cir. 1989); U.S. v. Brittman, 871 F.2d 1093 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); U.S. v. Brady, 895 F.2d 538 (9th Cir. 1990); U.S. v. Thomas, 884 F.2d 540 (10th Cir. 1989); U.S. v. Harris, 876 F.2d 1502 (11th Cir. 1989).

[287]18 U.S.C. § 3553(a)(5), (a)(4).

Table 79

Most Frequently Appealed Guideline Sections and Sentencing Issues

Section	Statute	Number of Appeals N	(%)[a]
3E1.1	Acceptance of Responsibility	28	(7.9)[a]
3B1.2	Mitigating Role	27	(7.6)
2D1.1	Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession; Continuing Criminal Enterprise	23	(6.5)
3B1.1	Aggravating Role	22	(6.2)
1B1.3	Relevant Conduct	20	(5.6)
5K2.0	Grounds for Departure	19	(5.4)
Fifth Amendment	Due Process	17	(4.8)
4A1.3	Adequacy of Criminal History	15	(4.2)
3C1.1	Obstruction or Impeding the Administration of Justice	14	(3.9)
4A1.2	Definitions and Instructions for Computing Criminal History	11	(3.1)
4B1.1	Career Offender	11	(3.1)
Departure Review	Reasonableness Test	10	(2.8)
2D1.4	Attempts and Conspiracies	9	(2.5)
18 U.S.C. §3553(b)	Imposition of a Sentence: Application of Guidelines	7	(2.0)
8th Amendment	No Excessive Bail/Fines, No Cruel and Unusual Punishment	7	(2.0)
U.S. Constitution Art. I Sec. 9	Ex Post Facto Clause	7	(2.0)
6A1.3	Resolution of Disputed Facts	6	(1.7)
18 U.S.C. §3742(e)	Review of a Sentence: Consideration	5	(1.4)
2B3.1	Robbery	5	(1.4)
4A1.1	Criminal History Category	5	(1.4)
1B1.4	Information to be Used in Imposing Sentence	4	(1.1)
2F1.1	Fraud and Deceit	4	(1.1)
Fifth Amendment	Double Jeopardy	4	(1.1)
Fed. R. Crim. P 32	Sentence and Judgement	4	(1.1)

Table 79 (cont'd)

2B1.1	Larceny, Embezzlement, Other Forms of Theft	3	(.8)
3B1.3	Abuse of Position of Trust or Use of Special Skill	3	(.8)
4B1.3	Criminal Livelihood	3	(.8)
5B1.1	Imposition of a Term of Probation	3	(.8)
6th Amendment	Speedy and Public Trial by Impartial Jury	3	(.8)
U.S. Constitution Art. I Sec. 7	Presentment Clause	3	(.8)
18 U.S.C. §3553(c)	Imposition of a Sentence: Statement of Reasons	2	(.6)
18 U.S.C. §924(c)	Use of Weapon During Crime of Violence or Drug Trafficking	2	(.6)
1B1.2	Applicable Guidelines	2	(.6)
3A1.1	Vulnerable Victim	2	(.6)
3D1.2	Groups of Closely Related Counts	2	(.6)
5E1.2	Fines for Individual Defendants	2	(.6)
5H1.1	Age	2	(.6)
5K1.1	Substantial Assistance to Authorities	2	(.6)
5K2.6	Weapons and Dangerous Instrumentalities	2	(.6)
Fifth Amendment	Burden of Proof	2	(.6)
18 U.S.C. §924(e)	Violation of §924(g) with 3 previous convictions under §924(g)	1	(.3)
1A4(b)	Departures	1	(.3)
1B1.1	Application Instructions	1	(.3)
2A2.2	Assault with Intent to Commit Murder; Attempted Murder	1	(.3)
2A6.1	Threatening Communications	1	(.3)
2B1.2	Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property	1	(.3)
2B2.2	Burglary of Other Structures	1	(.3)
2C1.1	Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right	1	(.3)
2D1.2	Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals	1	(.3)
2D1.5	Continuing Criminal Enterprise	1	(.3)
2J1.1	Contempt	1	(.3)

Table 79 (cont'd)

2J1.3	Perjury or Subornation of Perjury	1	(.3)
2J1.4	Impersonation	1	(.3)
2K1.4	Arson; Property Damage by Use of Explosives	1	(.3)
2K2.2	Unlawful Trafficking and Other Prohibited Transactions Involving Firearms	1	(.3)
2L1.1	Smuggling, Transporting, or Harboring an Unlawful Alien	1	(.3)
3A1.2	Vulnerable Victim	1	(.3)
5D1.1	Imposition of a Term of Supervised Release	1	(.3)
5D3.1	Replaced by 5D1.1	1	(.3)
5E1.1	Restitution	1	(.3)
5E4.2	Replaced by 5E1.2	1	(.3)
5H1.4	Physical Condition, Including Drug Dependence and Alcohol Abuse	1	(.3)
5H1.6	Family Ties and Responsibilities and Community Ties	1	(.3)
5H1.9	Dependence Upon Criminal Activity for a Livelihood	1	(.3)
5K2.10	Victim's Conduct	1	(.3)
5K2.13	Diminished Capacity	1	(.3)
5K2.5	Property Damage or Loss	1	(.3)
6A1.2	Disclosure of Presentence Report; Issues in Dispute	1	(.3)
6B1.1	Plea Agreement Procedures	1	(.3)
6B1.4	Stipulations	1	(.3)
7A1.2	Revocation of Probation - Now 7B1.3	1	(.3)
Fed. R. Crim. P. 11	Pleas	1	(.3)
Fed. R. Crim. P. 35	Correction of Sentence	1	(.3)
Total Issues Appealed		355	(100.0)

[a] Column percents appear in parentheses, and are based on 355 issues appealed.

SOURCE: U.S. Sentencing Commission Evaluation Report Appeals Study.

Table 80

Analysis of the Ten Most Frequently Appealed Issues by Appellant and Outcome

Guideline/Issue	Total Appeals Taken	Appeals by Defendant	Appeals by Government	Defendant's Claims Outcome	Government's Cross Appeal Outcome
U.S.S.G. §3E1.1 Acceptance of Responsibility	28	27	1 (cross appeal)	26 affirmed 1 reversed and remanded	1 affirmed
U.S.S.G. §3B1.2 Mitigating Role	27	27	0	24 affirmed 3 remanded	—
U.S.S.G. §2D1.1 Drug Offenses	23	23	0	21 affirmed 2 reversed and remanded	—
U.S.S.G. §3B1.1 Aggravating Role	22	22	0	21 affirmed 1 remanded	—
U.S.S.G. §1B1.3 Relevant Conduct	20	19	1	16 affirmed 2 remanded 1 reversed and remanded	1 remanded
U.S.S.G. §5K2.0 Grounds for Departure	19	19	0	16 affirmed 1 reversed and remanded 2 reversed	—
Fifth Amendment--Due Process	17	17	0	17 affirmed	—
U.S.S.G. §4A1.3 Adequacy of Criminal History Points	15	15	0	10 affirmed 5 remanded	—
U.S.S.G. §3C1.1 Obstructing or Impeding the Administration of Justice	14	14	0	13 affirmed 1 remanded	—
U.S.S.G. §4A1.2 Definitions and Instructions for Computing Criminal History	11	11	0	11 affirmed	—
U.S.S.G. §4B1.1 Career Offender	11	11	0	10 affirmed 1 remanded	—

SOURCE: U.S. Sentencing Commission Evaluation Report Appeals Study.

The courts have generally held that "the *ex post facto* clause prohibits retroactive application of a changed guideline if the change disadvantages the defendant."[288] The courts have looked to the Supreme Court's decision in Miller v. Florida, 418 U.S. 423 (1987), a case involving Florida state sentencing guidelines, and have interpreted it as compelling this result in the federal guidelines system as well.[289]

Courts have agreed that when amendments merely clarify pre-existing guidelines, they generally present no *ex post facto* issue in their retrospective application. Consequently, they have frequently consulted clarifying amendments in interpreting the Commission's intent regarding the application of pre-amendment guidelines.[290] However, the courts have differed in their interpretations of whether an amendment clarifies or presents a substantive change. Nor have the courts accepted as conclusive the Commission's statement that an amendment was intended only to clarify.[291] In some cases, a clarification has been held to produce a substantive change because it, in effect, reversed court precedent.[292] At least one circuit has drawn a distinction between an amendment to a guideline and an amendment to commentary.[293]

An important related issue is how the amended guidelines should be applied in a particular case. Courts have rejected the suggestion that intervening amendments should be applied in a "piecemeal" fashion. Rather, the pertinent Guidelines Manual should be applied as a whole, rather than extracting sections and applying them out of context. As the Second Circuit explained, "applying various provisions taken from different versions of the Guidelines would upset the coherency and balance the Commission achieved in promulgating the Guidelines."[294]

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[288]U.S. v. Underwood, 938 F.2d 1086, 1090 (10th Cir. 1991) (amendment to U.S.S.G. §1B1.3 eliminating finding of *scienter* as a requirement for giving U.S.S.G. §2D1.1(b)(1) enhancement for possession of a firearm during drug offense deemed to violate *ex post facto* clause as applied to defendant who committed offense prior to amendment). *See also*, U.S. v. Lam Kwong-Wah, 924 F.2d 298 (D.C. Cir. 1991); U.S. v. Harotunian, 920 F.2d 1040 (1st Cir. 1990); U.S. v. McAllister, 927 F.2d 136 (3d Cir.), *cert. denied*, No. 90-8101, 1991 WL 95123 (U.S. Oct. 7, 1991); U.S. v. Morrow, 925 F.2d 779 (4th Cir. 1991); U.S. v. Suarez, 911 F.2d 1016 (5th Cir. 1990); U.S. v. Swanger, 919 F.2d 94 (8th Cir. 1990) (*per curiam*); U.S. v. Worthy, 915 F.2d 1514 (11th Cir. 1990).

[289]*See, e.g.*, U.S. v. Saucedo, No. 91-6126 (10th Cir. Nov. 13, 1991).

[290]*See, e.g.*, U.S. v. Guerrero, 863 F.2d 245 (2d Cir. 1988); U.S. v. Aguilera-Zapata, 901 F.2d 1209 (5th Cir. 1990); U.S. v. Smith, 887 F.2d 104 (6th Cir. 1989); U.S. v. Walker, 906 F.2d 1424 (10th Cir. 1990); U.S. v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 816 (1990).

[291]*See* U.S. v. Guerrero, 863 F.2d 245 (2d Cir. 1988).

[292]*See* U.S. v. Saucedo, No. 91-6126 (10th Cir. Nov. 13, 1991).

[293]*See* U.S. v. Suarez, 911 F.2d 1016, 1021 (n.3) (5th Cir. 1990).

[294]U.S. v. Stephenson, 921 F.2d 438 (2d Cir. 1990); *see also* U.S. v. Lenfesty, 923 F.2d 1293, 1299 (8th Cir. 1991).

D. Relevant Conduct, Standard of Proof

The relevant conduct section of the guidelines (U.S.S.G. §1B1.3) defines the scope of the "acts and omissions" of the defendant, and any accomplices, for which the defendant will be held accountable at sentencing.

Courts have held that including unconvicted conduct within the scope of relevant conduct for the purpose of determining the sentence does not violate due process.[295] This practice predates the guidelines and has been upheld by the Supreme Court in the past.[296] As the Supreme Court noted in McMillan v. Pennsylvania, 477 U.S. 79 (1986), evidence at sentencing need only be established by a "preponderance of the evidence," rather than the trial standard of proof "beyond a reasonable doubt." All 12 circuits have held that factual determinations under the guidelines may also be established by a preponderance of the evidence,[297] although one circuit has held that a "clear and convincing" standard is necessary to support an extremely large upward departure.[298]

1. Acquitted Conduct

A number of courts have approved the consideration of relevant conduct underlying a charge of which the defendant or a co-defendant was acquitted in calculating the defendant's guideline sentence.[299] Several courts have held that the evidence of such conduct is admissible if the information is sufficiently reliable to support its probable accuracy.[300]

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[295]*See, e.g.*, U.S. v. Fox, 889 F.2d 357 (1st Cir. 1989); U.S. v. Guerrero, 863 F.2d 245 (2d Cir. 1988); U.S. v. Taplette, 872 F.2d 101 (5th Cir.), *cert. denied*, 110 S. Ct. 1288 (1989).

[296]McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986).

[297]*See, e.g.*, U.S. v. Burke, 888 F.2d 862 (D.C. Cir. 1989); U.S. v. Wright, 873 F.2d 437 (1st Cir. 1989); U.S. v. Guerra, 888 F.2d 247 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1883 (1990); U.S. v. McDowell, 888 F.2d 285 (3d Cir. 1989); U.S. v. Urrego-Linares, 879 F.2d 1234, *cert. denied*, 110 S. Ct. 346 (1989); U.S. v. Casto, 889 F.2d 562 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1164 (1990); U.S. v. Silverman, 889 F.2d 1531 (6th Cir. 1989); U.S. v. White, 888 F.2d 490 (7th Cir. 1989); U.S. v. Gooden, 892 F.2d 725 (8th Cir. 1989), *cert. denied, sub nom.* Keener v. U.S., 110 S. Ct. 2594 (1990); U.S. v. Wilson, 900 F.2d 1350 (9th Cir. 1990); U.S. v. Fredericks, 897 F.2d 490 (10th Cir.), *cert. denied*, 111 S. Ct. 171 (1990); U.S. v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990).

[298]U.S. v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).

[299]*See, e.g.*, U.S. v. Mocciola, 891 F.2d 13 (1st Cir. 1989) (acquittal on firearm charge does not preclude enhancement under §2D1.1(b)(1) for possession of weapon during drug offense); U.S. v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 127 (1990) (same); U.S. v. Isom, 886 F.2d 736 (4th Cir. 1989) (enhancement for printing counterfeit obligations proper after acquittal on separate counterfeiting charge); U.S. v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (*per curiam*) (acquitted of carrying firearm during drug offense, but facts used to support upward departure). *Contra* U.S. v. Brady, 928 F.2d 844 (9th Cir. 1991) (where defendant only convicted of lesser included charge, upward departure may not be based on conduct underlying more serious charges of which defendant was acquitted).

[300]*See, e.g.*, U.S.S.G. §6A1.3; U.S. v. Cuellar-Flores, 891 F.2d 92 (5th Cir. 1989); U.S. v. Jackson, 886 F.2d 838 (7th Cir. 1989).

2. Drug Quantity

The scope of relevant conduct has been litigated frequently in cases involving drug offenses. Courts have held that the offense level for drug offenses should be calculated based on the amount of drugs derived from the defendant's relevant conduct.[301] The determination of quantity is not limited by the amount charged in the indictment or offense of conviction, or by an amount specified in a jury verdict. Courts have held that drugs from dismissed or acquitted counts may be considered in determining the guideline sentence or as a basis for departure if the conduct is established by a preponderance of the evidence.[302]

3. Weapons Enhancement, U.S.S.G. §2D1.1(b)(1)

The courts have split on the issue of whether relevant conduct is to be considered in determining whether to apply the two-level enhancement under U.S.S.G. §2D1.1(b)(1) for possession of a weapon during a drug offense. The First, Second, Fifth, and Ninth Circuits have considered relevant conduct in determining whether a weapon was "possessed"; the Seventh Circuit did not.[303] The Commission has recently reaffirmed its intent that this specific offense characteristic is to be determined based upon a defendant's relevant conduct.[304]

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[301]*See, e.g.*, U.S. v. Mak, 926 F.2d 112 (1st Cir. 1991); U.S. v. Williams, 917 F.2d 112 (3d Cir. 1990); U.S. v. Sarasti, 869 F.2d 805 (5th Cir. 1989); U.S. v. Sailes, 872 F.2d 735 (6th Cir. 1989); U.S. v. Moreno, 899 F.2d 465 (6th Cir. 1990); U.S. v. Allen, 886 F.2d 143 (8th Cir. 1989); U.S. v. Restrepo, 903 F.2d 648 (9th Cir. 1990), *en banc* Oct. 4, 1991, replacing part 2 of earlier opinion on standard of proof; U.S. v. Alston, 895 F.2d 1362 (11th Cir. 1990).

[302]*See, e.g.*, U.S. v. Ryan, 866 F.2d 604 (3d Cir. 1989); U.S. v. Fonner, 920 F.2d 1330 (7th Cir. 1990); U.S. v. Averi, 922 F.2d 765 (11th Cir. 1991).

[303]*See, e.g.*, U.S. v. Paulino, 887 F.2d 358 (1st Cir. 1989) (enhancement given for guns in separate apartment where drugs sold in another apartment in same building); U.S. v. Quintero, 937 F.2d 95 (2d Cir. 1991) (gun from dismissed drug count used to enhance sentence for other drug count that was part of the same course of conduct); U.S. v. Paulk, 917 F.2d 879 (5th Cir. 1991) (firearm possessed during related drug activity may be used for enhancement on instant count); U.S. v. Willard, 919 F.2d 606 (9th Cir. 1990) (weapons that were part of same course of conduct may be used for enhancement even though found at different location); U.S. v. Stewart, 926 F.2d 899 (9th Cir. 1991) ("key" is whether weapon was possessed during the course of criminal conduct, not whether it was present at site of offense of conviction); U.S. v. Heldberg, 907 F.2d 91 (9th Cir. 1990) (enhancement applied to defendant arrested for drug importation where firearm found unloaded in locked briefcase in trunk of car). *But, cf.* U.S. v. Rodriguez-Nuez, 919 F.2d 461 (7th Cir. 1990) (weapons possessed at residence where drugs sold not used to enhance sentence for drug offense at another residence several miles away).

[304]U.S.S.G. App. C., amend. 394.

4. Determining Drug Quantities for Co-Conspirators

The courts have calculated the offense level based on the quantity of drugs possessed or distributed by co-conspirators where the amount was known to or was reasonably foreseeable by the defendant.[305]

5. Determining Role in the Offense, U.S.S.G. §3B1

The Introductory Commentary to U.S.S.G. §3B1 was amended, effective November 1, 1990, to clarify that the role in the offense adjustment should be made based on the defendant's relevant conduct. Prior to the amendment, the circuits split on the issue of whether relevant conduct was to be considered, with some panels holding different views within the same circuit.[306]

In determining whether an adjustment for a leadership role is appropriate under U.S.S.G. §3B1.1, courts have held that only "criminally responsible" individuals may be counted as "participants," and the defendant may be counted as one of the five required participants.[307] One circuit has held that to qualify as a leader or organizer, the defendant must exercise "control" or be otherwise responsible for organizing, supervising, or managing others in the commission of the criminal activity itself; therefore, the enhancement was not appropriate when the defendant only managed a business that was used in the offense.[308] The Eighth Circuit adopted a broad definition of leadership and organizational roles, holding that a defendant may qualify as an organizer without directly controlling other individuals.[309] The Fifth Circuit held that evidence that the defendant was the head of a drug cartel was not sufficient to determine whether the defendant qualified as an organizer, leader, or supervisor of criminal activity involving five or more participants; the government must adduce

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[305]*See, e.g.*, U.S.S.G. §1B1.3, comment. (n.1); U.S. v. Wood, 924 F.2d 399 (1st Cir. 1991); U.S. v. Cardenas, 917 F.2d 683 (2d Cir. 1990); U.S. v. Rivera, 898 F.2d 442 (5th Cir. 1990); U.S. v. Paulino, 935 F.2d 739 (6th Cir. 1991); U.S. v. Guerrero, 894 F.2d 261 (7th Cir. 1990); U.S. v. North, 900 F.2d 131 (8th Cir. 1990). *See also* U.S. v. Miranda-Ortiz, 926 F.2d 172 (2d Cir. 1991) (defendant who joined conspiracy at its end and participated in one transaction not held accountable for amount of drugs distributed before he joined conspiracy and of which he had no knowledge).

[306]The Fourth, Fifth, Eighth, and Ninth Circuits considered relevant conduct in assessing role. *See, e.g.*, U.S. v. Fells, 920 F.2d 1179 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2831 (1991); U.S. v. Mir, 919 F.2d 940 (5th Cir. 1990) (*per curiam*); U.S. v. Haynes, 881 F.2d 586 (8th Cir. 1989); U.S. v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991). The District of Columbia Circuit and panels of the Fifth, Seventh, Ninth, and Tenth Circuits held that the adjustment should be based on the conduct underlying the offense of conviction only. *See, e.g.*, U.S. v. Williams, 891 F.2d 921 (D.C. Cir. 1989); U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990); U.S. v. Tetzlaff, 896 F.2d 1071 (7th Cir. 1990); U.S. v. Zweber, 913 F.2d 705 (9th Cir. 1990); U.S. v. Pettit, 903 F.2d 1336 (10th Cir.), *cert. denied*, 111 S. Ct. 197 (1990).

[307]*See, e.g.*, U.S. v. Fells, 920 F.2d 1179 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2831 (1991); U.S. v. De Cicco, 899 F.2d 1531 (7th Cir. 1990); U.S. v. Anderson, 942 F.2d 606 (9th Cir. 1991) (*en banc*); U.S. v. Markovic, 911 F.2d 613 (11th Cir. 1990).

[308]*See* U.S. v. Mares-Molina, 913 F.2d 770 (9th Cir. 1990).

[309]U.S. v. Russell, 913 F.2d 1288 (8th Cir. 1990), *cert. denied, sub nom.*, Moore v. U.S., 111 S. Ct. 1687 (1991).

evidence that the participants were involved in the "transaction of conviction."[310] Similarly, the Second Circuit has held that the enhancement for manager or supervisor under U.S.S.G. §3B1.1(b) requires a "specific finding of the identities" of the "five or more participants."[311] The Tenth Circuit held that it was an error for the district court to make a four-level adjustment for aggravating role under U.S.S.G. §3B1.1(a) based on the number of participants when the participants consisted of three persons controlled by the defendant and two uncontrolled suppliers, but the adjustment was upheld because the evidence showed that the activity was "otherwise extensive."[312]

The Fourth and Tenth Circuits have held that in assessing a defendant's role, comparison should be made both with other defendants, and with an "average participant" in such an offense.[313] The Fourth Circuit has explained that the acts of the defendant should be compared in relation to his or her relevant conduct and to the elements of the offense of conviction, focusing on whether the defendant's conduct is material or essential to committing the offense.[314]

6. Determining Acceptance of Responsibility, U.S.S.G. §3E1.1

The circuits have also split on the question of whether U.S.S.G. §3E1.1 requires a defendant to accept responsibility for all relevant criminal conduct, or only for conduct underlying the offense of conviction. The Fourth, Fifth, and Sixth Circuits require acceptance for all relevant conduct,[315] whereas the First, Second, and Ninth Circuits considered only the conduct underlying the offense of conviction in assessing whether the defendant had accepted responsibility and merited the reduction.[316] The Background Commentary to U.S.S.G. §3E1.1 was amended, effective November 1, 1990, to clarify that the defendant must demonstrate acceptance of "personal responsibility for the offense and related conduct."

E. Vulnerable Victim, Official Victim, U.S.S.G. §§3A1.1, 3A1.2

The appellate courts have upheld adjustments under U.S.S.G. §3A1.1 if the defendant "knew or should have known that a victim was unusually vulnerable due to age, physical or mental condition; ... or otherwise particularly susceptible to criminal conduct."[317] The enhancement has been

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[310]U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990).

[311]U.S. v. Lanese, 890 F.2d 1284 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2207 (1990).

[312]U.S. v. Reid, 911 F.2d 1456 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991).

[313]*See* U.S. v. Daughtrey, 874 F.2d 213 (4th Cir. 1989); U.S. v. Caruth, 930 F.2d 811 (10th Cir. 1991).

[314]*See* U.S. v. Daughtrey, *supra*; U.S. v. Palinkas, 938 F.2d 456 (4th Cir. 1991).

[315]*See, e.g.*, U.S. v. Gordon, 895 F.2d 932 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); U.S. v. Mourning, 914 F.2d 699 (5th Cir. 1990); U.S. v. Herrera, 928 F.2d 769 (6th Cir. 1991).

[316]*See, e.g.*, U.S. v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989); U.S. v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (*per curiam*); U.S. v. Piper, 918 F.2d 839 (9th Cir. 1990) (*per curiam*).

[317]U.S.S.G. §3A1.1.

upheld in cases where the defendant drugged his minor victims, making them physically and mentally more vulnerable to sexual exploitation,[318] took an elderly man hostage during an escape attempt,[319] used his relationship with the victims' daughter to induce them to invest in a fraudulent scheme,[320] burned a cross on a black family's lawn,[321] stole money from bank tellers during a robbery,[322] and kidnapped a seventeen-year-old youth.[323]

The Fourth Circuit reversed the district court's decision to make the adjustment in a case where the defendant mailed letters to five residents of a city in a fraudulent scheme requesting funds to aid victims of a recent tornado in the area. The appellate court held that the fact that the city had been struck by a tornado did not qualify all the citizens of that area as vulnerable victims for purposes of U.S.S.G. §3A1.1.[324] The district court should analyze "the victim's personal or individual vulnerability" in relation to the defendant's criminal conduct.[325]

However, the circuits have differed on the issue of whether the enhancement should apply only if the defendant intentionally selected the victim because of his or her vulnerability. The Ninth Circuit has rejected the argument, holding that U.S.S.G. §3A1.1 does not require that the victim be selected because of vulnerability,[326] whereas the Eighth Circuit has reversed the enhancement in a case where there was no evidence that the defendant knew the extent of the victim's vulnerability or intended to exploit that vulnerability.[327]

Adjustments for offenses against official victims have been made in cases where the defendants made threats against the President of the United States,[328] or shot at police officers attempting to serve an arrest warrant.[329] However, the Tenth Circuit held that an assistant U.S. attorney who

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[318] U.S. v. Altman, 901 F.2d 1161 (2d Cir. 1990).

[319] U.S. v. White, 903 F.2d 457 (7th Cir. 1990).

[320] U.S. v. Astorri, 923 F.2d 1052 (3d Cir. 1991).

[321] *See* U.S. v. Salyer, 893 F.2d 113 (6th Cir. 1989); U.S. v. Skillman, 922 F.2d 1370 (9th Cir. 1990).

[322] U.S. v. Jones, 899 F.2d 1097 (11th Cir.), *cert. denied*, 111 S. Ct. 275 (1990).

[323] U.S. v. Rocha, 916 F.2d 219 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991).

[324] U.S. v. Wilson, 913 F.2d 136 (4th Cir. 1990).

[325] *See, e.g.*, U.S. v. Smith, 930 F.2d 1450 (10th Cir. 1991).

[326] U.S. v. Boise, 916 F.2d 467 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2047 (1991).

[327] U.S. v. Cree, 915 F.2d 352 (8th Cir. 1990).

[328] U.S. v. McCaleb, 908 F.2d 176 (7th Cir. 1990).

[329] U.S. v. Braxton, 903 F.2d 292 (4th Cir. 1990), *rev'd. on other grounds*, 111 S. Ct. 1854 (1991).

received, but was not the object of, a threat directed against others was not an "official victim."[330]

F. Obstruction or Impeding the Administration of Justice, U.S.S.G. §3C1.1

The guidelines provide a two-level enhancement if a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense."[331] The appellate courts have approved application of the adjustment to a variety of conduct, including giving a false name at the time of arrest,[332] threatening a witness,[333] lying to the probation officer,[334] committing perjury,[335] refusing to provide a handwriting sample,[336] failing to appear at court hearings and jumping bond,[337] and for throwing contraband out of a car during a high-speed chase with authorities.[338]

Because the obstruction or attempt must be willful, courts have grappled with the issue of whether an attempt to escape arrest, without other obstructive conductive, triggers the enhancement. The Second, Fourth, Seventh and Ninth Circuits have held that "instinctive flight" or a brief attempt to evade arresting officers is not enough to warrant the enhancement,[339] but the Seventh Circuit approved the enhancement when the flight was a lengthy high-speed chase endangering police and

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[330]U.S. v. Schroeder, 902 F.2d 1469 (10th Cir.), *cert. denied*, 111 S. Ct. 181 (1990).

[331]U.S.S.G. §3C1.1.

[332]*See, e.g.*, U.S. v. Saintil, 910 F.2d 1231 (1st Cir. 1990); U.S. v. Gaddy, 909 F.2d 196 (7th Cir. 1990); U.S. v. Brett, 872 F.2d 1365 (8th Cir.), *cert. denied*, 110 S. Ct. 322 (1989); U.S. v. Rodriguez-Macias, 914 F.2d 1204 (9th Cir. 1990) (*per curiam*). *Cf.* U.S.S.G. §3C1.1, comment. (n.4(a)), amended effective Nov. 1, 1990 (providing false name at arrest should not, in and of itself, merit the enhancement unless the conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense).

[333]*See, e.g.*, U.S. v. Shoulberg, 895 F.2d 882 (2d Cir. 1990).

[334]*See, e.g.*, U.S. v. McCollum, 911 F.2d 725 (4th Cir. 1990); U.S. v. Beard, 913 F.2d 193 (5th Cir. 1990); U.S. v. Baker, 894 F.2d 1083 (9th Cir. 1990).

[335]*See, e.g.*, U.S. v. Dorani, 909 F.2d 1485 (6th Cir. 1990); U.S. v. Hassan, 927 F.2d 303 (7th Cir. 1991); U.S. v. Contreras, 937 F.2d 1911 (7th Cir. 1991); U.S. v. Dyer, 910 F.2d 530 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 276 (1990); U.S. v. Barbosa, 906 F.2d 1366 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990); U.S. v. Fu Chin Chung, 931 F.2d 43 (11th Cir. 1991).

[336]*See, e.g.*, U.S. v. Reyes, 908 F.2d 281 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1111 (1991).

[337]U.S. v. Perry, 908 F.2d 56 (6th Cir.), *cert. denied*, 111 S. Ct. 565 (1990); U.S. v. Teta, 918 F.2d 1329 (7th Cir. 1990); U.S. v. St. Julian, 922 F.2d 563 (10th Cir. 1990).

[338]U.S. v. Galvan-Garcia, 872 F.2d 638 (5th Cir.), *cert. denied*, 110 S. Ct. 164 (1989).

[339]*See, e.g.*, U.S. v. Stroud, 893 F.2d 504 (2d Cir. 1990); U.S. v. John, 935 F.2d 644 (4th Cir. 1991); U.S. v. Hagan, 913 F.2d 1278 (7th Cir. 1990); U.S. v. Garcia, 909 F.2d 389 (9th Cir. 1990).

bystanders.[340] The Commentary to U.S.S.G. §3C1.1 was amended effective November 1, 1990, to exclude "avoiding or fleeing from arrest." At the same time, the Commission promulgated guideline §3C1.2, which provides a two-level enhancement for recklessly endangering others in the course of flight from a law enforcement officer.

Several courts have also examined the requirement that the obstruction occur during the investigation, prosecution, or sentencing of the "instant offense." The Fifth Circuit reversed an adjustment for obstruction in a case where the defendant concealed the gun used in the crime before the crime was investigated.[341] Similarly, the Eighth Circuit held that it was an error to apply the enhancement to conduct that is itself an element of the offense.[342]

G. Acceptance of Responsibility, U.S.S.G. §3E1.1

In addition to the issue of the scope of conduct to be considered in determining whether a defendant has accepted responsibility (discussed *supra* under Relevant Conduct), the appellate courts have examined other issues in respect to this guideline. The guideline grants district courts broad discretion to grant or deny a two-level downward adjustment for clearly demonstrating "a recognition and affirmative acceptance of personal responsibility for his criminal conduct."[343] The district court's decision will not generally be disturbed unless it is without foundation.[344] In reviewing district court determinations, the appellate courts have upheld the denial of the reduction in cases where the defendant has committed additional illegal conduct after arrest,[345] committed perjury during trial,[346] failed to cooperate with authorities,[347] or failed to accept responsibility

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[340]*See* U.S. v. White, 903 F.2d 457 (7th Cir. 1990).

[341]*See* U.S. v. Luna, 909 F.2d 119 (5th Cir. 1990) (*per curiam*).

[342]*See* U.S. v. Werlinger, 894 F.2d 1015 (8th Cir. 1990) (concealment, an element of the crime of embezzlement, may not provide basis for obstruction enhancement).

[343]U.S.S.G. §3E1.1. A stipulation between the government and defendant in a plea agreement stating that the defendant has accepted responsibility does not bind the court in its exercise of discretion. *See* U.S. v. Nunley, 873 F.2d 182 (8th Cir. 1989).

[344]*See, e.g.*, U.S. v. Camargo, 908 F.2d 179 (7th Cir. 1990).

[345]*See, e.g.*, U.S. v. Sanchez, 893 F.2d 679 (5th Cir. 1990) (use of drugs and commission of firearms offense during pretrial release); U.S. v. Watkins, 911 F.2d 983 (5th Cir. 1990) (use of drugs on release pending sentencing); U.S. v. Cooper, 912 F.2d 344 (9th Cir. 1990) (continued fraudulent activity); U.S. v. Scroggins, 880 F.2d 1204 (11th Cir. 1989) (post-arrest drug use), *cert. denied*, 110 S. Ct. 1816 (1990).

[346]*See, e.g.*, U.S. v. Zayas, 876 F.2d 1057 (1st Cir. 1989).

[347]*See, e.g.*, U.S. v. Beard, 913 F.2d 193 (5th Cir. 1990); U.S. v. Cross, 900 F.2d 66 (6th Cir. 1990) (*per curiam*). *But see* U.S. v. Watt, 910 F.2d 587 (9th Cir. 1990) (violation of Fifth Amendment to deny acceptance reduction based on defendant's failure to assist in recovery of "fruits and instrumentalities of the crime").

in a timely manner.[348] Courts have rejected constitutional challenges to the guideline brought under the fifth and sixth amendments.[349]

H. Computing Criminal History, U.S.S.G. §4A1.2

In calculating a defendant's criminal history, courts are advised to treat "prior sentences imposed in related cases" as one sentence.[350] The Commentary states that cases are related if they "(1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."[351] The Ninth Circuit initially held that this part of the Commentary should not be followed when factually unrelated cases are consolidated for sentencing,[352] but subsequently has effectively overruled that earlier decision.[353] Other circuits have followed the guidance of the Commentary but have affirmed upward departures when the result would have been an under-representation of the defendant's criminal history.[354] The Commission has responded with amendments narrowing the scope of prior sentences that are considered "related" and ascribing criminal history points to prior sentences for crimes of violence even if "related" within the meaning of the guideline.[355]

The courts have also considered whether prior convictions arose from a common scheme or plan. The Fourth and Ninth Circuits reached different results in two cases considering whether prior convictions arose from a common scheme or plan, where that determination affected the defendant's status as a career offender. The Ninth Circuit held that two separate drug convictions in two different counties for offenses that occurred within a short period of time and involved the same

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[348]*See*, *e.g*., U.S. v. Rios, 893 F.2d 479 (2d Cir. 1990) (affirming denial of adjustment based in part on defendant's decision to enter plea just prior to jury selection); U.S. v. Ochoa-Fabian, 935 F.2d 1139 (10th Cir. 1991) (affirming denial of adjustment where defendant denied essential elements of offense and admitted guilt and expressed remorse only after conviction at trial).

[349]*See*, *e.g*., U.S. v. Paz-Uribe, 891 F.2d 396 (1st Cir. 1989) (sustained under Fifth Amendment challenge); U.S. v. Cordell, 924 F.2d 614 (6th Cir. 1991) (sustained under Fifth and Sixth Amendment challenges); U.S. v. Crawford, 906 F.2d 1531 (11th Cir. 1990) (sustained under Fifth and Sixth Amendment challenges).

[350]U.S.S.G. §4A1.2(a)(2).

[351]U.S.S.G. §4A1.2, comment. (n.3).

[352]*See* U.S. v. Gross, 897 F.2d 414 (9th Cir. 1990).

[353]*See* U. S. v. Palmer, No. 91-30004 (9th Cir. Sept. 27, 1991), discussing the effect of U.S. v. Anderson, 942 F.2d 606 (9th Cir. 1991) (*en banc*).

[354]*See*, *e.g*., U.S. v. Geiger, 891 F.2d 512 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1825 (1990); U.S. v. White, 893 F.2d 276 (10th Cir. 1990); U.S. v. Dorsey, 888 F.2d 79 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 756 (1990).

[355]U.S.S.G. App. C., amend. 382.

undercover agent, were in fact part of a single common scheme or plan.[356] On the other hand, the Fourth Circuit counted separately convictions for two robberies committed in two adjacent jurisdictions within a two-week period to obtain money for drugs. In holding that the offenses were not part of a common scheme or plan, the court stated that to decide otherwise "would have the effect of making related offenses of almost all crimes committed by one individual. The fact that both offenses were committed to support one drug habit does not make the offenses related under §4A1.2."[357]

I. Career Offender, U.S.S.G. §4B1.1

The guidelines designate a defendant as a "career" offender if "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."[358]

The issue of whether an offense qualifies as a "crime of violence" and how that determination should be made has been litigated in several circuits, and the Supreme Court has decided a non-guideline case addressing related considerations. In Taylor v. United States, 110 S. Ct. 2143, 2160 (1990), the Supreme Court held that, under the applicable statute (the Armed Career Criminals Amendment Act), a trial court is required "to look only to the fact of conviction and the statutory definition of the prior offense," and not to the underlying facts when determining whether a prior offense was a "violent felony."

Courts have begun to apply the reasoning of Taylor to the career offender provision.[359] However, in cases where the crime is not listed in U.S.S.G. §4B1.2 as a "crime of violence," or where the offense does not contain "as an element the use, attempted use, or threatened use of physical force against the person of another,"[360] several courts have held it permissible to consider the underlying facts to determine whether the defendant's conduct "by its nature, presented a serious potential risk of physical injury to another."[361] In recent commentary amendments, the Commission addressed these issues, indicating that the conduct expressly charged in the count of

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[356]*See* U.S. v. Houser, 929 F.2d 1369 (9th Cir. 1990).

[357]*See* U.S. v. Rivers, 929 F.2d 136 (4th Cir. 1991).

[358]U.S.S.G. §4B1.1.

[359]*See, e.g.*, U.S. v. McAllister, 927 F.2d 136 (3d Cir. 1991).

[360]U.S.S.G. §4B1.2(1)(i).

[361]U.S.S.G. §4B1.2, comment. (n.2). *See, e.g.*, U.S. v. Thompson, 891 F.2d 507 (4th Cir. 1989) (point firearm at person is "by its nature" a crime of violence); U.S. v. Alvarez, 914 F.2d 915 (7th Cir. 1990) (felon in possession is crime of violence when defendant engaged in struggle with arresting officer); U.S. v. O'Neal, 910 F.2d 663 (9th Cir. 1990) (crime of felon in possession of a firearm is "by its nature" crime of violence).

conviction is the focus of the inquiry under §4B1.2 and that the offense of unlawful possession of a firearm by a felon is not a "crime of violence" under the guideline.[362]

J. Departures for Offense and Offender Characteristics

The appellate courts have considered departures from the guideline range for offense or offender characteristics, including criminal history, in numerous cases (*see* Part H of Chapter Three).

IV. Commission Response to Appellate Court Guideline Decisions

While the Commission is obviously not a party to litigation involving the application of sentencing guidelines,[363] it does play an important after-the-fact role. This role derives from the fact that, among the duties Congress assigned the Commission, is the responsibility to "periodically review and revise [the guidelines], in consideration of comments and data coming to [the Commission's] attention."[364] Appellate court decisions represent a substantial source of such "comments and data" on the operation of the guidelines upon which the Commission heavily relies in its ongoing amendment process. Additionally, the Commission incorporates significant case law developments into its various training materials and programs, in order that recipients may more fully understand the interaction of court decisions with the Commission's pronouncements in the Guidelines Manual.

In reviewing appellate court decisions, the Commission's legal staff prepares a written monthly review of circuit cases that may have an important effect on the operation of the guidelines, or that represent a significant interpretation of the guidelines, policy statements, or commentary. These reviews are provided to Commissioners and staff for use in the Commission's work, especially with respect to periodic revision of the guidelines. They are also used in Commission training programs and periodically made available to courts, probation officers, and others in the criminal justice system.

Upon Commission identification of priority issues for amendment consideration, legal staff investigate relevant appellate case law in detail to assist Commission working groups that prepare guideline amendments for the Commission's consideration. The Commission's legal staff researches trends in appellate case law to identify issues in application of the guidelines and implications of specific guideline language. The legal staff also reviews appellate case law for innovative approaches to resolving guideline issues, as well as for specific language that might assist in drafting a guideline amendment that clarifies a complex issue or that resolves varying circuit court interpretations of a guideline.

The Commission's role in promulgating amendments for the purpose of bringing about uniformity in guideline application among circuits is especially important. The United States Supreme Court recently had occasion to explicitly affirm the Sentencing Commission's critical function as a primary interpreter and arbiter of circuit court conflicts centering on the sentencing guidelines. In

[362] U.S.S.G. App. C., amend. 433.

[363] Moreover, since the U.S. Supreme Court's Mistretta decision upholding the constitutionality of the guidelines, the Commission has only rarely appeared in an *amicus curiae* capacity.

[364] 28 U.S.C. § 994(o).

Braxton v. United States, 111 S.Ct. 1854 (1991), the Court indicated that it was not the "initial and primary" body charged with resolving circuit conflicts concerning the meaning of the guidelines. Instead, a unanimous Supreme Court observed that the primary means for resolving such conflicts lies with the Commission. "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," as evidenced by the statutory mandate in 28 U.S.C. § 994(o) (Commission has the duty periodically to review and revise the guidelines) and 28 U.S.C. § 994(u) (Commission has the "unusual explicit power" to decide whether and to what extent its amendments reducing sentences will be given retroactive effect).

Even prior to this Supreme Court pronouncement, the Commission had in fact undertaken, to a limited degree, the task of clarifying its intent with respect to several guideline issues on which the circuit courts had disagreed. For example, in the 1989-90 amendment cycle, the Commission added introductory commentary to the guideline adjustment for role in the offense to reinforce its intent that role determinations be based upon the entirety of a defendant's "relevant conduct," rather than solely upon the conduct embodied in the count of conviction. *See* amendment 345, U.S.S.G. App. C.

More recently, in the 1990-91 amendment cycle, the Commission not only addressed the Braxton "plea agreement stipulation" issue (*see* amendment 434, U.S.S.G. App. C), but also several other guideline issues involving the interaction of the relevant conduct, drug offense, and multiple count guidelines. In these recent amendments the Commission emphasized its intent that quantities of drugs involved in transactions that were part of a common scheme of drug distribution be aggregated, whether or not contained in the eventual counts of conviction. *See* amendment 389, U.S.S.G. App. C, and *compare* United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989) (holding such quantities are not to be aggregated)[365] *with* United States v. White, 888 F.2d 490 (7th Cir. 1989) (disagreeing with United States v. Restrepo) *and* United States v. Blanco, 888 F.2d 907 (1st Cir. 1989) (same). *See also* United States v. Davern, 937 F.2d 1041, *reh'g. granted, decision and judgment vacated* (6th Cir. Sept. 26, 1991) and amendment 389, indicating that the same result is intended even if the unconvicted conduct involves inchoate offenses of attempt or conspiracy.

Another important example involves the Commission's clarification that the offense of unlawful possession of a firearm by a felon is not considered a "crime of violence" under §4B1.2(3) for career offender purposes. *See* amendment 433, U.S.S.G. App. C (adding commentary that indicates the firearms guideline (§2K2.1) and Armed Career Criminal guideline (§4B1.4) already increase the sentence for defendants with prior convictions for felony crimes of violence or controlled substance offenses). Several other areas of inter-circuit conflict in guideline application are under consideration in the current amendment cycle.

V. Summary

To date, the new Sentencing Reform Act phenomenon of sentence appellate review has produced a substantial body of case law that not only has resolved the law of litigated cases, but also has provided guidance to sentencing courts and aided the Commission in improving the guidelines. On the whole, the Supreme Court and the courts of appeals have strongly confirmed the sentencing guidelines as passing constitutional muster. The Supreme Court rejected the constitutional challenges to the Sentencing Reform Act and establishment of the Commission on the issues of

[365]Note that this opinion subsequently was withdrawn and replaced with the opinion at 903 F.2d 648, *withdrawn in part on reh'g. en banc*, 60 U.S.L.W. 2274 (9th Oct. 4, 1991).

excessive delegation of power and separation of powers in Mistretta v. United States, 488 U.S. 361 (1989). As discussed *supra*, the courts of appeals have uniformly rejected challenges to the sentencing guidelines under the due process clause.

A perusal of the appellate courts' interpretations of the major guidelines provisions reveals a high degree of uniformity among the circuits, with some important exceptions. The empirical data show that defendants have availed themselves of the newly-created statutory right to appeal their guideline sentence a high percentage of the time, but they have a relatively low overall success rate. On the other hand, the government has appealed very selectively with a moderate degree of success.

In the area of application of amendments to the guidelines and commentary, courts have diverged from the statutory scheme that Congress had in mind. As noted above, courts have uniformly held that the *ex post facto* clause precludes retroactive application of a guideline, including amended commentary, when it would serve to disadvantage the defendant. Thus, on this issue the courts have not followed Congress' express intent that courts apply the guidelines and any pertinent policy statements issued by the Commission "that are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4), (a)(5).[366]

Significant divergences among the circuits exist in some areas of guideline interpretation and application. These differences in court interpretation no doubt result in some disparity in guideline application, pending resolution of issues by the courts themselves or the Commission. The Commission has sought to be attentive to its role in resolving guideline interpretation conflicts among circuits. Particularly where the appellate courts have indicated that they have found a problem with the language of the guidelines, the Commission has responded by revising the guideline or commentary to make its intent more clear.

Guidelines sentencing, including the process of appellate review, is evolutionary. With a right to review in the appellate courts, defendants enjoy unprecedented opportunities to ensure that their sentence was correctly and reasonably determined. The government has the opportunity to vindicate the public interest in an appropriate, correctly determined sentence in individual cases and to selectively pursue important issues of guideline application. The Commission actively monitors and analyzes the development of this "law of sentencing" to assess the areas where guideline amendments, research, or legislative action may be needed. This process, in turn, enables the Commission to better accomplish its congressionally mandated task of reviewing and revising the guidelines as appropriate to ensure that they most effectively serve the purposes of sentencing.

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[366]The Department of Justice indicated in its November 1987 Prosecutor's Handbook on Sentencing Guidelines, at pp. 72-74, that it would not seek to apply amended guidelines that disadvantage a defendant. While the government has sometimes argued that a particular amendment was clarifying rather than substantive, it has never contested in court the fundamental issue of whether amended guidelines that substantively disadvantage a defendant may be applied retroactively. Thus, on that basic point, the constitutionality of the statutory provision as Congress intended it to operate has not been defended.

Appendix A:

Site Descriptions

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Overview of Site Descriptions

To aid in understanding the context within which interviews occurred, researchers wrote descriptions of each of the 12 offices visited.[1] These site descriptions present profiles of various court practitioners and their interactions, local practices and policies, and processes by which sentencing is accomplished. The intent is to describe the setting, characters, and the actions with respect to guideline implementation in each site.

The site descriptions contain statistics on the district's caseload, offense distribution, case dispositions, and size of the office. For reference and comparison, selected national statistics are presented below:

- Criminal case filings ranged from 57 to 2,960 per district for the fiscal year 1990 (October 1, 1989, through September 30, 1990);

- Drug trafficking offenses comprised 44 percent of federal cases in FY90; fraud and embezzlement together accounted for 14 percent; larceny, firearms, and immigration offenses comprised 6 percent each, followed by robbery at 4 percent;

- The percentage of guideline defendants sentenced in FY90 subsequent to a plea of guilty or *nolo contendere* was 87.1; 12.9 percent of cases went to trial; and

- The range of court professionals per district in 1990 was:
  Judges — 2-39 (median = 6; mean = 8);
  Assistant U.S. attorneys — 2-172 (median = 12; mean = 25);
  Assistant federal defenders — 0-25 (median = 1; mean = 4); and
  Probation officers — 4-127 (median = 17; mean = 25).

The relative sizes of the 12 districts visited (based on the numbers of court professionals listed above) could be described as three large, two medium-to-large, one average, and six small districts.[2] Nine of the sites visited had federal defender offices, although interviewers were not able to talk with the federal defenders at one site.

The number of criminal case filings per selected district ranged from approximately 250 to more than 2,500. Five of the districts visited reported criminal case filings in excess of 700, while seven districts had fewer than 700.

The percentage of guideline defendants sentenced in FY90 subsequent to a plea of guilty or *nolo contendere* in a majority of the districts in which sites were visited was close to the national figure of 87.1 percent. The highest rate of pleas for the selected districts was greater than 95 percent, and the lowest rate was close to 78 percent.

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[1]In addition to interviewers' notes and site survey data, various sources were used to write the site descriptions including documents collected from local offices, the Commission's Annual Report (1990) and Monitoring database, and the 1990 Judicial Staff Directory (Staff Directories, Ltd.).

[2]"Small, medium-to-large, etc." are approximate terms assigned for the purpose of description and comparison of districts. "Large" consists of 50 or more assistant U.S. attorneys and at least 10 judges; "medium-to-large" is somewhat greater than the mean or average numbers of 25 assistant U.S. attorneys and 8 judges; and "small" denotes fewer than the average number of prosecutors and judges.

With regard to the percent of guideline versus pre-guideline cases, the range was fairly wide. (The current proportion for all 94 districts averages approximately two-thirds guideline, one-third pre-guideline.) For the selected site districts, the highest percent of guideline cases was approximately 84 percent contrasted with a district in which only one-third of its cases were guideline cases.

A. Summary Observations

Even though the sites are scattered across the country and a number of similarities and differences appear in the descriptions, care should be taken not to draw general conclusions about guideline sentencing practices based solely on the information contained in the descriptions. Just as it would be a mistake to piece together a series of thumbnail sketches to create a representative portrait, it is inadvisable to assume that the site descriptions make up a definitive picture of sentencing under the guidelines. Nevertheless, patterns and variations of themes regarding sentencing procedures and the roles, interactions, and relative influence of practitioners emerge from the site descriptions. The following observations are extracted from the site descriptions.

1. Probation Offices

A recurring theme throughout the interviews is the role and relative influence of the probation officer. Almost no respondent appeared neutral or indifferent to the role probation officers play in sentencing under the guidelines. Judges often had high praise for the work probation officers do and many said they depended on the officers' knowledge and assistance in calculating guideline ranges, although a number of judges said they do their own calculations (*see* "Guidelines Knowledge" section). In only one office did there appear to be any identifiable "strain" between the judiciary and probation officers. While not prevalent, it appeared to be generated in part when judges at the site sentenced according to the plea agreement, irrespective of the probation officers' guideline calculations.

Relationships with other court practitioners (besides the judges) varied widely across sites. For example, in several sites, the comments by both prosecuting and defense attorneys about probation officers could be characterized as "respectful," but in a few sites the relationship would be more aptly described as "adversarial." In several sites, defense attorneys in particular noted that they believed probation officers were allied with the prosecution, which placed them at odds with defenders. Additionally, defense attorneys complained about the "power of the probation officer" to influence the judge and the sentence. On the other hand, prosecuting attorneys occasionally reported that probation officers were allied with defense counsel on behalf of the defendant.

2. Defense Counsel

In some sites a number of references were made to defense attorneys' lack of knowledge about guideline application. Respondents who gave this criticism sometimes qualified it by saying that there was considerable variation among private defense attorneys in that some were effective advocates for their clients, but others apparently knew little about guideline sentencing. In some cases, the probation officer was a source of assistance to private attorneys. Federal defenders were exempted from this criticism and were frequently described as hard working and very knowledgeable (*see* "Guidelines Knowledge" section).

3. Discretion

It is difficult to discern sentencing patterns from the judges' interviews, and for this reason the judges at any one site cannot easily be characterized or labeled. In most sites, the court at best could be described as "split," with some judges supportive of the guidelines and attempting to apply

them appropriately, while others are opposed to the guidelines and resent what they see as restrictions on their discretion. Although many judges considered reduced disparity and increased predictability of the sentence a benefit of guideline sentencing, others objected (some vehemently) to the perceived transfer of discretion to the prosecutor (*see* "Benefits and Problems" section). Yet, a review of the site descriptions certainly does not give the impression that the U.S. attorneys' offices have taken over sentencing — quite the opposite impression, in fact, is given.

In a majority of the 12 sites, the U.S. attorneys or their assistants specifically noted that they are committed to ensuring that the guidelines are followed or that they adhere to the Thornburgh memo by charging the "most readily provable offense." In one site, probation officers said that assistant U.S. attorneys sometimes stipulated away behavior relevant to calculating the guidelines, and this had a major impact on sentencing, depending upon which judge was presiding. In another site respondents indicated that judges are highly regarded, and the chief judge in turn stated that they have a "responsible prosecutor." As a result, judges at this site indicated that the U.S. attorney's discretion under the guidelines was not a problem.

B. Conclusion

The site visit data illustrate one important finding: although faced with similar tasks, offices vary in the way they implement guideline sentencing, depending on resources, sentencing philosophy, personalities, and a host of other factors. The following example of variations at two sites serves to illustrate this conclusion.

In two large sites where the ratio of assistant U.S. attorneys to judges in the district was greater than five to one,[3] judges and probation officers frequently pointed to an overwhelming caseload to be handled by too few court personnel. Judges in the two offices said they were particularly concerned about not being able to consider individual cases carefully enough to sentence fairly. The tendency was to say that the guidelines were at fault for creating the situation.[4] In both sites, adjustments to the heavy caseload were made in different ways.

At one site judges appeared to do what they could to consider the individual defendant, but said they often had to resort to sentencing based on whatever the prosecutor and defense attorney worked out in the plea agreement. This affected many probation officers at the site who became frustrated about calculating the guidelines and writing presentence reports according to what appeared appropriate, only to find at sentencing that the presentence report seemed to have little impact. Sentencing results in this situation seem to depend to some extent on the commitment of the U.S. attorney's office to the spirit of the guidelines in charging decisions and plea agreements.

At the other site, the shortage of judges was eased to some extent by bringing in visiting judges to assist in handling a backlog of criminal cases. A ripple effect was noted in the variation in amounts of departure when visiting judges departed from the guideline sentencing range for

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[3]One indicator of judges' workload is the ratio of assistant U.S. attorneys to judges in the district. The average for all districts is about three assistant U.S. attorneys to one judge, and in the majority of the sites visited, the ratio is near the national figure. However in three of the small sites, there are fewer than two prosecuting attorneys for every judge (implying a lighter workload for judges), and in two of the large sites the ratio was greater than five to one.

[4]Judges and probation officers did not suggest additional influencing factors; however, it is possible that other events such as a marked increase in the crime rate, the crackdown on drugs, recent rise in the number of prosecutors and investigative agents, or a large number of appeals also may affect the workload.

substantial assistance. The U.S. attorney's office responded by structuring the number of levels of recommended departure (usually two or four) according to the amount of assistance provided by the defendant. The judges at this site accepted the practice and generally defer to the prosecuting attorney's recommended amount of departure in substantial assistance cases. The influence of the probation office remained strong, and judges relied on officers to calculate the guideline range, assist in working out disputed factors in advance of sentencing, and recommend an appropriate sentence. Thus, the probation office at this site appears to play a key role in guideline application.

Site 02

Case Characteristics and Sentencing Outcomes

The majority of cases sentenced in 1990 in the circuit in which Site 02 is located were guideline cases. The proportion of guidelines cases versus non-guideline cases was lower for the office than for the circuit within which it is located. However, the number/percent of guideline cases sentenced for both this district and the circuit were higher than the national rate. The departure rate for this circuit was higher than the national rate of 16.6 percent, but the rate for the district was lower than that of the national figure. Again, the rates of departures on the basis of substantial assistance motions for both the circuit and district were above the national figure. The rate of both upward and downward departures for other reasons was slightly higher for the circuit than the national figures of 6.9 percent and 2.3 percent respectively, but considerably below that for the district.

Structural and Organizational Context

The Judiciary

This site is a "small court." Appointed by Presidents Carter and Ford, judges at this site have served on the federal bench for an average of 13 years. The judges in the district appear to work together on matters common to court operations and court governance. According to the chief judge: "We regularly have meetings of the district court. Items are put on the agenda, discussions take place, and action is taken as a body, rather than as individuals."

The judges at this site said the guidelines generally fit their idea of what an appropriate sentence is. One judge pointed out, however, that "95 percent of the time, the guidelines are adequate and are of benefit. It's the five percent of the time that I can't legally depart that gives me the problem." Another judge noted that while the purpose of the guidelines was to reduce or eliminate unwarranted disparity, the guidelines system itself is based on a notion of disparity in that it imposes similar sentences for dissimilar defendants and circumstances.

According to both the local case statistics as well as the perceptions of practitioners, the judges at this site do not readily depart from the guidelines. One probation officer also noted that the judges tend to sentence at the low end of the guidelines range. As pointed out above, in certain circumstances judges at Site 02 feel constrained by the guidelines from departing, particularly in cases involving first offenders or those with a good record of community service. All judges at this site also said that a benefit of the guidelines was the elimination of personal responsibility for the sentence: "It takes away a lot of the problems we had before, it takes public pressure off [the judge] a lot."

The Probation Office

The two supervisory probation officers at this site have extensive experience in this district, while the two line officers have had relatively little experience (average of 20 months). The average caseload is about 65 supervision cases and 11 presentence investigations. Only one officer reported handling pretrial cases (10-15 cases). One officer who specializes said that, "In the other offices, it's drug cases; here it's mail fraud, embezzlement, and white-collar crime." All others reported that their caseload consists of a mix of offense types. The probation officers said that presentence report writing takes about 65 percent of their time. The probation officers all reported that their workload is influenced by and reflects the high proportion of white-collar crime at this site. For example, there is typically very little contact with the prosecuting attorney in food stamp cases, and there may be little or no contact with the defense attorney during the typical presentence investigation. According to the officers, these white-collar cases typically generate more paperwork. But because

defendants in these kinds of cases tend to be better educated and do not have a criminal history, "the quality of the case is quite different."

Probation officers have a very influential role in the sentencing process in this district. Two probation officers have lengthy service records in this district and know all the practitioners in the system very well. They appear to have a considerable impact on the criminal justice process. All the judges rated the probation officers' knowledge of the guidelines as excellent, and specifically said that they rely heavily on the officers. The probation officers also had the perception that the judges took their views very seriously.

The probation officers said that because this is a small district, they have a close relationship with the assistant U.S. attorneys and have easy access to their files and information. In contrast, however, the prosecutors and defense attorneys complained about the great influence that the probation officers (particularly the chief) had in this district. According to several of the prosecutors (as well as some of the probation officers), the criminal justice system has been greatly impacted by the personal philosophy of this chief. One assistant U.S. attorney complained about the disproportionate level of influence that both probation officers and certain defense attorneys have on judges in this district.

Several probation officers also noted that defense counsel is so poorly informed on the guidelines that they have almost no impact on the sentencing process. Most of the respondents (including the defense attorneys) emphasized the need for more training on the guidelines for the private defense bar in this district.

The U.S. Attorney's Office

The assistant U.S. attorneys who were interviewed at this site have an average of 14 years of experience as attorneys, have been federal prosecutors on average for five and one-half years, and have been in their current positions for an average of three and one-half years. Two of the assistant U.S. attorneys specialize: one in drug cases, the other in RICO cases. The third handles white-collar cases and very large drug cases. The assistant U.S. attorney who handles drug cases is the office liaison with a community group that was established as part of the national drug strategy. The assistant who handles RICO cases does more of these than anyone else in the district. The average number of cases that each prosecutor handles is 17.

The assistant U.S. attorneys indicated that they have had disputes with the probation officer on various issues, but these are usually resolved before they get to court. All the assistant U.S. attorneys emphasized that the probation officers have enormous influence under the guidelines system; that judges don't have much control under the guidelines; and that the defense attorneys have even less control than the judges. One assistant U.S. attorney noted, however, that "the defense attorneys tend to be pals with the judges." The assistant U.S. attorneys saw their role largely as ensuring that the guidelines are followed, since their perception was that this is a district where there is a tendency to give light sentences.

Private Defense Attorneys

This district does not have a federal defender program. The four defense attorneys who were interviewed had an average of 14 years of experience as lawyers. The average number of federal criminal cases they handle each year is 26. Three of the attorneys said that of the guideline cases they have handled, none have gone to trial.

Two of the defense attorneys said that they are opposed to the guidelines, and two attorneys said that while they are not directly opposed to them, they deplore the impersonality and limitation of judges' discretion that result from the guidelines system. All thought that sentences are too severe under the guidelines system, and that the system was both intimidating and imposing. One attorney said that while not being a guidelines opponent (because of the certainty it adds to the process), a problem arises because of the implicit understanding that judges won't depart: "There's a freakishness to it. No one is looking at the offender. The safety valve is departure, but if you don't apply it, you will get people going to jail who shouldn't be. The language of departure should be clearer."

Three of the defense attorneys said that probation officers have a very significant role under the guidelines system. One defense attorney saw them as an arm of the prosecution, and was particularly irate over the power they had in this district: "Probation officers are very friendly, but they give me fits. Very few practitioners want to come to federal practice here. This is a 'top-count-plea, plug-in-the-guidelines' situation, and you know what the sentence will be. All of this is exacerbated by a runaway probation officer when calculating the guidelines." Another attorney complained that because probation officers don't report on the defendant but focus on the [guideline application] process, they don't provide a balanced view of the sentencing process.

Although they implied that the authority of the prosecution has increased substantially under the guidelines, defense attorneys did not give any specific views about their relationship to or attitudes about the prosecutors. Because the interviews with the defense attorneys took place in the federal courthouse, the interview team was able to draw some conclusions about assistant U.S. attorney/private defense attorney relations through observation. The prosecutors and private defense attorneys appeared to get along well, with spirited joking and a general familiarity typical of long-term friendships.

Policies and Procedures Affecting Guidelines Implementation

The U.S. attorney said that the Thornburgh memo is the principal policy or guide for making charging decisions. Exceptions are made only on the approval of the Department of Justice. Plea agreements in this district follow a standard format that sets out information concerning charges, responsibilities of the defendant with respect to the plea, and restitution. Plea agreements specify that discretion is left to the government as to whether or not the defendant meets the conditions. Pleas, however, never include waiver of the right to appeal. All plea agreements are written and there are no formal policies regarding stipulations to certain conduct. This U.S. attorney's office infrequently enters into plea agreements that call for a specific sentence (Rule 11(e)(1)(C)). Prosecutors say that there have been many cases where counts have been reduced or dismissed in a plea agreement and non-binding plea agreements have been entered into often.

The U.S. attorney's office in this district has very good relations with state and local law enforcement agencies, particularly concerning drug investigations. In this state, drug penalties for violations of state offenses are significantly higher than for federal statutes. A threat of state prosecution might be a part of a federal plea agreement to obtain cooperation, although the U.S. attorney said that the U.S. attorney's office does not make deals to refer the defendant to the state to avoid mandatory minimum sentences. Federal prosecutors in this district send cases to the state when they "feel they can do a better job. For example, in bank robberies, we look to see if they can do a better job there."

As is the situation throughout the country, most cases come to this U.S. attorney's office from other investigating agencies. Public corruption cases are a big priority in this district, and several

highly publicized corruption cases have been successfully prosecuted. The U.S. attorney personally approves all indictments. After consultation with the probation officers, pretrial diversion or deferred prosecution may also be used. Cases are declined after review by the first assistant U.S. attorney. Declinations are based on such considerations as: Is it a federal crime? Is it a low-level type of offense? Is there concurrent jurisdiction? Is there insufficient evidence?

Cases are assigned in the U.S. attorney's office through rotation. Exceptions are made for cases involving drugs and organized crime, which are assigned to specific individuals. A review is done twice yearly to reevaluate caseload burdens. Individual assistant U.S. attorneys have a great deal of autonomy in this office and there appears to be no formal arrangement for approving stages of the plea negotiation process. However, from responses to several of the questions, it appears that individual assistant U.S. attorneys have easy access to either the first assistant or the U.S. attorney.

There is no set pattern or policy in the U.S. attorney's office for other procedures relating to the sentencing process. Informations are used in this site for cases in which defendants waive indictments, prior to indictments, and in misdemeanor cases. Superseding informations or indictments are frequently used where "we need to move on cases after arrest, but where we don't have all the facts, such as in drug cases, where we have immediate arrests." However, prosecutors say they are never used as a tool in plea negotiations. The U.S. attorney stated, "You indict the facts. If you get facts to do an indictment, don't fiddle with the indictments." There is no set policy in the U.S. attorney's office for making a motion for substantial assistance. Issues emanating from this process, or relating to disputes, or for that matter relating to any other general policy issue is handled on a case-by-case basis with the supervising U.S. attorney or the U.S. attorney. For example, the assistant U.S. attorney raises the question of appeal with the supervising U.S. attorney, but the appeal is not made unless Department of Justice approval is obtained.

There were no specific policies or standard practices for application of acceptance of responsibility or obstruction of justice in this district. With respect to acceptance of responsibility, the chief probation officer said, "It's like a tree in the wind. Acceptance of responsibility is a very subjective thing. The more you look at it, the more complicated it becomes. It requires more time and a more sophisticated lawyer. It has been manipulated, and it varies from lawyer to lawyer." However, there is a [local probation office] policy on application of role in the offense: in multi-defendant cases, the policy is to give one or more adjustments.

According to the chief probation officer, individual probation officers determine on a case-by-case basis whether to make a recommendation for departure. However, there have been very few departures in this district (both upward and downward). There is no set practice or policy for conducting the presentence investigation or for completion of the presentence report in this district. The procedure for completion of the presentence report follows directives issued from probation division headquarters in Washington. The chief probation officer read from a memo that sets out the time frame for completion of the presentence report: 60 days to complete the presentence report, 10-20 days to make objections, 10 days prior to sentencing to achieve agreement on such issues as base offense level, acceptance of responsibility, etc. The report then goes to judges with notes on what cannot be agreed upon. The probation officers said that the presentence report always accurately reflects the offense conduct. One probation officer described how careful they are with what they put in the presentence report: "We're selective, clean it up, specific in allegations." All of the respondents at this site indicated that disputes regarding any point in the presentence report are usually resolved prior to the sentencing hearing, and that the judges get only those issues that have not been resolved. Probation officers in this district rarely testify in court on disputes relating to the presentence report.

The U.S. attorney and the chief probation officer are both supporters of guideline sentencing. The U.S. attorney said that it's important to have a criminal justice system that the public believes in. To do that you have to have consistency, and to have consistency, you have to have guidelines. The chief probation officer agreed: Sentencing under the guidelines has resulted in "more equity in sentencing -- more confidence in the guideline system."

Site 03

Case Characteristics and Sentencing Outcomes

This district has a reputation for being somewhat uncooperative in its implementation of guideline sentencing. Glimpses of this less than compliant attitude can be seen in the various aggregate indicators of caseflow and sentencing dispositions. The extremely low trial rate -- about 6 percent versus almost 13 percent for the nation -- is one of the first indicators that something is different about this district. The plea and trial rate are not much different from those of the circuit, although in both cases, the circuit is a bit closer to the national figures. Prior to the guidelines, the trial rate for this district was about 4 percent. While this has increased somewhat under the guidelines, it does not appear to be a substantial change from past practice. The distribution of criminal and civil cases is another interesting feature of this district. Nationally, criminal cases comprise less than 20 percent of all cases filed; in this district, criminal cases comprise almost 50 percent of the filed cases. In addition, the percentage of guideline cases versus non-guideline cases processed (80% of district's total criminal caseload) is higher than the national figure of about 65 percent.

It is not clear why this district is different, in many respects, from the norm. The distribution of cases filed reflects, to a large extent, the charging decisions of the local U.S. attorney's office. It is possible, although less likely, that the cases filed reflect the distribution of offenses that occur in this particular area. The most frequently prosecuted offenses in this district are drug-related crimes, followed by immigration and fraud cases.

This district is somewhat different from the federal system regarding personnel. The ratio of federal judges to assistant U.S. attorneys is 766 to 2,177 or about 20 percent compared to about 35 percent for the nation. In addition, the ratio of federal defenders to assistant U.S. attorneys is 364 to 2,177, 32 percent compared to 16 percent nationally. The distribution of court personnel at this site is a smaller ratio of judges to assistant U.S. attorneys and a substantially larger ratio of federal defenders to assistant U.S. attorneys than is found in the total federal system. The national mean for judges per district is eight with a median of six; this district has about 10 to 12 active judges, putting it above both figures. However, the national mean and median for assistant U.S. attorneys is 25 and 12, respectively; there are more than 50 assistant U.S. attorneys in this district, putting it substantially above the national average. Also, the national mean and median for federal defenders is 4 and 1, respectively; and this district has over 15 federal defenders, making it one of the largest offices in the federal system. These figures may provide some insight into the elevated plea rate found in this district. The relatively small number of judges compared to prosecutors and federal defenders may influence judges to accept plea agreements or motivate assistant U.S. attorneys to seek pleas in order to process the high volume of criminal cases. Data collected from all sites suggest that federal defenders are among the most highly rated in terms of their guideline knowledge, by other court practitioners. Therefore, the substantially higher number of federal defenders at this site suggests a very competent defense bar with a high level of guideline knowledge and expertise.

Compared to the national figures, a higher percentage of offenders sentenced in this district court receive a prison term (about 82% compared to 77% nationally). But even though more offenders are sent to prison, their average sentence is a little more than 50 months compared to the national average of 61 months. Related differences appear in the area of departures. In the federal system, approximately 83 percent of all guideline cases are sentenced within the appropriate guideline range. In this district court, however, only about 70 percent of the cases are sentenced within what was determined to be the appropriate guideline range. In terms of specific departures, approximately 3 percent of the defendants receive a departure for substantial assistance lower than the national rate of 7.5 percent. Slightly more than 12 percent of the cases receive some other type of downward departure, a figure much higher than the national average. The percent of upward

departures nationally is between 2 and 3 percent, but the percent of upward departures in this district is more than 11 percent.

Structural and Organizational Context

The Judiciary

In many respects, the judiciary at this site is the most distinctive element of this district court organization. The chief judge was appointed to the federal bench in 1970 and has been chief for the past seven years. Three other judges also were appointed in the late 1960s, and the remaining three judges are more recent appointments in the 1980s. More than half the judges in this district have substantial pre-guideline experience, a factor that may make the transition to guideline sentencing more difficult. However, three of the judges had only five years or less judicial experience prior to implementation of the guidelines. Nonetheless, when asked what changes they would like to see made in the guidelines, a majority of the judges in this district strongly favored complete and total elimination of the guidelines. One of the more recent appointments to the court captured much of this sentiment when he said: "I don't like the guidelines. I do not think they are just. . . . The judge does not sentence anymore -- the assistant U.S. attorney or DEA does the sentencing with the deals they make or the charges they make. . . . Judges can look at the guy and do a better job than a bunch of numbers." It seems that the uncooperative tone of this district court was established early by the initial negative response of the chief judge, who declared a lack of interest in any training because of a fundamental disagreement with the guidelines system.

All the judges in this office feel overwhelmed by the volume of criminal cases and indicate that they have restricted the hearing of civil cases as a consequence. The majority of judges feel that the guidelines generally, and mandatory minimum penalties in particular, have created much of this expanded workload by greatly increasing the time required to process criminal cases. There is a prevailing opinion, not necessarily reflected in the empirical evidence, that the guidelines and mandatory minimums have greatly increased the demand for trials and appeals. However, it is this potential increased demand for trials, and the absolute volume of cases, that many judges cite as necessitating the uncritical acceptance of all plea bargains presented. As one judge stated when asked if he typically accepted the plea at the plea hearing or deferred until seeing the presentence report: "I accept it at the plea. Tell the defense attorney to cut a deal with the government. I do not want to know about it. Congress gave sentencing discretion to the government and took it away from the judge."

Many of the judges in this district court appear resigned to this role of case processor, which they view as necessary given the guidelines and case volume. Several claim they are unable to maintain an active civil caseload, a result they resent. As is evident in both the aggregate statistics and their expressed opinions, this condition clearly manifests itself in the area of plea bargaining.

While in general it appears that most judges in this district are reluctant to depart in either direction, one particular offense produces a substantial number of upward departures. Judges have apparently reached a consensus that the applicable guideline for high speed illegal alien cases does not capture the seriousness of the offense. For example, one judge commented that "I've become pretty gun-shy on departures. Frankly, I think high speed chases are the only cases I've departed on in the past couple of years." This same judge stated further that "I recommend higher penalties for high speed chases. A sentence increase of two levels is almost nothing; it's much more serious than the Commission thinks. . . ." Finally, another judge concluded that s/he would "almost always [depart upward] for high speed chases and inhumane treatment of aliens. Tomatoes get better treatment than aliens."

The Probation Office

The chief probation officer for this district, with over 18 years of experience, has been chief for eight years. This office, like many others, has been forced to bifurcate to meet the demand and complexity of guideline presentence reports. Historically, officers would perform both supervision and presentence duties, but under the guidelines the chief feels this is no longer possible because of the guideline expertise required for the new presentence reports. The office is beginning to expand, but is currently staffed at 80 percent. All new officers begin in the presentence unit and receive both local and FJC guideline training. The office attempts to provide ongoing training to keep members of the presentence unit up to date concerning changes to the guidelines and emerging caselaw issues.

Overall, this office has a substantial number of experienced personnel, several of whom have 15 or more years of service as federal probation officers. The majority have been in the office since before the implementation of the guidelines and have rapidly accumulated extensive guideline experience. Because of the high volume of cases in this office many probation officers have already completed more than 100 guideline presentence reports. The typical caseload ranges from 12 to 15 cases, with the unit supervisor assigning cases on the basis of court date.

While in many respects the relationship between the probation office and the bench is strained, the basic nature of the relationship is not one of hostility. There are many specific instances of conflict that, over time, produce discomfort, strain, and a sense of alienation on the part of many probation officers. The mechanism of uncritical acceptance of plea bargains selected by judges, to accommodate the dual forces of guidelines and case volume, has created a structural situation within which the probation officer increasingly feels on the outside looking in. The most common complaint expressed by probation officers is that everyone ignores their guideline calculations in the presentence report, including the judge. In many cases, the judge appears to sentence according to the plea agreement, even when the guideline calculation is substantially different from the presentence report. As one probation officer said, "[P]lea bargains are what's hurting the guidelines in this district. Most judges accept them regardless of what probation recommends. [In some fraud case] a judge ordered the probation officer to rewrite the presentence report according to what would be acceptable and probation officer did it. We as a district are trying to apply the guidelines as they were intended but I don't think they're doing it that way in the courts." Another probation officer was more pointed when stating that, "[I]n nine out of ten cases, what the plea agreement says is what they will be sentenced to. Almost seems like our work is an effort in futility. . . ."

The relationship of the probation officer and the U.S. attorney's office is not overtly hostile, but both parties recognize the plea bargaining process as a continual source of disagreement. An atmosphere of formal cooperation pervades most transactions, even though each recognizes that ultimately their efforts may produce contradictory results in terms of the guidelines. Here again, the focal point becomes the eventual comparison of the guideline calculations contained in the plea bargain and the guideline sentence recommendation in the presentence report. The rub for probation officers comes from their sense that they "do it right" in the presentence report, but that the judge, appealing to the exigencies of case volume and time for justification, always accepts the plea bargain. It is this circumstance, more than anything else, that appears responsible for the sense of demoralization that seems to pervade the probation office. One probation officer addressed the dilemma of stipulations within plea bargains in the following manner: "If [those] stipulations are contrary to the actual offense, and accepted by the judge, we calculate the guideline range accordingly. It's a losing battle -- we'd just have to change the report. If the stipulations are accepted by the parties only, we include them in the Impact of the Plea, and calculate the guidelines based on the actual offense conduct."

The private defense bar, two distinct groups -- private retained or appointed counsel and the federal defender's office, have a somewhat different relationship to the probation office, with federal defender's office displaying a more antagonistic posture.

Private defense attorneys, although often at odds with probation over various guideline issues, view probation officers as a potentially helpful resource. A typical defense attorney's limited experience with guideline cases puts them at a disadvantage in their interactions with both the prosecution and probation. They find that when they attempt to work out a plea agreement with the prosecutor, probation comes along later and tries to upset the deal. One defense attorney concluded that: "[A]fter saying how good the probation officers are, there is a strange institutional pressure to take the side of the assistant U.S. attorney. They should be there to inform the judge. In the old days, the probation officer was the single most important person in the process. Now, like judges, they have no meaningful role in the process." Another defense attorney discussed how probation officers often contradict plea agreements: "[P]robation officers work up the guidelines as if there were no plea agreement. It defeats the process. One client of mine was to get 6-12 months according to the plea agreement, and the probation officer recommended 36 months. The judge departed and went to 30 months."

Perhaps because of the type of offenses or frequency of interaction, the relationship between probation and the federal defenders is something less than congenial and cooperative. The following comments by probation officers in this site capture both sentiments pertaining to their organizational role as it has developed under the guidelines and their relationship to the federal defender's office: "It's just my opinion but I think the role of the probation officer is becoming more difficult. We are trying to comply with the Sentencing Commission, but we do not get any support from defense attorneys, assistant U.S. attorneys, or judges. Probation officers do not get support from anyone in the system;" "We get beat up verbally. The federal defender says we have a ritualistic Nazi-like approach. Another said a probation officer had blood lust and a star chamber mentality in applying the guidelines."

These responses indicate a perception, at least from many probation officers in this district, that others in the court system are highly critical of their role under the guidelines. Indeed, probation officers even feel estranged from many judges, who they work for, making their sense of isolation more troubling.

The U.S. Attorney's Office

Compared to the number of judges, the size of the U.S. attorney's office seems quite large. In the criminal division there are approximately 65 assistant U.S. attorneys divided into five units. The unit supervisor handles all case assignments for that unit and the initial indictment review process. Officially, all charging decisions are governed by the policies of the Thornburgh memo or, at least, are generally consistent with the credo "whatever the evidence will support." Any significant problems or decisions pass up the chain of command from the line assistant U.S. attorney to the unit supervisor to the chief of the criminal division to the chief assistant U.S. attorney and finally to the U.S. attorney, if necessary. The primary obligation of the chief assistant U.S. attorney seems to be as a filter, keeping the U.S. attorney free from many of the mundane decisions that arise during day to day operations.

The U.S. attorney's office is a mix of experienced and inexperienced personnel. A sizable group has between 15 and 20 years of experience, while a somewhat smaller group has five years or less. In terms of guideline experience, the two groups are more similar and in many cases the more junior

assistants have more guideline case experience than many of the more experienced assistant U.S. attorneys.

This office has a fairly formal indictment review process for all cases. The chief assistant U.S. attorney described the process in the following manner: "We basically charge whatever crime the evidence will support. We have an indictment review process. Prior to charging, the prosecutor's memo goes to the individual review team, which includes myself, chief of criminal division, chief of complaints, chief of the unit involved, and any other experienced people who may be of help. The case and the charging document are reviewed; the decision is made as to whether we can support the case. We also look at it from a tactical point of view. Reactive cases, where the arrest is the first contact, are handled by the complaint unit up until the time of indictment. Once a week a review panel goes through the same type of procedure prior to presenting the cases before the Grand Jury."

Pre-indictment pleas are commonly used for "white-collar" crimes, but rarely in other areas. The office has specific policies for the use of acceptance of responsibility and role in the offense describing the criteria and circumstances under which these adjustments could be recommended. The office follows the criteria for substantial assistance departure as stated in the guidelines. They rarely, if ever, agree to a specific amount of reduction. The office recommends any other downward departure and the only upward departure that is routinely agreed upon and recommended is for high speed chases. All departure recommendations, except for substantial assistance and high speed chases, have to be cleared through the U.S. attorney.

Interaction between the assistant U.S. attorneys and probation or defense revolves around the plea agreement. The process begins with some type of preliminary negotiations between the prosecution and defense attorney. In the majority of cases, both the defense and prosecution find it in their own self-interest to pursue the common goal of the plea agreement. In most instances, this negotiation occurs prior to the probation officer receiving the case and this fact becomes a source of conflict later in the process. For the most part, there appears to be a reasonably cooperative working relationship between the U.S. attorney's office and most defense attorneys, exclusive of federal defenders.

Although several members of the U.S. attorney's office feel that guidelines sometimes make plea negotiation more difficult, they suggest that mandatory minimums more often lead to unwanted trials. This illustrates the mixed blessing of mandatory minimums from the government's perspective: while many assistant U.S. attorneys like the "hammer" of mandatory minimums, they do not like being forced to trial by a defendant who feels they have nothing to lose.

The relationship between the U.S. attorney's office and probation is more unstable. While plea agreements represent an effective method of case resolution for both the prosecutor and defense, they all too often become a source of conflict for probation. One assistant U.S. attorney, in describing the potential difficulty in dealing with probation concerning plea bargains, stated that the "probation officer can't take into consideration proof problems, evidence problems, and caseload problems of assistant U.S. attorneys. Better to get conviction with less time than fewer convictions with more time. The probation officer may interfere with the plea agreement -- anything to do with cooperation, they should stay out of. They are very inflexible about the guidelines." This latter characterization was offered by a fairly new assistant U.S. attorney. A more experienced supervisor stated that the office has infrequent disputes with probation and that "[W]e probably have a better probation office than other districts. We have no serious problems here." One probation officer described the dilemma: "[I]n terms of plea bargaining, we still write our reports according to how we view the circumstances of the offense. In this district, far more judges are going along with the

plea. We're down to about two judges who adhere to the guidelines strictly. One judge indicated to us that because another judge is leaving, time constraints allow no time for hearings. This judge actually apologized to probation for having to go along with the plea agreements. There's just no time for hearings."

The Federal Defender's Office

The federal defender's office is larger than most and is led by an individual who takes a highly critical posture toward the guidelines. This atmosphere may help to explain the strained relationship with the probation office.

The office provides new attorneys with basic guideline training and provides mandatory training for all panel attorneys in the district. The caseload is heavy but manageable if an assistant works a minimum of 60 hours per week, according to the chief. The federal defender's office handles about 60 percent of the eligible criminal cases. According to the chief, the office has no strict written policies on the issues of recommending adjustments, departure, appeal, etc., but works to best serve the interests of their clients.

As discussed previously, the focal point of all interaction among the federal defender, U.S. attorney, and probation officer is the plea agreement. When asked about the process of negotiating a plea in drug cases that encompasses less than the total offense behavior, one federal defender stated: "[T]hat's the goal in all my cases -- how much does the dope weigh. Get the defendant recharged in an indictment that does not specify the amount superseding the indictment with only part of the conduct or dope. Cop to one count that has a lesser amount. If other drugs are counted, it depends on how you word the plea agreement or which probation officer gets it. There is a tension between this office and the probation office and to a lesser extent the U.S. attorney. Probation officer always wants to count everything."

Obviously, this process could and often does lead to disputes among the various participants, most often between the federal defender and probation officer. The same federal defender, when asked if there were ever disputes with probation, without hesitation stated: "Nine out of ten cases. Four primary areas, (1) acceptance of responsibility, (2) upward adjustments, (3) specific offense characteristics (add or fail to subtract), and (4) criminal history once in a while."

Another point of contention, this time between the U.S. attorney's office and federal defender, has to do with appeals. The federal defenders view the filing of an appeal as part of their fundamental obligation to represent their client. However, it has become an expanding obligation requiring increased resources. The chief federal defender described the situation in the following manner: "Everybody takes appeal of their own case. Hired two new lawyers with a focus on appeals when trial lawyers don't have the time. One-half their [new attorneys] caseload is appeals, the other half is trials. We computerize what's due when in terms of due dates, and review appellate briefs before they go out. Our appeals are up, they've jumped from 25 to 130 a year (sentencing appeals). There are more trial appeals too because of the sentencing consequence."

While federal defenders view filing appeals as part of their professional responsibilities, assistant U.S. attorneys often have a different perspective. One of the primary issues of contention between the two offices appears to be the number of appeals. It is not surprising that assistant U.S. attorneys see the consequences of filing appeals much differently: "There's a strain to the bursting point of the appellate courts. The federal defender's office here feels obligated to file an appeal after every sentencing, even if it's frivolous . . . one even went to the Supreme Court. It's totally out of control. I won't enter into a plea without a waiver of right to appeal. They file in any event, almost 100

percent. They feel it's their professional duty to file an appeal on everything and to be as aggressive as possible. They're not as effective though because a lot of it is so frivolous."

Site 04

Case Characteristics and Sentencing Outcomes

This office is the largest within the district and most of the descriptive data do not show a significant difference between this office and the district as a whole. In size, this district straddles the line between medium and large.

An examination of court operation and the sentencing process reveals that the plea rate at this site (80%) is somewhat lower compared to a national trial rate of only about 12 percent. However, offenders in this district are sentenced to an average 59 months in prison, which is only slightly less than the national average of 61 months. Somewhat less than 80 percent of the offenders receive some form of prison sentence, while the other 20 percent receive probation. This distribution is similar to the national figures that show that approximately 77 percent of the guideline sentences imposed include some form of prison confinement. Drugs are the most common offense in this district, mirroring that of the federal system. However, compared to the national average, this district has more fraud offenses (22%) and slightly fewer drug cases (36%). The number of guideline cases sentenced in this district is approximately 10 percent below the nation's average, but almost identical to the circuit. In terms of departures, this district is virtually indistinguishable from the circuit and similar to the federal system. Close to 80 percent of the cases are sentenced within the guideline range, with about 15 percent of the cases receiving some type of downward departure, including departures for substantial assistance. Overall, less than five percent of the cases received some form of upward departure, compared to slightly over two percent for the nation and about four percent for the circuit.

Structural and Organizational Context

The Judiciary

This district has about 15 judges, more than 50 assistant U.S. attorneys, about 30 probation officers, and only three federal defenders. At first glance, there seems to be an imbalance among court personnel with a decided tilt toward judges and assistant U.S. attorneys. These numbers are all greater than the median figures for the federal court system overall. This apparent imbalance can be partially explained by the ratio of criminal and civil cases processed in this district. While in many districts the ratio of criminal to civil cases has decreased over the past decade, this district continues to process substantially more civil cases. This district matches the median criminal caseload for the federal courts at slightly over 300 cases per year. However, while the median civil caseload nationally is 1,712, the civil caseload for this district is more than 4,000. Like many districts, this one has recently experienced substantial personnel increases in the U.S. attorney's office, without the concomitant increases in other segments of the court organization.

Overall, the judges in this district are characterized as more liberal than much of the federal system. Many of the judges have previous experience on the state bench, and this appears to influence their approach to the guidelines. More than 30 percent of the judges at this site were appointed in 1972 or earlier. Almost 40 percent of the judges were appointed during the late 1970s, and about 25 percent were appointed during in the 1980s. As a result, all judges had at least some federal judicial experience prior to implementation of the guidelines. In particular, the chief judge has been on the federal bench for almost 20 years and was appointed chief more than five years ago.

Most of the judges rarely talk directly with the probation officer or hold a formal conference concerning the presentence report or sentence recommendation. Judges receive the presentence report one week prior to the sentencing hearing, but often read it one or two days before the actual

hearing takes place. Typically, judges will allow the parties to bring up new objections at the sentencing hearing, but do not necessarily encourage this activity. In addressing this issue, one judge stated: "[I] would accept new objections that had not been raised before. I don't think it's right to trade several years of prison to save a half-hour at sentencing. If there's a disputed issue, however, I usually resolve it in favor of the probation officer." Most judges said that they have evidentiary hearings in only a few cases. Several claim to calculate the guidelines independently of the probation officer. Few of the judges interviewed felt it necessary to provide any elaborate statement of reason if the sentence imposed was within the recommended range or if no appeal was foreseen. Several judges said they believe that the guidelines have produced an excessive amount of unnecessary paperwork.

For the most part, the judges in this district try to implement the guidelines as intended, although this is tempered by a clear and active recognition of problems that need to be addressed. Historically, several judges have disagreed with the guideline sentence for a specific offense and have frequently given a downward departure. These departures have generally been reversed on appeal. The assistant U.S. attorney with a particular interest in prosecuting this offense has since left the office and it is now rare that the U.S. attorney's office is proactive in the prosecution of such offenses.

Many judges in this district have a somewhat accepting attitude toward the guidelines as exemplified in the following comment: "The idea of the guidelines is excellent. I'm in agreement with the objectives of truth in sentencing and fairness. It gives me less agony than before. Criminal sentencing is the worst part of this job. But improvements in the guidelines can be made." However, a minority of the judges at this site have a critical approach to the guidelines. Identifying problems with the guidelines, one judge argued that "they're not yet flexible enough to permit fine-tuning. Sometimes it's necessary to do justice in a particular case."

The Probation Office

The probation office, with 27 officers, is larger than the national average. Several officers in the presentence unit have ten or more years of experience. Most officers have some previous experience in the state criminal justice system, most often as probation officers. The typical caseload in the presentence unit is somewhere between nine and 12; most officers consider this manageable. The majority of these officers have had considerable experience with the guidelines and have completed from 60 to 150 guideline presentence reports. The deputy chief spends substantial time in the compilation and distribution of basic court and sentencing information. These data are distributed to other court personnel; judges, in particular, have come to depend on this information. The reports include information on caseload, caseflow, and court backlog, in addition to sentencing information on the percentage of pleas and rate of departure.

The office has only recently bifurcated into supervision and presentence report units, and has no formal initial training or scheduled ongoing training specifically designed for the presentence report unit. Probation officers have recently identified the necessity of keeping up-to-date on case law as a significant problem. Some officers feel that because they do not have legal training, these issues are outside their expertise; others feel they can handle the substance, but do not have the time to thoroughly address these issues. In either case, the issue of case law and how to incorporate it into the presentence report remains an unresolved problem. Case law, along with the objection and addendum process, are typically mentioned as critical factors contributing to the perceived unmanageability of the caseload. In order to keep up with the workload, everyone in the probation office has to work more than forty hours per week. The chief probation officer stated that "in

presentence report unit we manage the caseload by putting in extra hours. We could not manage if we put in 40 hours of work. Everyone in unit does work at home."

The investigation, completion, and disclosure of the presentence report is regulated by a general procedural order covering the sentencing hearing. This order is similar to that found in most districts: the U.S. attorney has one week from the date of plea or verdict to supply the probation officer with all pertinent documents including information concerning the offense conduct. The probation officer has five weeks from the date of plea to disclose the presentence report to the defendant and counsel. Both the assistant U.S. attorney and defense counsel then have one week to file any objections to the presentence report, after which the probation officer has one week to address all objections and disputes and complete the necessary addendum to the presentence report. The entire process is scheduled to take seven weeks, with the sentencing hearing to take place eight weeks from the date of plea or verdict.

In general, objections arising from the presentence report are handled formally and in writing. There seems to be very little indirect or informal dispute resolution at this site. Any objections that remain unresolved are filed in the addendum to the presentence report and decided by the court at the sentencing hearing. Although the probation officer is expected to conduct a complete and independent presentence investigation, the assistant U.S. attorneys remain their primary source of information concerning the offense conduct. The assistant U.S. attorney is required to supply all information relevant to the defendant's offense conduct within one week of the plea or verdict. Frequently, this does not occur within the specified time frame, to the point where several presentence reports have been submitted without a complete offense conduct section. Several probation officers cited this as one example of what they characterized as an overall lack of communication with the U.S. attorney's office.

There is no formal policy pertaining to departures, except to follow the general policies stated in the guidelines. As mentioned, the most common downward departure is for substantial assistance. Probation officers complain that frequently they do not know of these departures until the sentencing hearing because "assistant U.S. attorneys do not want to tip their hand until the last moment." Information concerning a departure for substantial assistance is typically not available to the probation officer during their presentence investigation. As a consequence, they are forced to calculate the guidelines as if there is no motion for substantial assistance.

The U.S. Attorney's Office

This is a large office with a high rate of turnover among assistant U.S. attorneys. Few if any assistant U.S. attorneys can be considered expert in the guidelines with something approximating an adequate working knowledge perhaps best describing their level of proficiency in the guidelines. The caseload of the office and individual assistant U.S. attorneys appears quite manageable. One assistant U.S. attorney suggested that, in fact, he felt they were overstaffed and that this can cause problems for the other segments of the court system in this district. The office has a mix of reactive and proactive investigations, with the top priorities being drug, gun, public corruption, and economic offenses.

The office policy is to follow the Thornburgh memo and not engage in charge or count bargaining; however, their own policies are even more restrictive. All pleas are written and all relevant offense conduct information is made available to the probation officer. Probation officers seem to feel that the assistant U.S. attorneys too often give away the store in their plea bargains by entering into a tacit agreement with the defense attorney to limit the reported offense conduct to be consistent with the plea agreement. In general, the issue of relevant conduct has become a common topic of

dispute. It appears that prosecuting and defense attorneys adopt a more restrictive view of relevant conduct than probation officers. In addition, probation officers generally do not feel constrained in guideline application by plea agreements. Other adjustments, such as acceptance of responsibility or obstruction of justice, are often left to the discretion of the judge. It would be uncommon for the U.S. attorney's office to oppose acceptance of responsibility after a guilty plea. Obstruction of justice is almost always left to the judge's discretion, as are the remaining adjustments addressed in the plea bargain.

The relationship between individual prosecutors and probation officers is often guarded. Assistant U.S. attorneys feel that the probation officers too often take a hard line on the guidelines and contradict their plea bargains through the inclusion of additional relevant conduct. Probation officers suspect that the assistant U.S. attorneys hold back information that should be included in their presentence reports and would be relevant to their guideline sentence calculation. Much of this difficulty stems from the fact that the assistant U.S. attorney supplies the offense conduct information to be used in the presentence report. This is a long-standing relationship that predates the guidelines, but seems to produce more disputes under the guidelines.

The Federal Defender's Office

The federal defender's office is quite small, in comparison to the size of the U.S. attorney's office. Several of the more recent federal defenders to join the office have substantial prior experience as federal and state prosecutors. This extensive experience contributes to their rather negative opinion of the local assistant U.S. attorneys. For example, one federal defender stated that many assistant U.S. attorneys "view the amount of prison time they are responsible for as an indicator of their performance; another felt that "most assistant U.S. attorneys are just there to get trial experience . . . there is no emphasis on being a career prosecutor." Finally, one federal defender simply stated that the most significant problem is that most assistant U.S. attorneys just do not know the guidelines very well.

Within the office, cases are assigned on a more or less random basis. In some cases, the chief federal defender will assign a particular case based on individual experience. The work load is seen as manageable only if you consider that all members of the office frequently work on weekends. In this respect, it is generally felt that the guidelines add significant paperwork and time to each case and therefore reduce the number of cases that can be processed. The chief federal defender argued that the "main problem is that prosecution under the guidelines is incredibly expensive, only allows about one-half as many cases to be prosecuted. The guidelines have slowed down the system drastically. They have harmed the public."

There is more or less a cooperative relationship between the federal defender's office and probation, although there may be specific individuals who are viewed as problems or circumstances when the relationship becomes awkward. One federal defender suggested that "probation has gotten very suspicious around here," and that on occasion they have felt it necessary to "agree with the government to not show probation the [case] file." Several federal defenders perceive increased hostility among prosecutors, defense attorneys, and probation officers and attribute this to the guidelines. Even though informal cooperative relationships generally characterize this district, there nonetheless remain significant issues of dispute.

When disputes do arise, many federal defenders prefer to attempt informal methods of resolution prior to the formal addendum process. Several indicated that frequently the informal methods were successful and that they could get the probation officer to see their perspective. The most common

sources of dispute are related to issues of criminal history and career offender. As one federal defender said: "Now we argue over numbers, we fight over digits."

Private Defense Attorneys

A common trend in this site appears to be the recycling of federal prosecutors and their reemergence in the form of federal defenders or private defense counsel. A substantial number of the most active defense attorneys have previous experience in federal prosecution. Three of the four defense attorneys interviewed no longer take appointed cases; the fourth only takes a few such cases by special request. As a group they are very experienced lawyers with an average of at least ten years of experience. They are much less experienced in terms of criminal cases under the guidelines. Most have handled less than ten guideline cases and have not taken a guideline case to trial; only one has handled more than ten guideline cases and taken several cases to trial.

As would be expected given their previous experience as prosecutors, all the attorneys indicated they had no difficulties in dealing with the U.S. attorney's office. Because of the type of clients they represent, they generally are more likely to negotiate pre-indictment pleas or plea agreements almost simultaneous to the indictment process.

Their relationship to the probation office is more varied: "I have found them to be pretty good at listening to your version of the facts. I do not view the probation officer as an adversary. They can be helpful, they listen to your arguments on role in the offense. They keep everyone fully informed on what's going on in other courts. There is still some disparity but they have reduced disparity between judges, keep everyone advised." However, another defense attorney expressed a somewhat different perspective on probation: "The probation office has become a place where you cannot seek advice and get guidance as before. Now they are the enemy. They see their new role as working for the court, getting the right sentence."

Unlike the atmosphere found in other districts, defense attorneys do not exhibit a consistently negative or critical attitude toward the guidelines. Among the group interviewed, opinions of the guidelines range from the suggestion to abolish them, to the less dramatic position of suggesting specific revisions, to the feeling that the guidelines system is basically positive, albeit with a few necessary minor changes.

Site 05

Case Characteristics and Sentencing Outcomes

Site 05 is one of three offices in this district. In terms of size (i.e., number of judges, assistant U.S. attorneys, and probation officers), one other office has nearly as many personnel, while the other has far fewer. This particular site has no federal defender. The office's caseload consists mostly of drug offenses, white-collar crimes, and tax fraud. This distribution is similar to that of the district as a whole. For the most part, the judges in Site 05 accept the probation officers' calculations and sentencing recommendations at face value. Only one judge reported going over each calculation in the presentence report carefully. The average number of months of prison ordered by judges at this site is approximately 50, compared to a district average of 60 months and a national average of 61 months.

The district's most common offenses are drug offenses, fraud, embezzlement, and larceny. While the circuit's offense distribution resembles the district's, there is one distinction. Offenses with firearms have become more common in the circuit. In this district during 1990, there were more than 400 guideline defendants. This number, which is large for this circuit, represents 16 percent of the circuit's guideline defendants (n=2600). Twelve percent of those defendants were convicted by trial while 88 percent pleaded guilty. Approximately 60 percent of the defendants received prison sentences while the rest received probation and/or fines. The departure rate for the district, based on a 25 percent random sample, is approximately 21 percent (including upward, downward, and substantial assistance departures). The circuit looks similar with a 20 percent rate of departure, slightly higher than the national average.

Structural and Organizational Context

The Judiciary

There are four judges including the chief judge and one senior judge at this site. Although a judge for over ten years, the chief judge has been chief only a short time. The senior judge has served this district court for more than 20 years. The other two judges were appointed within five years. The ages of these four judges range from 50 years to more than 80 years. The differences in experience, prior employment, age, and even political affiliation resulted not only in differing sentencing practices, but also how each judge holds court. As one interviewee stated, "In this district, if you took the same case to the different judges, you would still get four different sentences."

Cases are assigned to the judges randomly by the clerk's office. The judges do not specialize, but take whatever case they are assigned. This site has a backlog of civil cases. Furthermore, this site gets more than half of the indictments filed in this district, approximately 300 civil and 60 criminal cases per judge per year. Although the total number of filings has decreased over the last few years, that total reflects an increase in criminal filings and a decrease in civil filings.

Judges have received guideline training through the Federal Judicial Center, Commission conferences, and probation officers. Each judge reported receiving sufficient guideline training. According to one respondent, the judges here are "heavy footed and have a more conservative midwest mentality." One judge may appear more conservative, rarely deviating from the guidelines while another finds flexibility in the guidelines to achieve what that judge believes is an appropriate sentence. Usually this occurs in the area of relevant conduct. At this site, some judges use relevant conduct to increase the sentence, while other judges are willing to use it to reduce the sentence. One attorney explained that some judges try to manipulate the guidelines to arrive at their own sense of justice.

Since implementation of the guidelines, the judges have established a policy concerning stipulations in plea agreements; that is, judges do not accept the plea agreement until after the presentence report is completed. The plea agreements most often do not include all relevant conduct. One probation officer said they try to "include everything and the kitchen sink" in the presentence report, especially all relevant conduct. The probation officers believe it is their job to "point out to the court what the defendant has done." All plea agreements include language that would allow the defendant to withdraw the plea if the court does not accept any of the conditions in the plea agreement. The district court has also adopted a policy setting time requirements for disclosure of the presentence report. The judges prefer that, when submitting the presentence report, the probation officers include the specific guideline range, including whether to depart and where, and the reason to support the departure.

The Probation Office

Nearly 500 criminal cases were filed in this district last year. The probation office at this site received about 40 percent of those cases. The rest of the cases were split between the other two offices in the district. The typical caseload for probation officers at this site is between 50 and 60 cases. Currently, the average caseload for officers is 70 guideline cases, compared to an average of 36 cases for all 12 interview sites. The supervisor reported that a caseload this size is unmanageable and prevents officers from doing their jobs effectively.

The chief probation officer has been a probation officer for 30 years and chief for almost ten. The chief is responsible for overseeing approximately 30 probation officers in three offices. The chief said that "the guidelines have changed the role of the probation officer," and believes it is not for the best. However, the other probation officers interviewed did not reveal similar feelings; in fact, most seem to enjoy their new roles under guidelines sentencing.

The three officers interviewed have been with this office from one to five years; the supervisor has been a federal probation officer for 16 years and supervisor for almost half that time. Probation officers in this office have spent an average of 39 months, which is about half the average for probation officers at all sites. The office is not specialized beyond employing a drug treatment specialist. All probation officers write presentence reports and supervise offenders. The probation office at Site 05 does not restrict the types of cases an individual officer handles. That is, each probation officer tends to be given a case as one comes along. The probation officers interviewed reported spending more time on presentence reports and less time on supervision cases.

The probation officers do their own investigations and report everything they learn in the presentence report. This reporting practice usually leads to disagreements between the parties. Although the probation officers interviewed had various comments about their relationship with the assistant U.S. attorneys, on the whole they felt that they got along well with them. The majority of the disagreements occur over guideline application with relevant conduct the most frequent area of dispute. Often, they use differing information to calculate the guidelines. One probation officer stated that this is occurring less frequently because the government now understands the probation officers' responsibilities. Another probation officer said, "It depends on how bad the assistant U.S. attorney wants to get someone and how bad they want to avoid going to trial." According to a probation officer, some assistant U.S. attorneys are more accommodating than others and might "give away the store to avoid trial." Other areas of dispute are the role in the offense adjustment, the amount of drugs, and possession of a gun.

The relationship between probation officers and defense counsel is similar to that of probation officers and prosecutors. As one of the probation officers stated, "We have more arguments with

them [defense counsel] concerning guideline application to the offense. However, it depends on the defense attorney. For the most part we get along pretty well." One probation officer reported that defense attorneys who lack knowledge in the guidelines object to everything. Most disputes occur with defense attorneys who are unfamiliar with the guidelines. Only one judge does an independent calculation of the guideline range; the other judges rely on the probation officers' calculations and recommendation. On the whole, the probation officers have a reputation for being a stubborn and resolute group that rarely alters the presentence reports.

The U.S. Attorney's Office

At this site, five assistant U.S. attorneys and one supervisor were interviewed. The U.S. attorney was appointed to this position four years ago after having previously served as an assistant for several years. All of the assistants interviewed had some legal experience prior to becoming an assistant U.S. attorney. The supervisor interviewed has been with this office for 20 years and has served as supervisor half that time.

Cases are assigned to the assistant U.S. attorneys by the supervisor, with assistants receiving cases based on their experience and workload. Unlike the probation office, many of the attorneys specialize in particular offenses. Two assistants primarily handle tax fraud, one focuses on defense fraud, one concentrates on bank fraud, and others handle white-collar or violent crime. One prosecutor said, "In this office we are becoming more specialized with most of the assistant U.S. attorneys handling certain types of cases." Although each assistant has a "specialty," they handle cases in other areas as well. The U.S. attorney obtains cases from the local police and federal investigative agents. Assistant U.S. attorneys at this site have had an average of 90 guideline cases compared to an average of 50 for all sites in the survey. Most assistants average about 50 cases in their current caseload compared to an average of 30 for all sites. It is difficult to ascertain whether this is atypical for this office because two assistant U.S. attorneys said it was, and two said it was not. The supervisor reported that although they had heavy caseloads, they were manageable.

During the interviews, one assistant U.S. attorney reported, "In this district, the Thornburgh memo is followed to the letter." Prosecutors must incorporate the issues and ideas of the Thornburgh memo into each plea agreement. Not only is the Thornburgh memo stressed, but office policy emphasizes that firearms and mandatory minimums cannot be negotiated. The only time this would happen is if there are evidence problems. Moreover, the U.S. attorney encourages the assistant U.S. attorneys to charge offenses carrying sentences as high as possible. "We charge as high as we can," one attorney stated. All plea agreements must be reviewed and approved by supervisors in the office.

Probably the most influence the government can exercise during plea negotiations is in the area of substantial assistance. "All we can do is put the case together and then use substantial assistance," one assistant U.S. attorney explained. The office policy regarding motions for substantial assistance is that the defendant must cooperate completely and supply valuable information. One assistant U.S. attorney stated that substantial assistance is common in multi-defendant cases to "flip" someone. Another assistant estimated that about 60-70 percent of the multi-defendant drug cases involve substantial assistance: "All those [cases] having a five-year mandatory and 70 percent of those having a ten-year mandatory involve substantial assistance." One defense attorney claimed that substantial assistance is "a good faith definition that varies from assistant to assistant." Usually, the government's motion for substantial assistance does not include any limitations or recommendations on the extent of departure.

The assistant U.S. attorneys interviewed have different views on their relationship with the probation officers. One assistant used the phrase "Nazi Youth Corps" to describe probation officers. This attorney felt that "there is disparity in the way the probation office works compared to other offices in this district." Furthermore, some assistants believe that the probation officers are inflexible once they make up their minds. "You are fighting with the same probation officers all the time." On the other hand, some assistant U.S. attorneys reported that they do not see much antagonism between the probation officers and the government. In fact, one assistant went as far to say, "The probation officers think we are prima donnas and to some degree they are right." One assistant accused the probation officers of "plagiarizing other presentence investigations for co-defendant(s)," not proofreading them, and then getting their facts wrong. The government and the private defense counsel have a stable relationship. Assistant U.S. attorneys tend to clash with the defense over role in the offense adjustments in the plea agreement and the local rule that puts time limits on objections to the presentence report.

Private Defense Attorneys

Because this site does not have a federal defender, the district court relies on private attorneys to provide defense counsel. Three private defense attorneys were interviewed at this site. Two of the attorneys were local prosecutors prior to switching to private practice. Furthermore, two attorneys receive most of their federal cases by appointment, while the third receives referrals and is privately retained. They each handle a varying percentage of federal criminal cases, predominantly drugs, of which only a handful have gone to trial.

According to the defense attorneys, the two major reasons for taking a case to trial are 1) the defendant's adamant claim of innocence; or 2) the lack of incentive to enter a plea. One attorney stated that trial benefits marginal players in conspiracy cases because through the course of the trial the court can see just how marginal the defendant really is. One defense attorney thought that negotiating mandatory sentences was easier in the early days of the guidelines. Today, the attorney claims, the assistant U.S. attorney hides behind the Thornburgh memo. Another defense attorney said, "If the plea can get under the mandatory minimum and the defendant knows he cannot get any better than this then he is more likely to accept the plea. [The] main objective is cutting the defendant's exposure."

Most disputes with probation officers occur over relevant conduct and role in the offense. One defense attorney disagrees with probation officers over relevant conduct nearly 70 percent of the time. Defense attorneys said that their dispute with the government usually involves substantial assistance and acceptance of responsibility. Disputes are resolved in conferences with all three parties. For the most part, though, nothing is resolved in the conferences, and the objections are settled by the judge at sentencing.

The defense attorneys seem to think their relationship with probation officers has matured since the implementation of the guidelines. As one defense attorney explained, "It was the defense attorneys versus the probation officers -- the first year was brutal. The probation officers took the battle personally and had to win everything." This attorney attributes the change to the probation supervisor, while another attorney credits the assistant U.S. attorneys who "took some of the heat off as they got more involved and were willing to negotiate out more." The assistant U.S. attorneys are not perceived as the rivals of the defense attorneys. In fact, one defense attorney said, "It is refreshing that the prosecutors here are man enough to see that it is wrong and will do things to defeat the guidelines." One of the defense attorneys interviewed was more critical of other defense attorneys than anyone else. This attorney believes that "the defense bar is far from knowledgeable

about the guidelines." Another defense attorney commented that the guidelines do not allow for "creative lawyering."

Site 06

Case Characteristics and Sentencing Outcomes

Interviews were conducted in one office in this small to medium size district. The types of offenses resulting in a conviction in Site 06 closely mirror the cases typically adjudicated in federal court, although there tend to be fewer immigration offenses. No offense information is available for the individual office. The trial rate for the district is somewhat higher than the national average. The trial rate for the office, however, is nearly double the national average. The percent of convicted offenders receiving a prison term in this office is close to the national average, but the percent receiving a prison term across the district as a whole is somewhat below the national average. Finally, the overall departure rate for the district is near the national average, but the type of departure varies considerably from the national average. The district is twice as likely to depart downward for substantial assistance compared to national practice, but is less likely to depart upward or depart downward for reasons other than substantial assistance. In summary, the site appears to be typical of most federal courts in terms of the types of offenses adjudicated, but sentencing practices appear to be somewhat atypical compared to national practices.

Structural and Organizational Context

The Judiciary

Three judges were interviewed, including the chief judge from another office. The judges interviewed have served on the federal bench an average of ten years, although all have had considerable previous courtroom experience. Judicial resources appear to be adequate and the backlog of cases is kept to a minimum. On an individual basis, judges in this district handle approximately one-third fewer criminal cases per year than the national average.

Cases are assigned to the judges by the clerk of the court on a "rotating" basis (apparently the two judges in the office take every other case). All three judges interviewed have received guideline training, although one judge felt he did not have enough time in his schedule to pursue as much training as he would like. Formal training includes district seminars organized by the probation office, Sentencing Commission sponsored training, and mock sentencing hearings in conjunction with another circuit. Various written materials are also available and as one judge noted, "I call probation a lot."

Judges at this site report different policies regarding the acceptance of binding or non-binding pleas. Rule 11(e)(1)(A) and (C) plea agreements are accepted by some judges but not others. Factual stipulations, however, are reportedly not accepted.

The judges interviewed are ambivalent about sentencing guidelines. Only one of the three judges voiced the opinion that sentences resulting from the guidelines are clearly inappropriate, but all three judges stated that the guidelines are too restrictive and that the courts should have greater discretion to depart. A typical response was a statement by one judge that the guidelines should be "stronger than recommendations, but not mandatory." On the other hand, all of the judges interviewed appear to be committed to applying the guidelines in accordance with Commission policy. There was no mention in any of the interviews of manipulation of the guideline calculation by the judges. All the judges appear to closely examine the impact of any plea negotiations. In general, judges at this site appear to be uniform in their sentencing practices.

The Probation Office

This is a veteran office with an experienced staff. The chief probation officer for the district is relatively new to his position but has nearly twenty years experience as a federal probation officer. The officers at this site average ten years experience in their current position, twice the average of officers at other sites interviewed for this study. The officers have had somewhat fewer guideline cases than other officers interviewed, but the average caseload is higher. There appear to be sufficient resources at the site and there is no indication that there is any difficulty in completing presentence reports on time or meeting other demands of the court. In fact, the average number of presentence reports per month completed by each officer is reported to be at a five-year low. This office combines probation and pretrial services and does not have a unit devoted exclusively to writing presentence reports.

Because of the relatively small size of the office, no formal guideline training is offered, but there is reported to be good communications between the officers. The opinion on training is that "we learn by doing" and "we learn from each other." They also circulate written materials provided by the Commission, court opinions, and publications such as the *Federal Sentencing Reporter*. ASSYST is routinely used in calculating the guidelines, but unspecified problems with the software system were noted.

The probation officers appear to have a good relationship with the court. The judges rely on the officers for the guideline calculations and have confidence in their judgment.

There is a good working relationship between the probation officers and assistant U.S. attorneys. Probation officers generally describe prosecutors as following the Thornburgh memorandum and say that they "do not see many cases where the plea agreement violates the guidelines." Officers did complain, however,,about occasional problems in getting information in drug cases. Both probation officers interviewed stated that they have problems "getting control" of the information in order to establish a complete summary of the relevant conduct.

Probation officers appear to respect the role of defense attorneys. Federal defenders in particular are viewed as "very thorough."

One striking characteristic of the probation office is the relative lack of support for the guidelines. The guidelines are described as too harsh or as reducing the potential for rehabilitation. There appears to be strong concern about the fundamental fairness of the guidelines, and this may stem from the extensive pre-guideline experience of the officers at this site.

The U.S. Attorney's Office

The U.S. attorney's office at this site has an experienced staff. The U.S. attorney (located in another office) was not interviewed, but assistant U.S. attorneys interviewed have been practicing law, on average, more than ten years and have been in their current position more than three years. This is comparable to federal prosecutors interviewed at other sites. The least experienced federal prosecutor has been in his current position for two years. As a group, the federal prosecutors in this site have prosecuted more guideline cases and have a higher caseload by about one-third compared to other prosecutors interviewed.

Despite the heavy caseload, the workload is reported to be "somewhat" manageable. The office is divided into civil and criminal divisions, but there do not appear to be any specialized sections beyond this. When a case comes in (generally from other federal agencies), it is reviewed by the

chief of the criminal division and is generally assigned to the assistant who was first contacted by the investigating agency. The investigating agency (such as the FBI) therefore has some control over which attorney prosecutes a case.

Prosecutors have attended guideline training sessions sponsored by the District Court, the Commission, and the Department of Justice. There are also informal meetings to discuss guideline issues. Two assistants have been identified as guideline experts and serve as resource persons for other prosecutors.

The assistant U.S. attorneys generally appear to have a good relationship with the probation officers and defense attorneys, although defense attorneys complain that prosecutors are too rigid in applying the guidelines and are always seeking enhancements. As noted earlier, probation officers complain that prosecutors sometimes restrict information in drug cases

There are two noteworthy features to the U.S. attorney's office at this site. The first is that unlike some of the sites visited, this office has an explicit written policy governing charging and plea bargaining. The policy is an extension of the Thornburgh memorandum and is fairly restrictive in its application. The written policy states:

> As a general rule, defendants must plead to a sufficient quantity and type of counts to insure that his or her guideline-punishment range takes into consideration all of the defendant's relevant conduct and all applicable guideline factors. In other words, a defendant must plead to those counts which maximize his or her guideline calculation based on readily provable offenses. This holds true whether bargaining takes place before or after indictment. Any questions or problems arising from this policy or any requests for variance from this policy must be presented to [the U.S. Attorney] in writing.

In addition to this, a written guideline computation must be attached to all plea agreements to make it easier to assess the impact of the plea.

Second, the office is very aggressive in pursuing substantial assistance. As noted earlier, the district as a whole has twice the rate of downward departures for substantial assistance compared to the rest of the country. This office also has a policy of recommending to the court the degree of downward departure in substantial assistance cases.

The Federal Defender's Office

A relatively small but fairly experienced federal defender's office is active at this site. Federal defenders interviewed average about five years in their current position, a year longer than the average tenure of federal defenders interviewed at other sites. The average caseload is about the same as other federal defenders, although defenders at this site have handled only about half the number of guideline cases as other defenders interviewed nationally.

The caseload is reported to be manageable but "right at the edge." Training comes from national programs put on by the federal defenders and the Federal Judicial Center. This is supplemented by written materials from other agencies and by informal discussions within the office.

The federal defenders appear to have a good relationship with the prosecutors and probation officers. The major complaint is that the prosecutors have too much authority to dictate the sentence by what they charge. This situation is viewed as primarily the result of the guidelines system.

There also is some complaint that probation officers are being required to make findings of fact for the court without sufficient legal training.

Private Defense Attorneys

The private defense attorneys interviewed average more than 15 years experience and have defended the same number of guideline cases as other private defense attorneys interviewed in other sites. Cases are both privately retained and court appointed.

The private defense attorneys stated that they have a good relationship with probation officers and have respect for their ability to calculate the guidelines accurately. The relationship with prosecutors also appears to be fairly harmonious. The main complaint is that the prosecutors are inflexible in negotiating guideline factors except for acceptance of responsibility and substantial assistance. One private defense attorney also complained that assistance is part of every plea agreement and that the agreement made may be revoked if the defendant does not tell all he knows to the satisfaction of the prosecutor.

Policies and Procedures Affecting Guidelines Implementation

Presentence Report Investigations and Disclosures/Dispute Resolutions

By office policy, the probation officers conduct an independent investigation of the offense conduct that includes a review of arrest records and interviews of investigating agents. The officers calculate the guidelines and the impact of the plea in every presentence report.

The presentence report is completed within 37 days of the plea and is then forwarded to the attorneys. Allowing three days for mailing, the attorneys have 15 days to respond with any objections (generally in writing but not always). In most cases sentencing occurs within 60-70 days from the time of the plea.

There is no formal policy regarding the resolution of disputes in the presentence report. The probation officers are expected to informally resolve disputed issues prior to sentencing, but often the court must decide unresolved issues at sentencing. The probation officer may alert the court in advance of any unresolved issues.

Charging

As noted previously, this office has a strict written policy governing charging and pleas that maximizes the guideline calculations or takes the case to trial. There is no policy on declining cases other than on the strength of the evidence. Cases that are declined may be referred to the state for prosecution. Drug cases are sometimes jointly prosecuted with the state. Priority is given to the prosecution of narcotics offenses, violent crime (particularly armed career criminals), public corruption, obscenity, and defense contracting fraud. Mandatory minimums may not be charged if the offender is cooperating or if the resulting penalties appear to be inappropriate in a particular case.

Pleas

As noted above, the U.S. attorney's office has a written policy governing plea agreements. All plea agreements are written and must be approved by the supervising assistant U.S. attorney or his first assistant.

Motions for Substantial Assistance

Written notice of a motion for a substantial assistance departure must be submitted to the supervising assistant U.S. attorney three days prior to sentencing for approval by the U.S. attorney. As noted earlier, the office has a policy of recommending to the court how much of a departure should be considered.

Other Recommendations for Departures

Other recommendations for departures (upward and downward) must be approved by the U.S. attorney. There are very few departures other than for substantial assistance.

Acceptance of Responsibility

The written policy of the U.S. attorney's office is that acceptance of responsibility must be timely to result in a favorable recommendation and that those convicted by trial should not qualify. Defendants "entering a plea on the eve of trial will be considered on a case-by-case basis." As a practical matter, it appears that most defendants who plead guilty, receive the adjustment for acceptance of responsibility.

Other Chapter Three Adjustments

The written policy of the U.S. attorney's office is that Chapter Three Adjustments are not negotiable.

Appeals

Appeals by the government are discussed with the chief of the appellate section. Other than that, there appears to be no formal policy on recommending appeals, although the issues are first discussed with the assistant U.S. attorneys in the office designated as guideline experts.

Case Law Considerations

Probation officers and defense attorneys expressed an uneasiness with probation officers making legal decisions in applying the guidelines. Several respondents recommended that ASSYST be expanded to include court decisions on guideline application or that law clerks should be assigned to the probation office. There was no mention, however, of any specific case law dramatically influencing sentencing policy in relation to the guidelines.

Site 07

Introduction

In this medium-to-large size district, interviews were conducted with approximately two dozen persons at one of the offices (Site "07"). The number of criminal cases filed in the district for fiscal year 1990 is nearly 50 percent more than the national average per district, but is by no means near the top of the range for all districts.[5]

Case Characteristics and Sentencing Outcomes

The offense distribution across this district resembles the national profile, with a few notable differences. The district's caseload of drug trafficking offenses is considerably higher than the national average, and counterfeiting offenses occur with approximately the same frequency as bank robberies within the district. Immigration cases are fewer than the national average. Consistent with these statistics, one assistant U.S. attorney commented (in response to an interview question on the use of office resources), "Two general priorities consume three-fourths of our resources -- (1) drug trafficking, and (2) fraud or white-collar crimes." The district's percentage of guideline cases compared to pre-guideline cases was about the same for fiscal year 1990 as the national distribution: approximately two-thirds guideline, one-third pre-guideline cases.

Approximately 75 percent of the criminal cases in this office are resolved pursuant to a guilty plea. This is about 10 percent lower than the number for the district as a whole, which in turn is somewhat less than the national figure. One supervisory assistant U.S. attorney commented that their percentage of cases resolved by plea is less than the national average probably because they "do big-time drug dealers who want their day in court. They'll take the gamble and go to trial."

Not many offenders sentenced under the guidelines in this district receive probation. More than 80 percent of all guideline offenders sentenced in the district in fiscal year 1990 were sentenced to prison, compared to the national figure of less than 80 percent. A small number (less than 5%) of drug offenders received probationary sentences in this district. Judges here generally sentence within the guideline range at a rate very close to the national figure. When they choose to depart, it is usually downward, primarily for substantial assistance. Upward departures are very rare.

Structural and Organizational Context

The Judiciary

The three judges in Site 07 average 13 years of experience on the federal bench. The workload of criminal cases for judges in the district is considerably higher than the national average.[6] The state has a high crime rate, and according to the U.S. attorney, the district is on the front lines of the drug fight. The size of the U.S. attorney's office has increased greatly in the last two years (somewhat less than doubling the number of assistant U.S. attorneys), while the number of judges has remained approximately the same. The ratio of assistant U.S. attorneys to judges in this district

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[5]Nationwide, criminal case filings ranged from 57-2,060 for the fiscal year beginning October 1, 1989 through September 30, 1990.

[6]"Average" criminal caseload is derived from the total number of criminal cases divided by the total number of judges. Varying factors may affect the averages, which should be used for comparison purposes only.

of five to one is substantially higher than the national average of three to one. These factors combine to create a heavy workload for the court, and have necessitated bringing in visiting judges to assist with the caseload. In an interview, one judge expressed dismay and anger at the backlog of cases and the time required for sentencings, and two other judges considered their very busy court calendar a problem serious enough to mention when asked to name problems and benefits of the guidelines.

Cases are assigned randomly to judges by the supervisor of the criminal division in the office of the clerk of the court. The time required until sentencing is generally 45 to 60 days after a plea or guilty verdict according to the clerk of the court. However, one judge complained that it was difficult to get all the information for sentencing together in less than 75 days, and vowed that sentencing would go to 90 days if resources did not improve.

Guideline training was offered to the judges by probation officers under the leadership of one judge, as well as by the Federal Judicial Center, and a sentencing institute. One judge interviewed said that sufficient training in the guidelines was available, but expressed frustration at not having time to take advantage of all of it.

Of the three judges interviewed at this office, two felt that guideline sentences are generally "on target" or "seldom not appropriate." One of these judges qualified the appropriateness by saying that he felt guideline sentences are "heavier than necessary." The third judge objected to what was characterized as "needless restriction of [my] discretion," yet stated that he generally accepted the guideline range as calculated by the probation officer, even though "I may not like it, and I don't." This same judge evidently felt constrained from departing by the possibility of appeal, stating that if he knew a sentence would be appealed, then it is "not in my discretion to depart."

Two of the judges recently expressed the opinion to the U.S. attorney's office that sentences imposed should be at the mid-point of the guideline range, unless there are additional aggravating or mitigating circumstances not considered in determining the guideline range. A supervisory assistant U.S. attorney who was interviewed disagreed with the judicial interpretation. The assistant U.S. attorney said that by not accepting a recommendation for a sentence at the low end of the range absent additional unusual circumstances, judges were unnecessarily limiting their own discretion.

The Probation Office

The chief probation officer brings long experience to the job, having served as a chief for nearly ten years. He heads a district with a large probation division, approximately two and one-half times the national average number of probation officers per district. His office is based at Site 07 where the largest number of probation officers in the district are located. According to their own account, probation officers interviewed at this site have written approximately twice the number of guideline presentence reports as the average reported at all sites visited. When asked about office caseload manageability, the chief classified it as "somewhat to very unmanageable." He listed several factors that he believes contribute to unmanageability: The workload staffing formula of the Administrative Office of the U.S. Courts is inadequate; specialization in either supervision or presentence report writing allows less flexibility, particularly when there are dramatic increases in caseload; and the district is currently understaffed. He speculated that even if the district were up to full staff, the situation would be difficult because of the time required to do both presentence reports and supervision. He asserted that some districts have "forsaken supervision," but theirs has not.

This district provides many opportunities for training, including three days of initial guideline training for presentence report probation officers, followed by a period of close supervision under

a supervising officer. There is also advanced guideline training outside the office and other district training sessions. A handful of officers have emerged as "resources" after participating in Commission-sponsored train-the-trainer seminars and temporary assignments at the Commission. The probation office maintains a record of all opinions from the circuit and distributes information from the Commission on guideline sentencing decisions.

The chief and a number of other interviewees mentioned a practice that has been developed to assist the court in dispute resolution. Conference meetings are convened by the probation officer for the purpose of resolving disputes prior to the sentencing hearing. The probation officer who authored the presentence report, his or her supervisor, and one other probation officer along with prosecution and defense attorneys attend these meetings and discuss the preliminary probation report prepared following a conviction. By the conclusion of the conference, few issues remain that cannot be resolved and are left to the judge to decide. Probation officers and assistant U.S. attorneys spoke favorably about these conferences in terms of clarifying issues and increasing guideline knowledge. Defense attorneys either did not mention the conferences, were neutral in referring to them as an attempt to resolve issues, or did not consider them useful.

Probation officers are assigned cases by their supervisor, except for high profile or especially difficult cases that go to a specified officer. In writing the presentence report, officers are instructed to "do what the spirit of the law requires," and any information provided by government agents ends up in the presentence report. The chief probation officer referred to the policy of including all relevant information in the offense conduct section of the presentence report by saying that "nobody is going to swallow the gun;" and "we don't negotiate away anything we can defend."

As noted earlier, the assistant U.S. attorneys generally seemed to respect the probation office for their work, describing them as thorough, not taking any short-cuts, and knowledgeable. The judges rely on them heavily according to defense attorneys and probation officers themselves, although one experienced probation officer said he wasn't sure that probation officers really had any influence. In contrast, the relationship between defense attorneys, particularly federal defenders, and probation officers is more adversarial. Defense attorneys tend to see probation officers as "little prosecutors" or "junior judges," and complain that they wield too much power. From the probation officer's point of view, the complaint was voiced by one officer that defense attorneys don't know the guidelines and he often has to train them.

The U.S. Attorney's Office

The U.S. attorney spoke of the growth in the district during his two-year tenure and the burgeoning caseload for judges. The district has a policy regarding the amount of substantial assistance recommended by the government, a policy developed to keep judges (including visiting judges) from "sentencing all over the place" in cases involving cooperating defendants. Probably the most notable practice of the U.S. attorney's office in the district, the "guided departure" policy, defines a structured scale of one to four levels -- four levels being the maximum. The assistant writes a memorandum that must be approved by the chief of the criminal division requesting the amount of departure and stating the reasons for it. If the defendant's cooperation helps indict persons already known by the government to be involved in the case, the recommendation is for one or two levels. If the cooperating defendant talks about other persons unknown to the government and helps to make a new case, or acts as an undercover agent, the recommendation is typically for a departure of four levels. The policy is accepted by judges (some less willingly than others), and affects more than ten percent of the cases, since about three-fourths of the downward departures in the district are for substantial assistance.

The criminal division of Site 07 is organized into three major sections: drug trafficking, major crimes, and fraud. Two additional smaller sections (asset forfeiture and strike force) complete the division. Assistants who were interviewed at this site estimate they have been assigned an average of 50 guideline cases, which equals the reported average number for assistants interviewed at the 12 sites visited in the study. When asked about the office's caseload manageability, the supervisory assistant U.S. attorney described it as somewhat unmanageable (fourth on a five-point scale ranging from very manageable to very unmanageable). He remarked that assistants work more overtime hours than in most districts in the country.

Assistant U.S. attorneys interviewed here average over ten years experience as practicing attorneys, and approximately two years in their current positions. Both these figures are somewhat less than those for all sites visited. Guideline training initially was a formal training session involving the Commission, probation officers, and defense attorneys. The office has a resident expert on the guidelines, and has prepared videotaped lectures on topics (e.g., relevant conduct, multiple counts) for training purposes. New prosecutors receive training through the Advocacy Institute of the Department of Justice. There is no ongoing formal guidelines training, but there are periodic memos as well as continuous on-the-job training. Before indictment in each case, a prosecution memo is written with one section on implication of the guidelines. That section and its impact is considered and discussed before the case continues.

Assistant U.S. attorneys generally had high praise for the work of the probation office. One assistant U.S. attorney said that the judges here give a great deal of deference to probation, and "understandably so." Another assistant U.S. attorney felt that the probation officers are the ones who apply the guidelines, and that discretion has been shifted over to them. With regard to the defense bar, the U.S. attorney (and some assistant U.S. attorneys) believed that the defense bar has "not done their homework." Defense attorneys were criticized for not being prepared in many cases, especially in the more complicated cases. A line assistant U.S. attorney who was critical of defense attorneys' lack of guideline education excepted the public defenders, saying that they "are good." It is interesting to note, on the other hand, that one of the federal defenders interviewed asserted that the assistant U.S. attorneys often don't know how to calculate the guidelines [with reference to relevant conduct], that they don't know the exposure, and will rely on the probation officer to "max out" the guidelines.

The U.S. attorney expressed a commitment to making the guidelines work, having told the assistants, "We're not going to subvert the system." He faces resistance by some judges in the district who he felt are reluctant to apply the guidelines at the high end of the scale. Initially, some prosecutors also were resistant, for example, in recommending a departure for reasons such as age. The U.S. attorney said he was prepared to defend what he described as a high rate of departure for substantial assistance, and expected the trend to continue based on the high-level drug cases.

The Federal Defender's Office

The federal defenders in this district have heavy caseloads. One of the judges lamented that the defenders' office was drowning with cases, and no evidence to the contrary emerged from the site interviews. According to the supervisory federal defender, the current caseload of most of the attorneys in the office is 60 to 70, and he generally carries 15 to 20 cases in addition to supervisory duties. These numbers seem high when compared to the supervisory and line assistant U.S. attorneys' average caseloads of 10 and 15 to 20, respectively. In response to an interview question, the supervisory federal defender described the office caseload as very unmanageable. At the same time he also mentioned the "judicial crisis" in the district, referring to the need for more judges.

There is no office policy that suggests whether or not to go to trial with a case. In the supervisory federal defender's practice, it is up to the defendant. Neither is there a specific rule governing when to file a notice of appeal. The practice seems to be that after trial, the likelihood of appeal is great if there is a guideline issue. If the conviction is by plea and there is a guideline issue, an appeal will serve to satisfy the defendant (who wants to appeal) that the case will be reviewed. The supervisory attorney reported that his office (one of a number in the district) had generated more appeals in the previous year than in all the offices combined in 1987 and 1988. This, he said, was due to the guidelines.

Guideline training for defenders is sponsored by the Administrative Office of the U.S. Courts through Federal Defender Services' training seminars. There also have been local training sessions. Other aids are provided by the *Guideline Grapevine* and other newsletter updates.

Generally, the attorneys in this office were troubled by what they saw as the effects of the guidelines. Their concerns were not tied to specific guidelines, but rather to the relative power of court practitioners. One of the attorneys was bothered by substantial assistance, which he said gives great power to the individual line prosecutor, often with unfair results. Another expressed the opinion that probation officers apply the guidelines with a prosecutorial bent.

Private Defense Attorneys

Private defense attorneys interviewed at Site 07 averaged almost eight years of experience in practice, which was less than the average of all private defense attorneys interviewed in the study. With regard to the number of guideline cases they had handled, the number was slightly less than the average of 25 cases for all private defense attorneys in the study. Attorneys at this site received cases both by being privately retained and through court appointments.

Generally, the four private defense attorneys interviewed at this site talked in very specific terms about concerns of guideline application, giving the impression (contrary to accusations of other groups of practitioners) that they were well-informed. One attorney specified changes he wanted to see in the guidelines beginning with U.S.S.G. §1B1.1 and continuing through U.S.S.G. §1B1.3 (Relevant Conduct), which he described as the single most problematic guideline.

The relationship between probation officers and private defense attorneys interviewed at this site (similar to public defenders) could be described in general terms as adversarial. One attorney felt that the problem was due to the refusal of the probation officers to give any breaks to the defendant by calculating the guidelines as high as possible.

Policies and Procedures Affecting Guidelines Implementation

Presentence Report Investigations and Disclosures/Dispute Resolution

After completing the preliminary presentence report, probation officers submit them to a supervisor for review. Local rules set dates for disclosure of the presentence report to attorneys within 25 days of sentencing, with objections due back to the probation officer within 15 days of sentencing. The supervisor noted that objections are often late, but probation tries to accommodate late objections if possible. The disposition committee (see section on probation office) consisting of prosecution, defense, and probation representatives meets for discussion and dispute resolution. Final recommendations by the probation officer to the court generally fall in the middle of the guideline range unless otherwise determined by the conference meeting. If applicable, the

recommendation page of the presentence report notes that the recommendation is agreed to by the committee.

Charging

The U.S. attorney's office has written declination policies for certain kinds of cases that are published to various law enforcement agencies. When a case comes into the office, a decision to prosecute is made based on such standards as provability, priority of attacking drug organizations, scope of the case, and whether there is a civil alternative. The charging decision is irrelevant to the guidelines.

According to a supervisory assistant U.S. attorney, their office follows the Thornburgh memo and charges the most serious, readily provable offense. They extract their own policy from the memo and use that as a guide. All indictments are reviewed by the line attorney's immediate supervisor, and some cases (for example, Continuing Criminal Enterprise, RICO, public corruption, and civil rights) must be reviewed by the chief of the criminal division, the first assistant, and the U.S. attorney.

Informations are used in virtually every case where there is a pre-indictment plea. The prosecution contacts defense counsel to negotiate a plea agreement stating that the defendant will plead guilty to an information to be filed.

Superseding indictments are sometimes used in the plea negotiation process when the original charges do not "fit what [the prosecution] wants to do." A superseding information in those cases is considered a time-saving device.

With regard to the federal government's taking state cases, the state will bring the U.S. attorney's office a certain number of cases because they think justice won't be done due to particular situations in the state system such as the lack of a pretrial detention statute and severe overcrowding of prisons that result in "revolving door" justice.

Pleas

Local policy in accordance with the Thornburgh memo directs assistant U.S. attorneys to take a plea to the count or counts that "would make the guidelines work." If the guidelines are not affected, a count may be dismissed. There is a policy against entering into binding plea agreements calling for a specific sentence (Rule 11(e)(1)(C)). Assistant U.S. attorneys do recommend what they believe should be the base offense level, acceptance of responsibility, and low/mid/high end of the range or departure.

Two of the three judges interviewed were asked if there were circumstances when they would accept a plea that does not reflect the seriousness of the offense. Both responded similarly that relevant conduct would come into play and therefore it wouldn't make any difference. One of the two noted that if a misdemeanor instead of a felony were charged, however, the court could not force the prosecution of a felony.

Departures

When the assistant U.S. attorney believes a departure is appropriate, he/she fills out a form describing the case, the kind of departure (U.S.S.G. §5K1.1 or other), and the reasons for recommending it. The reasons and the amount of recommended departure are discussed with the chief of the criminal division who approves or disapproves the request. All departures are guided departures. (See section on the U.S. attorney's office.)

Appeals

A supervisory assistant U.S. attorney, in response to a question on policy regarding the initiation of appeals, said that after advanced training by the Department of Justice, they had anticipated filing an appeal in cases where the judge refused to sentence within the guideline range and sentenced according to personal preference. The attorney said that turned out to be a rare occurrence, however, and most of their appeals are on issues other than guidelines. He believed that there had been a significant increase in the number of appeals due to the guidelines, however. He used the words "awash in appeals," which was corroborated by the clerk of the court who estimated that the rate of appeals was up to 85 percent from 25 percent.

Acceptance of Responsibility/Chapter Three Adjustments

The probation office does not have a specific policy for recommending the reduction for acceptance of responsibility or for other Chapter Three adjustments such as role in the offense. The chief probation officer noted that officers had been troubled by the issue of defendants claiming acceptance of responsibility at the last minute. It seems to be the practice of the judges in the office to award acceptance in almost every case in which the defendant pleads guilty. The U.S. attorney's office opposes awarding acceptance if the defendant goes to trial.

Observations and Impressions

Judges have a very heavy caseload at Site 07. They generally sentence within the guidelines, although one judge stood out in very vocal opposition to the whole concept of guidelines. The U.S. attorney's office and the probation office seem committed and conscientious in applying the guidelines as they perceive they were intended. They are in conflict with federal defenders and private defense attorneys who object to what they see as the power of the probation officer, especially in the area of assessing relevant conduct, and to the assistant U.S. attorney's discretion in recommending departures and the amount of reduction for cooperation.

Site 08

Case Characteristics and Sentencing Outcomes

The majority of cases sentenced in this circuit in 1990 were guideline cases. Twice as many guidelines compared with pre-guideline cases were sentenced in this circuit relative to the national statistics. The departure rate for this circuit was slightly below the national figure of 16.6 percent, and the rate of departures for the district (about 14%) was slightly below that of the circuit. The rate of departures for substantial assistance in both the circuit and district were slightly above the national average, but the rate of both upward and downward departures for other reasons was significantly lower than the national figures of 6.9 percent and 2.3 percent, respectively.

Structural and Organizational Context

The Judiciary

This district court can be described as being at the "small" end of the scale. The chief judge, who does not regularly sit at this site, described court governance procedures as involving a standing committee of members of the bar who work with the district judges to keep rules up-to-date. The judges who were interviewed did not specifically describe decision-making processes among the judges for court procedures in this district. However, observation and comments from probation officers and assistant U.S. attorneys give the impression that the judges in this district have a professional, collegial relationship, and get along well with each other. One respondent observed that judges in this district are split between those who work around the guidelines and frequently depart, and those who follow the guidelines and rarely depart. When asked about their views on the guidelines in general, the judges said that the guidelines are generally appropriate, and that they usually sentence within the range. One judge said it was hard to generalize, but "75 percent of the cases are within the range and are appropriate. In 25 percent of the cases, it is a matter of degree, and in 15 percent of the 25 percent, it is not a big disagreement. Maybe 10 percent of the cases involve big disagreements."

The judges who were interviewed at this site have an average of 11 years of experience on the bench. Prior to their appointments to the federal bench by Presidents Carter and Reagan, the judges were private practitioners or county prosecutors. Each judge in the district has between 50-100 cases pending at any given time. The clerk of court estimates that it takes about 5-6 months for a typical single count, single defendant case with a guilty plea to move from indictment to sentencing.

The Probation Office

With one exception, the probation officers in this office are young and have little federal experience. Their prior experience generally consists of work at the county probation office. The officer's caseload averages about 40 supervision cases and seven presentence investigations. This is a consolidated office, and several of the officers who do investigations also do pretrial work. One officer specializes in drug cases; all others reported that their caseload consists of a mix of cases. The probation officers who do presentence reports estimate that they take about 65 percent of their time. Two probation officers noted that it was difficult to shift from presentence report writing to pretrial investigation mode when an arrest takes place. One also said that it is difficult setting appointments for presentence reports when pretrial service work intervenes.

The probation officers said that guideline cases take a lot more time: "The biggest thing about that is that it interferes with supervision and takes more time to write the presentence report. Because it's so complicated, it may take forty hours just to do the computation." However, they said

that when compared with presentence reports in the county probation system, federal court presentence reports are much more thorough and, as a result, have far greater respect.

Probation officers said that on the whole they agree with the guidelines system. But, "every now and then, it goes overboard. And if the assistant U.S. attorneys read their own manual and followed Department of Justice directives and went after the right people, the system would work. The system breaks down with assistant U.S. attorneys and certain judges who won't accept [the guidelines]." Both supervisory probation officers said the biggest problem is manipulation of the guidelines through charging decisions and in plea negotiations. They stated that some control of the plea negotiation process is needed to eliminate the negative effects of "watering them [the guidelines] down or canceling any benefit you would have from them."

Probation officers have a rather low opinion of defense counsel at this site, stating that they have little impact on the sentencing process. Probation officers reported that they do not spend a lot of time with defense attorneys prior to sentencing. One probation officer said, "They don't have much to argue about so they argue about everything -- so they give the appearance of working for the defendant." Probation officers also complained that the defense bar doesn't understand the guidelines, and that probation officers were often required to educate the private bar.

Defense attorneys at this site commented that the judges pay close attention to the probation officers. One defense attorney said the judge reads the presentence report like a bible. Probation officers agreed that judges follow their recommendations closely and that judges do not depart from the guidelines very much. One probation officer said, "If the probation officers didn't apply the guidelines, it wouldn't be done." Private defense attorneys said that probation officers have a disproportionate amount of power. One defense lawyer said that the probation officer "is second in power to the judge. The probation officers overuse their power and take on a prosecutorial role."

Prosecutors also believe that the probation officers in this district have a preeminent role in guideline application. One prosecutor stated, "Basically it's the probation officer's show. They make the final decisions -- they have become a fourth branch. They have gone from being advisors to the court to being independent watchdogs." The influence of probation officers, according to the prosecutors, extends "to every area -- drug weight, relevant conduct, role. What they say, the judge follows nine out of ten times." This assistant U.S. attorney gave an example: "The probation officer has immense power by telling the court what I can or can't prove: For example, by specifying in the presentence report that the amount of drugs is 1000 lbs. when the government can only prove 10 lbs. The probation officers take at face value what the presentence report says." This prosecutor had no specific comments on the local bar, but thought that private defense lawyers have very little influence on the sentencing process.

Interestingly, one of the judges thought that "it's common for the probation officers to have a position different from the U.S. attorney and defense attorney. There is no meaningful way, no dynamic to deal with this effectively. Before the guidelines, the probation officers accepted the assistant U.S. attorney's position. This is not so anymore. The probation officers have an independent view which leads to disputes. The probation officer has the same view as the defense . . . the dynamics between the probation officer and defense have changed. The probation officer is doing more for the defendant than the defense attorneys know what to do."

The U.S. Attorney's Office

The assistant U.S. attorney interviewed at this site primarily handles drug cases. This attorney has extensive experience with guideline cases, and has gone to trial with many of the cases that were handled.

The number one priority of the U.S. attorney in this district is drugs; the number two priority is economic crimes. Cases are assigned by the supervising assistant U.S. attorney. One attorney spends 99 percent of the time on OCDETF cases, another prosecutes drug cases, another handles cases mostly in the areas of ATF and violent crimes, and one person does program fraud.

Private Defense Attorneys

This district does not have a federal defender program. One of the private attorney respondents in this study functions as a part-time administrator of the local public defender program. Both private defense attorneys said that most of their cases come to them by referral from other attorneys. One respondent noted, however, that two or three times a year judges ask permission to appoint them, adding that those kinds of cases are a "pain in the neck."

The two private defense attorneys interviewed in this district are very experienced practitioners. Each has practiced law for at least 25 years, and has had a federal practice for at least ten years. As might be expected in a small district, their practice is concentrated primarily in the state courts, and the number of cases that they handle in the federal courts is relatively small. Consequently, their experience with guideline cases is limited. They reported that on the average they handled 6-10 guideline cases a year, almost all of them in this district. It is significant to note that these attorneys were selected because they were considered by others in the federal court system (judges, probation officers, assistant U.S. attorneys) to be the most experienced in both federal criminal practice and the guidelines.

Both attorneys said that their caseloads are mixed. One said that of the two federal cases currently being handled, one is a drug case and the other a firearms case. The other attorney's caseload consists of about 40 percent drugs, 40 percent white-collar, and 20 percent miscellaneous offenses.

One defense attorney commented on the local culture that largely defines the practice in this district (and therefore in this office). In this attorney's view, the prosecutorial process here is heavily politicized. According to this respondent, it is well known that the U.S. attorney uses his position to advance political goals, and admitted to personality conflicts between defense attorneys and prosecutors arising from this situation. The defense attorney said that the impact of this is felt throughout the system and that negotiations are limited and prosecutors try counts that they do not charge at the sentencing hearing: "They usually get a conviction when they charge. Their exercise in compassion is fading. The prosecutor's role is to see that justice is done, and this might involve not charging." As this attorney put it, "It makes everyone think there is a real crackdown, but it's only the little guy who is getting hurt."

The view that the U.S. attorney is overly political was shared by the chief probation officer who said that in this district assistant U.S. attorneys are not interested in getting drug kingpins, only large numbers of convictions: "Prior to the current U.S. attorney, we didn't have cases involving so many indictments. Many of the cases are 'mickey mouse' cases; the big people aren't getting penalties, and the assistant U.S. attorneys aren't going after them." However, when asked whether a plea negotiation would ever not be pursued, the other defense attorney said that the assistant U.S.

attorney would always be consulted, and stated that they "have a very intelligent, compassionate U.S. attorney."

Both attorneys felt that the probation officers have undue influence under the guidelines system, and that they are second in power only to the judge. One defense attorney admitted that while the probation officers' job is harder under the guidelines, the probation officers seem to go out of their way to object to the defense position saying, "Anything that could be interpreted as being helpful to my client they object to." And, even though this lawyer considers probation officers his friends, said: "They have become a prosecutorial force, acting as detectives to find other crimes." The other defense attorney said that probation officers are an arm of the prosecution and are not neutral. In the view of the defense attorneys, judges at this site follow the guidelines and do not readily depart.

Policies and Procedures Affecting Guidelines Implementation

District policies for preparation of presentence reports generally follow procedures established by the Administrative Office of the U.S. Courts. It appears that there are no district-specific, formal, written policies and procedures for determining how to handle adjustments, preparing presentence reports, and recommending departures. The supervisory probation officer at this site said that the probation officers conduct their own investigation of the offense. According to this officer, probation officers have a good rapport with the assistant U.S. attorneys; both assistant U.S. attorneys and case agents have an open file policy, and probation officers have easy access to this material. The supervisory probation officer signs off on all presentence reports at this site and its branch office, and there appears to be a high level of collegiality among probation officers at this site, with frequent discussions and interactions on any issues that may arise.

There is a standing order developed by the judges that allows 120 days for preparation of the presentence report. By statutory requirement, the report must be forwarded to the assistant U.S. attorneys and defense attorneys ten working days before sentencing. A standing order also requires officers to have a first draft of the presentence report to the defense and prosecution 40 days prior to sentencing and gives counsel ten working days to object. Ten days are allotted to prepare an addendum.

The supervisory assistant U.S. attorney interviewed at this site provided little information on how the U.S. attorney's office functions in this district, because (according to this respondent) almost all policies are established by the district's main office. For example, the research team was told that charging decisions are all made in the district's main office by the first assistant, and the Thornburgh memo is followed "like the bible." Pleas are always written and always cleared through the main office. Stipulations are not included in the plea agreement. Sometimes there is an agreement to recommend, "but it's the exception rather than the rule." Plea agreements follow a standard format (the form is entered on the computer), that sets forth the elements, the factual basis, a recommendation (e.g., minimum security), the defendant's waiver of trial rights, and the statutory penalties. Rarely do assistants enter into plea agreements calling for a specific sentence (Rule 11(e)(1)(C)). It is also rare to reduce a count (Rule 11(e)(1)(A)), but it is not unusual for a count to be dismissed. According to the supervisory assistant U.S. attorney, 18 U.S.C. § 924(c) counts are never dismissed.

Pretrial diversion or deferred prosecution is rarely used. The U.S. attorney's office has no specific policies for application of acceptance of responsibility, obstruction of justice, and role in the offense. Cases are first reviewed by the supervisory assistant U.S. attorney at the site, and then accepted or declined after a recommendation from the district main office. Informations are used in cases where the U.S. attorney's office has initiated contact with the subject and a plea agreement

can be worked out prior to indictment. Superseding informations or indictments are used if additional information is obtained.

Cases may be sent to the state courts for prosecution if the best resolution lies in the state court. The supervisory assistant U.S. attorney noted, "It depends on the severity of the offense and the extent of federal interest (whether the case involves one person as opposed to a whole ring)." The supervisory assistant U.S. attorney also looks to the resources that are available to both jurisdictions when making this determination. For example, a small neighboring county does not have the resources to pursue a complicated million dollar fraud case. Rule 20 cases have been used on a few occasions, but according to the supervising assistant U.S. attorney, it is "more pain than it's worth."

While final decisions regarding filing of motions for substantial assistance are left to the district main office, generally "the person has to be in a position to offer evidence or information that we would otherwise not have. Generally, it requires something beyond a codefendant." The supervisory assistant U.S. attorney has never filed such a motion. But one assistant U.S. attorney who was interviewed said, "Our policy on 5K1.1 is that we must have something new that we couldn't prove without cooperation. If we have this, we call the main office and lay out the facts; then we can put a paragraph in the plea agreement saying it lies in the discretion of the U.S. attorney. We don't ever go below 50 percent of the guidelines range." This assistant U.S. attorney also said that prosecutors need more steps in requesting U.S.S.G. §5K1.1 departure (2, 4, 6 levels, or complete departure) as well as more levels of distinction in the role in the offense adjustment. The decision to file an appeal is also made by the district main office in conjunction with the Department of Justice.

Site 09

Case Characteristics and Sentencing Outcomes

Interviews were conducted in one office in a small to medium size district. Across the district, the types of offenses resulting in a conviction generally reflect the types of cases typically adjudicated in federal court, with the exception of more theft and firearms offenses and fewer immigration offenses. There is no offense information available for the individual office. The trial rate for the office is very near the national average, although the trial rate for the district is somewhat higher than average. The percentage of all convicted offenders receiving a prison term in the office is very close to the national average; the percentage receiving a prison term across the district is below the national average. The overall guideline departure rate for the district is near the national average even though the rate of upward departure is less than the national average In summary, the office appears to be fairly typical of most federal courts in terms of the types of cases adjudicated and its sentencing practices.

Structural and Organizational Context

The Judiciary

The four judges in this office have served on the bench between 10 and 25 years and therefore have extensive pre-guideline experience. Judicial resources appear to be adequate and case dockets are kept current. According to statistics from the Administrative Office of the U.S. Courts, judges in this office each handle fewer criminal cases per year than the national average.

Cases are randomly assigned to the judges by the criminal docket clerks. While the three judges interviewed for this study have all received fairly extensive training in the guidelines, the prevailing view appears to be that actual case experience ("hands-on, hard knocks") is the best training. Formal training includes workshops and seminars conducted by the Federal Judicial Center, videotape training, and written material provided by the Federal Judicial Center and others.

The judges report that they are willing to accept both binding and non-binding pleas (Rule 11(e)(1)(A), (B) and (C)). They are also willing to accept factual stipulations.

Marked differences exist in both the outlook and practice of the judges interviewed in this office. Two of the judges are generally supportive of guideline sentencing and appear to review plea agreements carefully to ensure that all relevant facts are taken into consideration. Another judge, however, considers the guidelines to be an "affront" to the court. This judge tends to accept plea agreements at their face value and sometimes rejects recommendations of the probation officer to include additional behavior under relevant conduct. This difference in judicial approach makes it difficult to characterize the office as a whole. Responses to any particular question in the interview concerning the application of the guidelines could vary considerably depending on which judge answered the question.

The Probation Office

Probation officers in this office have an average of more than five years with the federal probation service. This is higher than officers at most other sites interviewed. The officers, however, averaged about half the number of guideline presentence reports (fewer than 30) reported by other offices with comparable caseloads that were included in the study. There appear to be sufficient resources at this office, and there is no indication that there is any difficulty completing presentence reports on time or meeting other demands of the court. The only consistent problem noted is that the physical size of the territory covered by the office requires a great deal of travel time.

Within-district training is offered for new officers, and ongoing seminars for all experienced officers are supplemented by written materials provided by the Commission and publications such as the *Federal Sentencing Reporter*. The officers no longer use ASSYST to calculate the guidelines because it is perceived as out-of-date. The officers, however, feel they are sufficiently well trained in guideline calculations without using ASSYST.

The probation officers said they have a good relationship with the district court. The judges in this office respect the dedication and competence of the officers. The main point of contention mentioned by most of the officers interviewed is that one judge in particular "does whatever he wants." The officers said they include the total offense behavior in the presentence report, but this is sometimes ignored by one judge if it differs from the facts stipulated in the plea agreement. This appears to be a source of dissatisfaction for the officers.

The relationship of the probation officers to the assistant U.S. attorneys appears to be somewhat ambivalent. There generally seems to be a good working relationship between the probation office and the U.S. attorney's office, but clear areas of dispute remain concerning the withholding of information by the assistant U.S. attorneys and the attempt to restrict relevant conduct in the plea agreement. Three out of four officers interviewed noted that plea agreements sometimes ignore or stipulate away behavior relevant to calculating the guidelines. Depending on which judge is handling the case, probation officers say this has a major impact that they are not able to overcome.

The relationship between probation officers and defense attorneys is adversarial in the sense that defense attorneys try to influence the officer to change the guideline calculations in the favor of the defendant. The relationship, however, appears to be based on mutual respect and understanding for the other's role. There is no evidence of any widespread hostility on the part of either party.

The U.S. Attorney's Office

The U.S. attorney's office at this site is somewhat inexperienced. The U.S. attorney is new to the position and the assistant U.S. attorneys have been in their positions, on average, less than 20 months (less than half that of assistant U.S. attorneys interviewed at other sites). They also have been practicing law for considerably less time than other assistant U.S. attorneys interviewed (about 90 months practicing law in this site compared to about 150 months for all assistant U.S. attorneys interviewed). On the other hand, the assistant U.S. attorneys interviewed at this site have handled as many guideline cases (about 50) and have a current caseload (about 30) equal to the assistant U.S. attorneys interviewed at other sites.

The caseload is reported to be fairly manageable. The office is divided into specialties such as drug, violent, and financial crimes. When a case comes in (generally from federal agencies), it is reviewed by the supervisor and assigned to an attorney in the relevant specialty area.

All assistant U.S. attorneys handling criminal cases have attended at least one training seminar; a few have attended "train-the-trainer" sessions. Training is supplemented by videotapes provided by the Department of Justice, but several attorneys commented that the best training is "going to court."

As noted earlier, there is some conflict between the assistant U.S. attorneys and the probation officers concerning plea agreements and the application of relevant conduct. To improve this situation, the U.S. attorney recently instituted a policy to have written plea agreements in virtually every case and to discourage Rule 11(e)(1)(C) binding pleas.

There appears to be nothing unusual in the relationship between assistant U.S. attorneys and defense attorneys at this site. While the relationship by nature is adversarial, there is no evidence of any unusual areas of conflict or any unusual degree of hostility.

The Federal Defender's Office

There is a relatively small but fairly experienced federal defenders' office at this site. The average caseload appears to be somewhat less than the national average for federal defenders and the caseload is reported to be manageable.

Training comes from national programs offered by federal defenders. There are no office training programs other than the circulation of written materials from other agencies.

The federal defenders appear to have a good relationship with the assistant U.S. attorneys. The relationship with the probation officers seems generally positive, but there is some complaint that the probation officers exercise too much authority through the application of the relevant conduct guideline (an application that tends to be accepted by the court). Federal defenders also complain that probation officers are too closely allied with the assistant U.S. attorneys.

Private Defense Attorneys

The private defense attorneys are fairly experienced (practicing law more than ten years on average), but those interviewed in this office appear to have few guideline cases. Additionally, representation of federal offenders makes up less of their practice than private defense attorneys interviewed at other sites. Cases are both privately retained and court appointed.

There appears to be nothing unusual in the relationship between private attorney, assistant U.S. attorneys, and probation officers. There was some complaint on the part of both private defense attorneys interviewed that the probation officers are "pejorative" in describing the defendant in the presentence report and in discussing negative things that the defendant has done that have no impact on the guidelines.

Policies and Procedures that May Affect Guidelines Implementation

Presentence Report Investigations and Disclosures

Probation officers, by office/district policy, conduct an independent investigation of the offense conduct that includes contacting arresting agents. As noted earlier, probation officers report having occasional problems getting complete information from the U.S. attorney's office. The probation officers make every effort to overcome this through an independent investigation. The impact of the plea section is always included in the presentence report.

The presentence report is completed within 45 days of conviction and is then forwarded to the attorneys who have ten days to respond in writing with any objections.

Resolution of Disputed Presentence Factors

Dispute resolution is attempted informally through meetings among the probation officer, the government, and the defense. If the disputes cannot be resolved informally, they are decided by the court at the time of sentencing. Some probation officers meet alone with the judge prior to sentencing to explain the issues in advance.

Charging

The U.S. attorney's office basic policy on charging is guided by the Thornburgh memorandum. Priority is given to financial fraud, drug offenses, and offenses with mandatory minimums. Charging decisions are reviewed by the lead coordinator. Minor offenses, such as fish and game violations, are sometimes given pretrial diversion, but this is unusual. State drug cases are sometimes pursued to get the greater penalties available in federal court. The local court may be asked to take minor fraud cases if the office is overloaded. Mandatory minimums may not be charged if the offender is cooperating or if the resulting penalties do not appear to meet the intent of the statute.

Pleas

As with charging, the basic policy of the U.S. attorney's office on plea negotiations is guided by the Thornburgh memorandum. In other words, the primary charge must reflect the seriousness of the crime, and the agreement should not hide or distort any of the relevant facts. As noted earlier, there is a movement in the U.S. attorney's office to require written plea agreements and to restrict the use of binding plea agreements. In general, however, there appears to be little in the way of written policy governing either charging or plea agreements.

Motions for Substantial Assistance

A motion for substantial assistance must first be approved by the lead coordinator who serves as the immediate supervisor of the assistant U.S. attorneys. If the coordinator agrees, the assistant U.S. attorney prepares a written memo to the U.S. attorney setting out the facts of the case, the reasons supporting the motion, and the position of the investigating agency. The U.S. attorney must approve the final motion for substantial assistance. There is no set policy on the amount of recommended reduction, but a recommended amount based on individual case factors is developed and approved by the U.S. attorney.

Other Recommendations For Departure

Other recommendations for departure require the approval of the lead coordinator, but not the U.S. attorney.

Acceptance of Responsibility

The general policy is that anyone who pleads guilty in a timely manner will receive the acceptance of responsibility adjustment. The U.S. attorney's office will generally oppose awarding acceptance of responsibility after a trial.

Other Chapter Three Adjustments

There appears to be an informal policy that Chapter Three adjustments other than acceptance of responsibility are not open to negotiation and are decided by the court based on the recommendations of the probation officer. The assistant U.S. attorneys generally do not make recommendations in this area.

Appeals

There are no policies concerning the filing of an appeal by the government other than to discuss any appeal first with the U.S. attorney.

Site 10

Case Characteristics and Sentencing Outcomes

According to USSC Monitoring data for FY 1990, this site is located in a district that generally conforms with the national average in terms of the distribution of its guidelines caseload: it is somewhat higher than average, however, in the percentage of its caseload that is larceny (14% vs. 6%), and more of its drug caseload consists of simple possession cases than the nation as a whole (24% vs. 6%). Bank robberies are typically charged in state court at this site. One significant feature of its caseload is the large number of misdemeanor cases it handles from several nearby military bases. The plea rate for this district is about 85 percent, approximately the same as the national average. Judges depart less frequently in this district than for the nation as a whole. Upward, downward, and substantial assistance departures were consistently below the national average.

Judges in this district carry an average caseload of 228 cases, which is much heavier than the national average of 62. This higher-than-average caseload can be attributed to the large number of military misdemeanor cases this district court is required to handle. These cases are typically heard by magistrates, which explains why no complaints were raised regarding the judges' caseload in this site, whereas the U.S. attorney's office and the probation department reported being overwhelmed by the number of military misdemeanor cases. Another measure of judicial workload -- the ratio of judges to assistant U.S. attorneys -- is 1:2.8 in this office. This is comparable to the district ratio of 1:3.0 and identical to that of the national average.

The mean prison sentence imposed during FY 1990 for those offenders who received a prison sentence in this district was about 70 months, compared to the national average of 61. Average prison sentences imposed were considerably higher for drug offenses (other than simple possession) and robbery and considerably lower for firearms offenses and larceny.

Structural and Organizational Context

This is a medium-sized office in a medium-sized district. Neither the U.S. attorney nor the chief judge is in residence, only the chief U.S. probation officer. There is no federal defender's office.

The Judiciary

The scheduling of cases is controlled through a master calendaring system by the docket clerk. He was described by one judge as having a good feel for how long a case will take, which was especially important for big cases with out-of-town "big city lawyers" who take longer. It was clear during the scheduling of the interviews that this docket clerk is the district court's figurative right arm.

According to the court clerk, judges usually begin cases after the indictment. However, all judges can work on a given case (e.g., one at the preliminary hearing, another at trial). Scheduling is determined by availability; there are no specialties. It is not known until the day of trial which judge will try any given case. Other offices in this district are different in that hearings are scheduled according to who was assigned the case. Ordinarily magistrates handle pre-indictment proceedings. Preliminary motions are filed within 10 to 20 days. A preliminary hearing is scheduled quickly thereafter, although there is not a hearing in every case. A typical case moves from indictment to arraignment within ten days, at which time many defendants enter a guilty plea. Following the plea or trial, there are 60 days to prepare a presentence report, hear and resolve objections to it, and sentence the defendant.

No direct questions were asked about the relationships among the actors, but it nevertheless came up repeatedly within the context of other questions. One defense attorney said the judges have "always been mean" here, and another said they are tyrannical and "ridicule us, holler at us, and berate us." Otherwise, most respondents made generally favorable comments, such as that they are wise, make good decisions, and give good sentences (from a supervising probation officer); and that they are good and that the respondent likes them and can talk informally about cases with the judges in this office (from a defense attorney). One supervisory probation officer registered some dissatisfaction with the judges by saying "it makes him feel awful that the judges rely on us so much." One prosecutor suggested that there was some guideline manipulation by the judges in fact finding and that it was only the threat of appeal that "keeps the judges honest."

The procedure for formulating and amending local rules differs from division to division within the district. These divisions operate independently; all have current dockets using different systems. Judges consider amendments or new rules through an exchange of letters. The senior judge in each division sounds out his fellow judges and decisions are made by consensus. Public notice is provided, and local rules are published and available in the clerk's office.

Only one judge said that he had departed either upward or downward (other than for substantial assistance), and that was only in a "few" cases. One said that he made findings of fact in order to avoid departure; another said that while this was a way to impose a desirable sentence, it was "intellectually dishonest." While several mentioned that they would like more flexibility in the guidelines for downward departure, their reason for not departing was the possibility of reversal: "I don't want to submit to the brains of my superior court and have them determine what warrants departure."

The Probation Office

The chief probation officer has been a probation officer for well over 20 years -- almost half in the federal system. He has been chief in this district for more than five years and described his duties as directing the work of the probation officers and meeting the court's requirements, training and performing as the court directs, setting policies, and seeing that the probation officers are trained. He claimed that theirs was one of the first districts to have "jumped on" guideline training.

The four line officers interviewed had an average of 26 months' experience as federal probation officers. These were described by a supervisor as being the officers who were most experienced in guideline application. Two had prior experience in the state system, and another had prior federal experience.

The office's caseload was described as "somewhat unmanageable" by the supervisory probation officer. Once again, the reason cited was the large number of military probation cases requiring supervision. Since 1985 the office has acquired two new magistrates just to deal with the number of misdemeanor offenders. The anticipated arrival of two new probation officers would put them "in good shape," the supervisor said. He remarked that it was necessary to reduce field hours from 32 to 16 hours a month. One line probation officer remarked in passing that he wished he had time to do his job. "Presentence reports have to get done. What suffers is supervision." The chief discussed the length of time it takes to write guideline reports and its effect on the office's supervisory function. "They tell me 'I can't go out into the field because I have two guideline reports to do.' Supervision suffers. It isn't necessary. Now the presentence report requires less field investigation than before."

The chief U.S. probation officer is decidedly opposed to bifurcation. He was rather expansive on the issue of magistrate supervision cases, stating that there are "800 cases right here in this office -- 350 magistrate cases. The judges want alcohol treatment, especially for driving under the influence cases. Some districts do not handle magistrate cases. Enlisted people are in the waiting room -- sometimes in and out all day." The probation office was originally required to calculate a guideline sentence for these cases, but no more: the magistrate says from the bench that he has enough information to sentence. Then he figures the guidelines at sentencing.

Cases are assigned partly on the basis of caseload, partly geographic area, partly prior experience. All presentence reports are reviewed. After a presentence report is prepared, it goes from the clerk back to the probation officer who wrote it for review, and the supervisor prepares a critique sheet that identifies typos, an illegal recommendation, or incorrect scores.

The chief reported that at first the officers were very nervous and impatient preparing guideline presentence reports. "We did good training right off the bat." Initially two probation officers trained all the officers. Now guidelines training is handled by a resource development officer stationed in another office in this district who coordinates training for new officers. He assigns different probation officers to teach different things. Over half the judges remarked upon the excellent training the probation officers had and their general ability to do a good job. The judges rely on the probation officers' guideline calculations, their sentence recommendations, and their understanding of the guidelines for resolving disputes. The probation officers' thoroughness in preparing presentence reports is acknowledged by the judges, one of whom said, "They are top notch. They include more than we need." Only one judge made any unfavorable comment -- that probation officers can get "snowed" by white-collar offenders because of their lack of business acumen.

The assistant U.S. attorneys interviewed made several unfavorable comments about probation officers. One remarked that the "trouble is with the probation officers interpreting the obstruction guideline too strictly." Another registered doubt that the probation officers are as proficient as they ought to be: "Sometimes the reports are not clear enough about the facts. This was true even before the guidelines. Probation officers are overworked and in complex cases they may not lay out everything." However, a third said that the probation officers are thorough and objective.

The defense bar was generally favorable in their evaluation of the probation office. One attorney said that there are good probation officers in this district who are fair minded people, and another said that they "write a good report." This same attorney was interviewed in the conference room of the probation department and clearly seemed at home there.

The overall impression of the probation office was that they are a very serious, hardworking, well-liked group of people who are dedicated to their judges, accepting of, and perhaps even enthusiastic about the guidelines, and proud of their accomplishments. The supervisory probation officer commented on their model presentence report and how they've "done some neat things with it so the judges have everything they need to make a decision. It changes as our needs change. We put in information about the plea and substantial assistance. You put in as much as you can so the judges can get a full and accurate picture."

According to one defense attorney interviewed, however, this close relationship with the court predates the guidelines. He said that the judges have always talked with the probation officers confidentially about what the sentence should be and have always been influenced by the probation officer's evaluation of the defendant. One assistant U.S. attorney registered dissatisfaction with a

system that allows probation officers to have *ex parte* contacts with the judges, saying that "all important statements should be on the record."

The U.S. Attorney's Office

According to the deputy chief of the criminal division, there are ten criminal division assistants, some of whom were recently hired. The assistant U.S. attorneys assessed the manageability of the office's workload as being between "manageable" and "somewhat unmanageable." This contrasts with the assessment of the deputy chief of the criminal division, who indicated that they were being "killed" by the number of military misdemeanants.

The criminal division assistants and a number of special assistants (military, veterans, and four assistant state's attorneys) are supervised by the deputy chief of the criminal division. He does intake from state and local jurisdictions and assigns them to others. He reviews the assistants' caseloads, indictments, and plea agreements and spends 60 percent of his time on his own cases. The assignment of cases comes after the completion of a PROMIS form and depends on "whatever body is available." There are three OCDETF attorneys who primarily handle drug cases. Two attorneys are assigned general crimes that have short turn-around cases of three months or less. Four attorneys handle white-collar or complex fraud cases.

According to the deputy chief, there is no office policy regarding the acceptance of cases. Rather, acceptance is on a case-by-case basis. One assistant U.S. attorney said that there are no specific guidelines about the kinds of cases they decline, but that they try to prosecute everything. He described it as "a full-service office." The deputy chief reported that mandatory minimums play a role in whether to proceed with drug cases, through a policy with DEA in which they accept cases only if the quantity involved would place the defendant above a mandatory minimum. But this is not a hard and fast rule.

The office does pretrial diversion and works with pretrial services. The types of cases diverted are property cases -- shoplifting, felony theft, larceny -- but not crimes of violence, driving under the influence, or drugs.

The office does not like to get involved in Rule 20 cases because it is "a headache to put the two together," and gives such cases to the other jurisdiction involved. The plea agreement routinely specifies that the defendant will not be prosecuted further in this district.

The deputy chief reported that there is no political pressure to accept or pursue certain kinds of cases. All the investigative agencies want to perpetuate their own budgets, so the U.S. attorney's office gets referrals and pressure from them to prosecute their cases. Prosecutorial priorities are white-collar fraud and drug cases.

Cases are referred to this office by 23 separate federal investigative agencies, such as the FBI, DEA, postal inspector, and military investigatory services. They prosecute narcotics cases from the local jurisdiction due to the low state penalties for drug offenses. They also handle conspiracy cases for the state because of the state's requirement that offenders be tried separately.

Informations are used primarily on theft and fraud pre-indictment pleas and occasionally in drug cases -- not reactive cases.

The office files superseding indictments and informations for cases that are not as strong as was thought at the time of the original indictment. The superseding indictment is always within the original guideline range.

Charging practices in this office was an important topic to two defense attorneys interviewed. They mentioned the practice of overindicting ("shotgunning") the defendant and then taking a plea to a single count, which they felt was unfair because of the implications of relevant conduct.

Guideline training is not handled systematically in this office. According to the deputy chief of the criminal division, there is no training program in place and the only systematic training the assistants received was when the guidelines went into effect. "We go into battle, and it's trial by fire. I give them the *Guidelines Manual* when they start, and that's it."

The four respondents from the U.S. attorney's office had worked an average of four years in this office. Their experience with guideline cases ranged from 20 to "at least 100 defendants." One judge remarked on the relative inexperience of the U.S. attorney's office. However, the magistrate who is responsible for the training of everyone in the system rates the assistant U.S. attorneys' guidelines knowledge as good to excellent. The judges' assessment of assistant U.S. attorneys ranged from "pretty knowledgeable" to "excellent."

Private Defense Attorneys

Four defense attorneys were interviewed after being recommended by one of the supervisory probation officers. Their experience in defending cases in the federal system ranged from three to 42 years. Two had a mixture of retained and appointed federal cases, the third's caseload was entirely appointed, and the fourth was entirely retained. Two respondents reported that a third of their caseload consisted of federal criminal cases; the other two reported their percentage was only about five percent. The number of guideline cases they had handled ranged from seven to 30. They all had received district-sponsored training from the magistrate who performs that function.

Defense attorneys were described by all four non-supervisory probation officers as lacking knowledge in the guidelines. Two of them remarked that this results in defendants being misled about pleas; those who plead to lesser amounts of drugs, for example, do not expect to be saddled with relevant conduct at sentencing. One assistant U.S. attorney remarked that defense attorneys are too far behind in their knowledge of the guidelines. The magistrate in charge of training described the knowledge of the defense bar as generally poor.

Policies and Procedures That May Affect Guidelines Implementation

Presentence Report Investigations and Disclosures

The four non-supervisory assistant U.S. attorneys interviewed described the typical procedure whereby assistant U.S. attorneys provide the probation officer with information. Generally the file is given to the probation officer within a week after the plea or trial. This file consists of the indictment, the plea agreement, and the investigative report. The information concerning the defendant's offense conduct provided by the assistant U.S. attorney may consist of a condensed version of the facts in complex cases, but otherwise it is typically their policy to provide the probation officer with all relevant information concerning the defendant's criminal behavior that is not part of an ongoing investigation.

From there, the assistant U.S. attorney refers the probation officer to the case agent who may be interviewed in person or over the telephone, depending upon the complexity of the case. The agent also provides the probation officer with a case summary. One probation officer reported occasionally contacting the victim and/or the defendant to get their point of view about the offense conduct.

According to one probation officer, slightly less than half of the assistant U.S. attorneys will recite the facts of the case in the plea agreement. This makes writing the presentence report easier, but he reviews the file anyway. One probation officer reported that decisions on cases involving more than minimal planning, scheme to defraud more than one victim, and acceptance of responsibility are made on the basis of information provided by the prosecutor. Another reported that he goes to the investigator to assess the applicability of these guidelines and does not rely on, or even provide in the presentence report, a government version of the offense. Furthermore, he ignores stipulations in the plea agreement in his guideline decision-making. However, a defense attorney interviewed stated that the presentence report reflects the facts as told to the probation officer by the prosecutor.

Defense attorneys report that they give probation officers whatever they ask for but that generally probation officers acquire their information directly from the defendant and do not contact the defense attorney unless there is some problem, such as establishing contact with the defendant.

The probation officers' assessments of the length of time it takes to complete a presentence report ranged from ten hours (for a probation officer whose caseload was largely misdemeanor cases) to 40 (for someone with a "special offender" and white-collar caseload).

The presentence report is completed 20 days before sentencing, and a meeting is arranged with defense counsel if there are any objections to guideline application in it. The more objections to the presentence report, the more often they meet.

Five to ten days before the sentencing hearing, the presentence report goes to the judge with any unresolved disputes. One judge says that he likes to get the presentence reports for white-collar cases earlier because these can be complicated and require more "business acumen" than most probation officers have. All but one of the judges say they meet with the probation officer the morning of sentencing.

The practices described above suggest that individual probation officers adopt their own style of investigation. Probation officers appear to gather their information regarding the offense conduct from a variety of sources and do not depend entirely upon the prosecution's version of the offense.

Resolution of Disputed Presentence Report Factors

One defense attorney commented that disputes over guideline application are not common. This is borne out by the site survey data showing that two of the three defense attorneys responding to the survey said they had few disputes; three of the four assistant U.S. attorneys said they had few disputes; and all the probation officers said that they had few disputes with prosecutors, while three of the four probation officers said they had few disputes with defense attorneys.

If the attorneys dispute any information in the presentence report, they generally state their objections within ten days of the sentencing hearing. Disputes are typically resolved through a conference among the probation officer and the two parties, as well as the defendant or an expert. When such conferences are required, they are usually, as one probation officer put it, "cut-and-dried." They may not solve anything, but everyone's positions are known ahead of time and issues that will arise in court can be anticipated. One defense attorney reported that most disputes are

resolved during these conferences. According to the site survey data, half of the probation officers reported that few cases are fully resolved prior to sentencing. An addendum is filed that includes everything according to a fixed format, or "boiler plate" whether the dispute is resolved or not. (Even if they agree, though, the attorneys are required to file position papers.) One judge commented that "good lawyers" will not dispute facts in court but will work it out with the probation officer. The supervisory probation officer said that this system of filing addendums allows the judge to know what has "been given away" and "keeps the system honest." Disputes other than those over guideline application are more likely to be resolved by the judge.

Charging

When asked about the office's charging policy, the deputy chief of the criminal division said that they follow the Thornburgh memo. Several assistant U.S. attorneys substantiated this assertion by saying that they charge according to the facts of the case, regardless of the penalties involved. Several defense attorneys, however, stated that the U.S. attorney's office "shotguns" defendants with extra charges in order to "put the fear of God into them" and then "negotiate it all away to one [count]." This was not indicated by the assistant U.S. attorneys interviewed, although one did say that he charges the full offense conduct in the indictment for fear that it will not be considered at sentencing; another said that they charge conspiracy cases as broadly as possible; and a third said that he occasionally brings non-conspiracy drug counts into a conspiracy case in order to get the defendant's cooperation.

Charging decisions are reviewed by the deputy chief of the criminal division and the other criminal supervisor.

Pleas

Prosecutors in this office require the defendant to plead to the main charge. The probation officers felt the assistant U.S. attorneys are "good" in that respect and present them with plea agreements that they can live with for the most part. According to the deputy chief of the criminal division, they do not stipulate to facts. However, one judge said that such stipulations do occur and that is the way prosecutors get around the guidelines.

Other offices in this district include a waiver of the right to appeal in their plea agreements. Although the U.S. attorney's office here tried it, the judges did not "go for it," and this practice has since been discontinued.

Every felony and class A misdemeanor plea agreement is written. The U.S. attorney's office does not negotiate binding plea agreements in this office, but three judges said that they would accept them if appropriate. One defense attorney lamented their unavailability and commented that it was the U.S. attorney, not the judges, who prohibits the use of 11(e)(1)(C) agreements.

Judges in this office typically accept the plea at the plea hearing, rather than put it off until the disclosure of the presentence report. One judge said that there was nothing to be gained by deferring acceptance of the plea because the assistant U.S. attorneys do not recommend punishment in the plea agreement.

Motions for Substantial Assistance

This district has a committee system for reviewing and evaluating the possibility of motions for substantial assistance. If it is a case out of this office, the deputy chief of the criminal division is

on the committee. The committee reaches its decisions by consensus. Complete cooperation means giving a full debriefing, testifying in front of a grand jury and at subsequent federal trials, and cooperating with other jurisdictions that are willing to immunize the defendant. Obtaining a conviction at subsequent trials is not required.

Assistant U.S. attorneys see cooperation as essential to the process of plea negotiation. Several mentioned that any decision not to pursue plea negotiations would hinge on the defendant's willingness and ability to provide information. One assistant reported that there is a standard clause in the plea agreement concerning the ability of the government to move for a departure under Rule 35(b).

Cooperation (perhaps broadly defined) can fit into the awarding of acceptance of responsibility as well: one probation officer said that he would not recommend acceptance if the defendant did not "cooperate with law enforcement in apprehending other criminals and come clean about his full involvement."

Other Recommendations for Departure

There is no written policy regarding the procedures for requesting departures other than U.S.S.G. §5K1.1. Assistants may discuss the issue with other assistants, but no particular approval is needed and the recommendations are not reviewed.

Policies Regarding Chapter 3 Adjustments

There is no policy in either the U.S. attorney's office or the probation department regarding the application of these adjustments. Both supervisory respondents indicated that decisions are made on a case-by-case basis. The judges reported that they would not grant the reduction for acceptance of responsibility just because the defendant pleaded guilty.

Sentencing Procedures

The probation officer may testify at the sentencing hearing to explain findings and recommendations. For that reason, probation officers feel that they need to know the case just as well as the case agent or the assistant U.S. attorney. All judges resolve disputes by hearing whatever the parties have to present -- oral arguments and/or evidence. One judge described his procedure as a full sentencing hearing -- "just like a trial." Another said that he allows objections to be brought up at sentencing "because we have an appeals court" that would reverse him if he didn't allow evidence to be heard. A third said that frequently "people have afterthoughts" and that it is easier to do it here than at the circuit level. "I let the defendant get away with murder because it is easier."

Sentencing hearings with no disputed facts typically last one hour; those with disputed facts last two hours.

Appeals

Three of the four assistant U.S. attorneys interviewed in this site report that they have never recommended an appeal. In this district the decision to appeal a sentence must go through the appellate specialist in another office. The deputy chief of the criminal division says that their office has rarely initiated appeals -- only in three or four situations in which they felt the judges were clearly wrong.

The deputy chief of the criminal division reports that "all defendants appeal" and that therefore they have a lot of briefs to write. Yet, of the four defense attorneys interviewed, two said that they have never appealed a sentencing decision.

Site 11

Case Characteristics and Sentencing Outcomes

Site 11 is the largest of three cities in a district whose guideline offense distribution in FY 1990 closely matched that of the nation as a whole. The largest component of its criminal caseload (40%) was drug offenses, while white-collar offenses (15%) constituted the second largest type of offense. The percentage of its caseload that were guideline cases was less than the nation as a whole (50% vs. 69%).

The sentences imposed in Site 11 during FY 1990 were on average slightly higher than the country as a whole (70 vs. 61 months). This is especially apparent in robbery, drug offenses, and firearms. Sentences for simple possession and embezzlement cases were somewhat less than the national average.

Structural and Organizational Context

The Judiciary

Six of the eight judges in this district, including the chief judge, sit in Site 11. The caseload per judge in this district is about twice the national average. Another measure of judicial caseload -- the ratio of judges to assistant U.S. attorneys is higher than the district and circuit in which it is contained and is almost twice as high as the nation as a whole. While there is no ready explanation for this, no judges interviewed complained about being overwhelmed by their caseloads.

The chief judge has more than ten years of experience on the federal bench and has had his position for more than three years. The other judges' experience on the federal bench ranges from three to 20 years.

The clerk of the court described their system of scheduling as "a unique system in which each court has a paired team of one intake deputy and one docket clerk." Judges are assigned a case upon the filing of an information or indictment. A member of the clerk's staff is responsible for picking the judge for that case. Assignments are made randomly using a sealed envelope system. Criminal cases typically go through a magistrate hearing, detention hearing, motions hearings, trial or guilty plea, sentencing, and then, if required, evidentiary hearings. Each judge maintains an individual calendar. The clerk commented on the district court's relatively low volume of criminal cases -- fewer than 400 criminal cases a year. This does not square with data from the Administrative Office that show over a thousand criminal cases a year for this district. Moreover, according to these same data, the percentage of the district's total caseload that is criminal is about twice that of the national average.

The judges in this office seem to be highly regarded by the other personnel in the system. The supervisor of the presentence report unit in the probation office said that the judges are very independent of probation and make their own decisions. They do not necessarily completely or blindly accept the guideline calculations made by probation officers, although one judge, whose experience on the bench postdates the implementation of the guidelines, does rely heavily on probation officers and even requires guideline calculations for non-guideline cases. The supervisor of the criminal division in the U.S. attorney's office commented that under the old system the court had total discretion. He described it as "not necessarily a problem because we have a very good federal bench here." One federal defender said that the judges are bright and competent, take their job seriously, and are able to exercise discretion without destroying the integrity of the system.

The judges' independence of the probation office does not necessarily suggest their unwillingness to work within the guideline structure. One defense attorney said that the "judges here work within the guidelines and probably welcome it. It takes the heat off them."

The judges' conformity to the guidelines is borne out in a departure rate for the district that mirrors the national average. All judges interviewed said that they either do not depart at all or depart only "sometimes." When asked about their policy regarding departure, judges either reported not having one, that their policy is "not to depart," or that it is to go by the book: "to depart only when the legal standards for departure are met and the circumstances require departure to reach a just sentence." The chief judge noted that he finds a way to depart if he needs to and believes "it is good that we have to structure departures."

Several federal defenders commented on the rarity of departures in this office. "Judges see them as risky and thus off-limits." Another said, "They won't stick their necks out, even when they say the guidelines are too high." However, the supervisor of the presentence report unit in the probation office said that in truth some judges sentence below the guidelines no matter what.

The Probation Office

The chief probation officer for this district has worked in this office for more than 20 years and has been chief for over ten. He described his job as accumulating and allocating resources, organizing the office and staff of 13 probation officers, and delegating responsibilities so that the work of the courts and the Parole Commission is accomplished. The office is bifurcated. The responsibilities of the presentence report unit supervisor are to assign all presentence reports and collateral requests to the unit's six probation officers; review and sign off on all presentence reports and collaterals; and discuss the reports with the judges.

Everything the probation officers do is fully staffed with supervisors and colleagues reviewing all presentence reports. One probation officer described this staffing system as an excellent learning experience. After the presentence reports come back to the office with the parties' objections, every member of the investigation unit gets a copy and is expected to read it for accuracy and grammar before it goes to the judge.

Cases are assigned on a rotation basis by the supervisor of the presentence report unit with each officer taking a turn to equalize the work load.

The office's caseload was described by the chief as being "manageable" but by the presentence report unit supervisor as "somewhat unmanageable" because of the fluctuation in their presentence report caseload. "Last year's average was five presentence reports [per month] per probation officer. That's not bad, but sometimes they bunch up." He went on to comment on the increased responsibilities associated with presentence reports under the guidelines. The model local rule was written at a time when they had fewer obligations regarding what had to be covered in the report, he said. The line probation officers interviewed reported that they had caseloads of 10-12 presentence reports and that was, on average, between "manageable" and "somewhat unmanageable." Both probation officers mentioned having been "pretty busy" during the last six months. They both described this caseload as fairly typical, although they had seen it range from eight to 14. The supervisor of the presentence report unit mentioned that the office had not been sufficiently staffed until the summer of 1990.

Guidelines training for new probation officers is handled through Commission and Federal Judicial Center videotapes. The officers discuss cases from the Commission's training manual and

assign new probation officers to a veteran for the first few presentence reports. At that point, new officers are assigned to cases, usually after attending the New Officer Orientation in Baltimore, MD. Beyond that, officers get yearly training with the Commission, the two presentence report units have weekly meetings that include education and training, and the *Sentencing Guidelines Updates* are circulated as they come in and are discussed at staff meetings.

The relationships between the probation office and the other court personnel vary. The judges consider the probation officers to be good and thorough at their job. The chief judge attributed the brevity of his sentencing hearings to the probation officers. "You are talking to a judge who has not had extensive fact finding difficulties, nor long sentencing hearings. I attribute this to the probation officers. They do a good job -- substantiate their information. They do not make allegations that they cannot support." Another judge reported that they do "a nice job" and that he frequently uses what they have prepared when he gives his Statement of Reasons. One probation officer said, "Judges do not change my reports very often. I am very effective now based on what we are supposed to be doing."

Several assistant U.S. attorneys also spoke of the probation officers in flattering terms: they represent the concerns of the U.S. attorney's office well and they have good rapport and are thorough. Two assistant U.S. attorneys mentioned the importance of taking care in their dealings with probation because of the influence they wield with the judges.

The defense bar was less flattering in its characterization of the probation office. One private defense attorney said that probation officers "swallow whole what the U.S. attorney agrees to in the factual agreement. Probation accepts little from defense. They take everything the case agent says as gospel." This was confirmed by a federal defender who said that "a majority of the probation officers look at the case from the government's perspective and come up with the highest possible score." But the defense attorney went on to say that "the probation officers who have been around for a long time write the reports more objectively." He also said that the probation office under the guidelines is, like everyone else, "calloused about the numbers and talk that way, throwing around big numbers of months." Another federal defender mentioned how the "probation officers view themselves as an arm of the Department of Justice. The offense conduct section of the presentence report contains the prosecution version only -- not mine. In the personal history section, the probation officers use words like 'purports,' 'claims,' and 'alleges' while the prosecution's information is represented as fact. They ask for higher sentences in court. Sometimes it is even the probation officer against us and the prosecutor." Some support for this view came from the supervisor of the presentence report unit himself, who said that "prosecutors give things up too easily."

The U.S. Attorney's Office

The U.S. attorney had only worked as a prosecutor for the 17 months that he had this appointment. His answers were short and generally reflected only a superficial knowledge of the procedures, practices, and policies of his office.

The office is divided into civil and criminal divisions, with the criminal division having approximately 35 attorneys divided into seven units: major crimes, complaint/intake, asset forfeiture, bank fraud, drug, economic crimes, and environmental crimes. Each unit has the autonomy to set priorities for itself, and there are no written guidelines. Rather, decisions are made on a case-by-case basis with a recognition that office priorities may shift over time.

The supervisory assistant U.S. attorney who spoke for office policy and general practices had been a federal prosecutor for 12 years but had been in his current position as supervisor of the major

crimes division for only three months. This unit handles work from the complaints unit, which prosecutes mostly reactive cases not handled by the drug, economic, or fraud units. The remainder of their work comes from major crimes that require some type of investigation or grand jury work. He described the office's caseload as "somewhat manageable."

Cases come to the respective units based on their subject matter, usually from the particular federal investigative agency that handles that type of case. Speaking from his own experience in the major crimes unit, the supervisor said that most cases are received from outside agencies, a few from citizen referrals, or occasionally from the pursuit of something they may have heard or read about. He said that there is no specific policy regarding the acceptance of cases. "There are so many varieties of federal cases, it is impossible to have an answer to that." Rather, before they prosecute the office looks to see what is readily provable and whether they can successfully prosecute the case. The U.S. attorney reported that mandatory minimums play no role in the decision to accept a case. "It's the criminal and the action, not what might happen to him." The supervisor of the major crimes unit, however, said that they do "look for mandatory minimums and emphasize to ATF that they want to see [18 U.S.C. §§] 924(c) and 924(e) cases." He also said that the office is interested in the underlying offenses that implicate mandatory minimums, such as violent offenses. They claim to be under no political pressure to accept or pursue cases, although the U.S. attorney did say that there is "lots of pressure from the agencies." He also said that drugs are the office's number one priority, followed by financial fraud and environmental crime. Because of limited resources, the supervisor said that they sometimes go to an agency and ask for their five biggest cases. The supervisor said that the guidelines play no role in the decision to accept a case. While the policy regarding declinations varies from unit to unit, all declinations are in writing and a letter is sent to the agent handling the case. Cases are assigned first by subject matter to the appropriate unit, and then by availability of assistants. Generally supervisors are responsible for reviewing all informations and indictments.

The office uses informations whenever a defendant is willing to waive indictment in connection with an anticipated guilty plea. The supervising assistant U.S. attorney said that in misdemeanor cases they file them "all the time." Without anticipated guilty pleas, the cases go to the grand jury with the expectation of filing an indictment. The office uses superseding informations/indictments either with anticipated guilty pleas or for legal and evidentiary reasons.

According to the supervisor of the major crimes unit and a private defense attorney, the office in the past relied more on pretrial diversion. Presently, the office diverts only two or three cases a year -- mostly zero tolerance cases dealing with possession of minor quantities of drugs. "Deferred prosecution is a standard package," the supervising assistant U.S. attorney said. "The person is notified by letter, sentenced by a magistrate on the day they come in after receiving the letter. We used to do 20-30 cases a week. Now we are down to about five cases per week. This program was started in March 1988. Of course these are misdemeanor cases that we are talking about." The federal defender reported that this was a point of contention between the two offices. He argues for diversion "in any circumstances. . . . Any nonviolent case with a defendant with little or no contact with the criminal justice system and does not involve significant harm. Those that do not seem like a big deal case." According to one private attorney, they negotiate over the sentence in these cases, not the charge.

The U.S. attorney's office consolidates cases under Rule 20 whenever requested. "We try to accommodate any district that requests it. It conserves resources. However, we will turn down a case if part of the transfer includes conditions in a plea bargain that are different from our policies on pleas," the supervising assistant U.S. attorney said.

According to the supervisor of the major crimes unit, cases are sent to the state "Whenever we are requested to do it. We try to accommodate any district that requests it. It conserves resources. However, we will turn down a case if part of the transfer includes conditions in a plea bargain that are different form our policies on pleas." He also said that "sometimes the state is willing to handle a case when a lack of federal resources prohibits the U.S. attorney's office from taking it. These are typically small economic crimes. Occasionally the state will say 'I want this one.' There is a policy with bank robbery cases: If the local police make an arrest soon after a bank robbery and the person has no previous bank robberies, we let them keep the case, even if the defendant has a criminal record." This respondent also said that they take cases for the state "when there is concurrent jurisdiction, when the state calls and requests assistance for investigation, and when it develops that there is an overriding federal interest." The U.S. attorney said that they pick up state cases "when the state wants us to pick up a marihuana case because of the gross disparity between state and federal marihuana penalties or in the rare case when the state has had substantial involvement with the investigation and arrest."

Guideline training for new assistant U.S. attorneys is handled by the supervisors. All new assistant U.S. attorneys go through the intake unit for three to six months and receive formal training as well as on a case-by-case basis. The supervisor of the major crimes unit was described by the U.S. attorney as the office's guidelines guru. His training program consists of a "healthy review and study." Assistants also receive guideline training at the Department of Justice's Advocacy Institute. There is a meeting among all the assistants every Thursday at noon, when part of the time is set aside to talk about sentencing.

The four assistant U.S. attorneys interviewed worked in the economic crimes, environmental, major crimes, and drug units. Their experience in this office ranged from 18 months to 19 years, with an average of about nine years. These respondents reported having handled from six to 80 guideline cases, with an average of 37.

The relationships between assistant U.S. attorneys and the other personnel in the system appear to be good. A line probation officer commented on the positive relationship they had with the U.S. attorney's office and attributed it, at least in part, to the guidelines. "The guidelines have helped the working relationship between attorneys and us. There is more accountability now. This will greatly assist officers in their professionalism. We have to be precise and unbiased." A supervisory probation officer described the prosecutor's office as "good." The chief judge told us that they are fortunate because they have a responsible prosecutor. As a result, judges said that the increased discretion of the U.S. attorney under the guidelines has not been a problem here. The chief judge did remark about the inexperience and youth of the prosecutors who like to use the mandatory minimums but lack the long-term experience with sentencing to really understand how to make this type of decision. The defense bar made no comments regarding their relationship with the assistant U.S. attorneys, except for one federal defender who said that the government does not understand the guidelines.

The Federal Defender's Office

The federal defender has been an attorney for 18 years. Over ten of these years have been spent in this office. He manages an office with eight assistant defenders. He also runs the defender's office in another district in this circuit, although that arrangement was soon to end because the other district was about to become "independent." He is very active in several federal defenders' committees, and because of this has insufficient time to maintain a caseload. He described his job as being divided into three areas: administration, real lawyer work, and extra work -- legislative

and training. He reported that at any given moment he typically has 15 cases. He has defended about 50 guideline cases.

The federal defender described the office's caseload manageability as "entirely manageable" insofar as if the office "gets swamped," they can call the clerk of the court and have a case referred to a panel attorney. He said it is not the number of cases that overwhelms the office, but the intensity and complexity of the cases because of the guidelines that takes up time. An assistant defender referred to the difficulty of dealing with his caseload because of the complexity of the sentencing process, citing the additional time spent on calculating criminal history. He said that the judges are bogged down by the complexity of the guidelines and often continue cases. Another assistant defender said increasingly complex drug and fraud cases requiring more documents and discovery (he cited one case in which he had 214 boxes of discovery material) contribute to the difficulty of maintaining his caseload.

The defender's office assigns cases according to a duty lawyer system. Every person has a day. If a case comes in on that person's day, s/he takes the case. There are no divisions in the office, except a distinction based on experience to ensure that the best person will handle the case. The federal defender's philosophy is that "you are a better lawyer if you handle a variety of cases and have contact with all the judges."

The federal defender said that only two staff members have less than four years' experience. The three assistants interviewed had five, eight, and ten years' experience in that office and had defended 75, 300, and 75 guideline cases, respectively. One assistant spoke about the difficulty of keeping up with the complexity of the guidelines and how dependent the private defense bar is on them for their expertise: "Individual defense attorneys come to us hysterical -- it's a ridiculous expenditure of time for everyone involved. Not only the guidelines, but the body of law interpreting them. The amendments are confusing even for those us who are considered experts."

Private Defense Attorneys

The two private defense attorneys interviewed at this site both had considerable experience in defending federal cases, averaging about 15 years each. One had defended eight guideline cases, and the other 40. Their caseloads were rather different: One described his yearly federal caseload as typically consisting of four "big" fraud and/or drug cases while the other attorney described his as about 55 felonies a year and mentioned a wide variety of offense types. One of the attorneys gets his cases only by referral, while the other has referrals and a few panel cases. Neither of them has much trial experience in the federal system: One had one case go to trial, while the other reported "three or four."

The private defense attorneys in this office do not seem to have the reputation for "guidelines ineptitude" that attached to private attorneys in some other interview sites. According to one assistant federal defender, however, the federal defender's office provides support for private defense attorneys in terms of guideline application, both on a case-by-case basis, as well as in ongoing training.

Policies and Procedures That May Affect Guidelines Implementation

Presentence Report Investigations and Disclosures

As described by probation officers, the presentence investigation begins at the time that the plea is entered. The probation officer who attends the plea hearing is usually the one who writes the

presentence report. At the hearing, the probation officer gets a copy of the indictment/information and the plea agreement. After reading the investigative reports, the probation officer gets together in most cases with the assistant U.S. attorney for a discussion about the details of the offense (such as drug amounts, role, and restitution) and to find out, according to one probation officer "if anything has changed since the plea." The probation officer specifically asks about anything that would affect the guidelines and U.S.S.G. §5K1.1 motions. Sometimes, all of this is handled over the phone. In complicated cases, the probation officer meets with the case agent, and, if possible, the probation officer contacts the victim. According to the supervising probation officer, office policy requires probation officers to interview the assistant U.S. attorney and the case agent, and the information they obtain goes into the offense conduct section of the presentence report if it can be substantiated.

The assistant U.S. attorneys said that they give the probation officers a written summary of the case, especially in complex cases. This is supplemented by interviews with the victims, a financial analysis, and access to case files with the grand jury testimony deleted. One assistant U.S. attorney who handles complex environmental cases said that on occasion he has "sat down and given a slide show to the probation officer" and added that he would not withhold information from the probation officer. The supervisor of the major crimes unit said that they did their best to offer information to the presentence report writer. Another assistant U.S. attorney said that the prosecutor can take an active role in the sentencing process. "We can show the extent of the harm done to individual victims and the impact on their lives. We get affidavits and make possible bases for departure. Also, we can characterize a defendant's prior criminal record. We also do a sentencing memorandum in addition to the presentence report in all cases."

Probation officers report that they have contact with defense attorneys at the plea and occasionally interview the defendant at the time of the plea, especially if the defendant is from out of town. More typically, they invite the attorney and defendant to meet within ten days. During the course of the presentence investigation, the probation officers interviewed said they try to keep defendants informed of issues that may affect the guideline computation (e.g., the possible application of obstruction if clients lie about their identity). One probation officer reported that he typically interviews defendants only once because of time constraints. This same probation officer commented that "if you have pretrial information such as criminal history and know something about the case, you can really know the individual before the interview. So we meet only once unless there is additional information or there is a problem with the statement." The other probation officer interviewed said that he interviews the defendant an average of two or three times, and in a complicated case, four or five times. Typically, defendants are interviewed with their attorney present. "I'm prevented from talking with defendants or am limited with respect to the information I'm able to obtain in all or most cases. It's hard to get criminal history, the offense, and some drug/alcohol issues. Some attorneys caution their clients not to discuss anything about drug or alcohol usage." One probation officer described the initial interview as beginning with a description of the ground rules -- what is up for discussion and what information will be provided in a written statement.

According to the three federal defenders interviewed, they sit in on most presentence interviews and review with the defendant the information requirements. Generally, the defendant makes a written statement concerning the offense and guideline-relevant factors, such as role, and the defender reviews it to make sure it is complete." Defense attorneys will provide the probation officer with information if they think the information from the government is not complete or inaccurate. But federal defenders complained that the information they provide is considered less credible by the probation office than that provided by the government: "Whatever the prosecution presents are facts and whatever I present are allegations." Federal defenders said they advise the defendant to provide no information concerning their criminal history because "we don't know what the prosecutor

gives to the probation officer. The prosecutor doesn't always tell the probation officers everything for security reasons. We never find out these things -- and neither do the courts." Another defender mentioned providing the probation officer with all background history of the client, including anything he has that the court "should know about: family history and psychological problems."

Private defense attorneys had less to say about the information they provide to the probation officer. One said that he gives the probation officer less and less because they accept very little from the defense. Another said that he gives them everything "depending on the case." He feels that this is necessary in order to see that the guidelines are applied correctly.

According to the probation officers interviewed, the offense conduct section in the presentence report consists of the prosecutor's file and all investigative reports excluding any grand jury testimony. Probation office policy is to describe the circumstances of the entire offense. A line officer described the policy as reflecting the court's right to know all the information concerning a case. This is made difficult when the defense prevents him from talking with defendants or otherwise limits the information he can obtain.

The probation office apparently perceives itself as doing "straight shooting" as far as the guidelines are concerned. For example, one probation officer described this office as "very conservative in applying the guidelines. We apply them according to the book. We look at the defendant's role in the offense and circumstances, criminal history, and then staff the case. We look at how they fit with other defendants; we want to be fair with multiple defendants. We look at the facts of the offense."

The number of hours required to complete a presentence report was reported as five or six by one line probation officer and eight by the other. One officer said getting all the information from the attorneys in a timely fashion is sometimes difficult and makes his caseload unmanageable.

After the presentence report is typed and reviewed by its author, it goes to the supervisor of the presentence report unit. He reviews it and signs off. There is a secondary review because each report is also read by all the other officers in the presentence report unit. The chief probation officer reported that this has been a tradition since before the guidelines. "We did it to ensure consistent recommendations, but we may be outgrowing this process."

The local model rule allows for eight weeks from entry of the plea or trial to sentencing and four weeks for completion of the first draft of the presentence report. The supervisor of the presentence report unit considers this insufficient time. The model rule, he said, was written at a time when "we only had to report on the defendant's prior record, but we have to do more now. We have to do a social history of the defendant for purposes of deciding where he will be institutionalized."

Copies of the presentence report go to the parties and to the chief probation officer four weeks before sentencing. Ten days later the attorneys respond in writing to the probation officer who wrote the report. The policy is to have the final presentence report to the judge ten days before sentencing, usually with an addendum discussing any disputed issues.

The issue of whether the judge should talk with the probation officer is apparently a contentious one at this site. One judge reported that the custom was to talk with the probation officer the morning of sentencing, but this judge feels that by doing so he was given information not available to the defense attorney. "I look at this from a fairness perspective." One judge reported that "the judges have discussed whether it's appropriate for us to be talking to probation officers." According to one assistant U.S. attorney, the probation officer has the judge's ear. "They have access to the

judge. It depends on the judge. Some judges refuse to meet with the probation officer because they do not like the guidelines. Others rely on the probation officer, give great weight to the probation officer recommendation." One probation officer reported that probation officers meet "with two of our judges regularly to discuss presentence reports. We talk with our judges. We are there to be an assistance to them. I think that it really helps to meet with the judge." The probation officer's sentencing recommendation is revealed to all parties at this site.

Resolution of Disputed Presentence Report Factors

A form letter accompanies the initial version of the presentence report for attorneys to inform the probation office of any objections. If the probation officer agrees with the parties' objections, the changes are incorporated into the final report. If not, probation officers leave the report as is and attach an addendum noting the objections and send it to the judge. A supervising probation officer said that there is "not much formal sit-down with the counsel."

According to one federal defender, "Some probation officers don't like conflict, so they just lay it out for the judge (in the addendum) and don't resolve it. Others make recommendations one way or the other. It would be good to have the probation officers lay out both sides and let the judge decide." Few disputes are resolved over the phone.

The private attorneys interviewed reported that often the probation officer agrees with their objections. If the dispute is not resolved, it goes to the court for resolution. In some cases, the judge makes no finding -- rather the judge "will try to find the right range without deciding all the issues, some way to satisfy all parties. If you can offer them an out in the plea bargain, this helps," one defense attorney said.

Assistant U.S. attorneys report that they sometimes meet with the probation officer but more generally phone the probation officer if they have an objection. They then follow up with a letter and send a copy to the defense attorney.

According to the probation officers, disputes occur "quite often" and there is considerable contact after the parties have received the presentence report. "We are straightforward and try to work closely with both the defense and prosecution. When the parties have objections, they will usually call . . . (or) . . . send letters to us. . . . [I]f it is a guideline issue, we try to discuss it and resolve it before the addendum. Unresolved issues go on the addendum to the presentence report where guideline application issues are addressed explicitly. The judge is given both sets of objections and makes the final decision. We identify in the addendum what factors will impact the guidelines and note this to the judge. We note that there will be an evidentiary hearing." If there is a dispute, probation officers said they seldom meet with both parties at the same time.

Charging

According to the supervisor of the major crimes unit in the U.S. attorney's office, there are no written guidelines with respect to charging due to a lack of interest on the part of the previous U.S. attorney. Now the Thornburgh memo is used to decide charging policy.

Each supervisor is required to sign off on charging decisions and indictments. Few cases go through the U.S. attorney for approval -- only those that raise significant policy issues.

Pleas

The policy of the U.S. attorney's office is that defendants are supposed to plead to the most serious readily provable offense. The supervisor of the major crimes unit said that they look to the guidelines for purposes of predicting the sentence and then determine the plea that would accomplish that sentence. "This assumes that there are no mandatory minimums. If we have mandatory minimums, then we have to go to the guideline counts that ensure a specific guideline sentence."

All pleas are required to be in writing. There are no conditions that are not in the written document and each supervisor must review and approve all plea agreements. There are no stipulations to facts or law. However, there are exceptions occasionally for substantial assistance, but the supervising assistant U.S. attorney said that these are very rare.

There is an informal, unwritten policy regarding the use of pre-indictment pleas. These happen fairly frequently in this office and are encouraged to save resources. In more routine, nonviolent cases the government may use a pre-indictment letter in an effort to resolve a case after hearing from an agent who has built up a strong case. The U.S. attorney's office sends a letter to the suspect, informs him/her of the investigation, and advises the suspect to retain a lawyer. They also do pre-indictment pleas in cases in which the investigation has become public and the defendant comes forward and offers to cooperate.

According to the federal defender, the policy of the federal defender's office is not to plead guilty "unless we get something. Plea agreements are not reviewed as a matter of practice; not like the U.S. attorney's office. We have a continuing dialogue, more of an ad hoc, brainstorm, not a formal review process. We ask the question: Is this good, or could it be better?"

One assistant U.S. attorney claimed that they do not stipulate to anything in the plea agreement, but others reported that stipulations are included. One federal defender said that prosecutors typically let the defendant plead to one count and let him/her stipulate to the amount of loss or the amount of drugs; or they recommend no additional charges or the low end of the guideline range. A private defense attorney reported that the plea agreement may include a stipulation regarding the sentence. Prosecutors say they do not include a specific guideline range or anything about guideline calculations in their plea agreements.

One federal defender said he had a few cases in which the government would agree to acceptance of responsibility, but a private defense attorney said that prosecutors will not stipulate to acceptance just because the defendant pleads guilty. A probation officer said that some plea agreements "lock in" the reduction for acceptance when "we don't believe the defendant qualifies for it." The same officer complained about having to work with such "wacky plea agreements that don't make sense."

An assistant U.S. attorney said dropping counts was important in the old system, but that does not happen anymore because the entire offense behavior is taken into consideration for sentencing. According to a federal defender, drug cases might "get a gun to disappear," either through dropping an 18 U.S.C. § 924(c) count or not applying the guideline enhancement. In multiple armed bank robbery cases, the prosecutor will negotiate away the second and subsequent 18 U.S.C. § 924(c) counts. One federal defender said that the government will not drop counts of bank robbery, another said they would as long as the defendant pleads to at least six robberies. Two federal defenders said pleas that consist of count(s) that encompass anything less than the total offense behavior are never negotiated.

Substantial assistance is almost always a factor in drug cases, according to one federal defender, and is the only meaningful thing that can be done for a client in plea negotiations: Otherwise, the defender said, the prosecutors' plea offers are written in stone. The U.S. attorney's office uses substantial assistance to avoid mandatory minimums, a federal defender and supervising probation officer said. The supervisor of the presentence report unit identified drug pleas as making less sense than those coming out of other sections of the U.S. attorney's office. He felt that for those defendants, the government is "giving away the farm" by making a motion for substantial assistance when the assistance provided was neither timely nor of any true value to the case. One federal defender said that it is a real source of disparity because U.S.S.G. §5K1.1 motions are made in drug cases rather arbitrarily.

The U.S. attorney's office has a policy not to agree up front to make a motion for substantial assistance. Rather, they stipulate that there is a possibility of a U.S.S.G. §5K1.1 motion, according to one federal defender. The supervisor of the presentence report unit described one case in which staged reductions were specified in the plea agreement, depending upon the level of assistance.

Standard language is written into the plea agreement providing that if the court does not accept the plea agreement, the defendant may withdraw the plea. A private attorney said that if the plea agreement includes a maximum sentence, then it is guaranteed and the plea can be withdrawn if the judge wants to give more prison time.

Judges in this office generally accept the plea agreements with which they are presented. According to the supervisor of the presentence report unit, only one judge rejects plea agreements, but according to this judge, "I probably have never rejected a plea." Rather, it is "subject to the presentence report and my independent evaluation. It's a legal call ultimately. You might say I figure the guidelines myself. I go through it with the defendant -- whether they understand what the guidelines and the guideline range are. I ask the defense attorneys how they were calculated. I tell the defendant that the probation officer figures them further and then I ask if they still want to plead." This judge does not like binding pleas and tells the parties so. Another judge says he accepts just about any kind of plea agreement but has not seen any plea agreements that contain charge reductions. "They've already amended the indictment by the time I see them."

Motions for Substantial Assistance

The U.S. attorney's policy regarding moving for substantial assistance had changed two weeks prior to the site visit. Previously, any departures had to go through a departure committee that had veto power. Now, the supervisor of the assistant U.S. attorney who wants to bring the motion must approve it. The assistance must be "substantial" and must have been provided before the motion is made.

Other Recommendations for Departure

Other than recommendations for U.S.S.G. §5K1.1 motions, the U.S. attorney's office has a departure committee composed of the unit supervisors and the chief of the criminal division for review of both upward and downward departure recommendations.

Generally the probation office makes recommendations for downward departure only if the criminal history or offense level is overstated. The probation officers said that they follow the *Guidelines Manual* closely because it is such a controversial area. They report that they seldom make departure recommendations, and this is confirmed by at least one federal defender who reported that he had never seen a downward departure recommended in the presentence report.

Sentencing

All four judges interviewed allow the parties to bring up objections at the sentencing hearing even though one judge said that "this is contrary to our local rule. Everyone should have their say." Another judge added that the attorneys "always" do it.

One judge's procedure for resolving disputes is to ask whatever party has the burden to present evidence. He noted that they almost never present new evidence; rather they argue from the record. He asks if they want evidentiary testimony and then makes a finding. Another judge described his procedure as having a hearing and letting the parties argue before making a decision. If the dispute is material, another judge holds an evidentiary hearing, if necessary, and makes a finding. Most judges said that they have evidentiary hearings in "few" cases.

The length of sentencing hearings, according to one judge, is dependent upon "the attorneys involved. I normally sentence in 15, 20, 30 minutes. It's their personalities and their argumentativeness. It's not their lack of guidelines knowledge." Two other judges say that what contributes to the length of sentencing hearings is any dispute on a guideline range or factual disputes in the presentence report. A fourth judge said that the need for evidentiary hearings is responsible for long sentencing hearings. The U.S. attorney noted that judges vary with respect to the length of their hearings. "Some are fast at sentencing hearings with no disputed facts. Others are not. Some can be as short as 10 minutes. It depends on the attorneys and the judge."

Only one assistant U.S. attorney commented on the length of sentencing hearings, likening them to small trials. "I have seen sentencing hearings last 1-2 days." He speculated that their length would diminish over time.

One federal defender reported that he had a four-hour sentencing hearing in a case that involved "splitting hairs" over the issue of how much acceptance of responsibility was sufficient to qualify for the reduction. "We have sentencing hearings that are longer than trials." None of the federal defenders interviewed had experienced the government's bringing in evidence at the sentencing hearing. One said, "I know of these cases, but that disaster has not happened to me yet, but you always think that it is going to happen." Both private attorneys reported that they had experienced additional evidence being presented by the government at sentencing.

Both the U.S. attorney and the supervisor of the presentence report unit reported that probation officers testify at few sentencing hearings. The supervisor sees the probation officer as a resource rather than a witness. This is confirmed by the probation officers themselves. One reported, "If we're called into the court to assist in dispute resolution, we identify in the addendum what factors will impact the guidelines and note this to the judge. We note that there will be an evidentiary hearing. Only once have I had to testify. At the sentencing we will go to sidebar. Sometimes we will have to answer questions about various options for offense levels."

Appeals

If the U.S. attorney's office has an adverse ruling, a supervising U.S. attorney said, they "call Department of Justice, discuss the case and follow their advice. Either there is nothing to appeal or we send them a memorandum for further review. They decide and let us know." The U.S. attorney reports that they have not appealed very often, and three of the four assistant U.S. attorneys interviewed said that they had never recommended an appeal.

The federal defender's office does not file a notice of appeal in every case. "Only when we feel there is an appealable issue. We also do it if the defendant requests it, even if we do not think there is an appealable issue." One prosecutor said that he was currently handling eight appeals with guideline issues raised by defense attorneys and is "frustrated about spending time on frivolous appeals."

Of the two private attorneys interviewed, one had appealed one case (claiming that the court failed to consider the defendant's inability to pay a fine), and the other had never appealed a sentencing decision.

Site 12

Introduction

There are two court sites in this medium size district. Interviews were conducted with 20 persons at the largest office located in a relatively large city. The number of federal criminal cases filed in the district (felonies and misdemeanors) is nearly twice the national average, but the number of judges, assistant U.S. attorneys, federal defenders, and U.S. probation officers is about equal to the average for all districts across the country. These figures might suggest a workload problem in terms of the number of cases each judge, attorney, and probation officer is assigned. Throughout the site interviews, however, there was little indication that such a problem exists. Responses by the supervisory assistant U.S. attorney and chief probation officer to specific questions about workload indicated that the caseload is manageable. One possible explanation is that there may be numerous misdemeanor cases in the district that require less time for disposition.

Case Characteristics and Sentencing Outcomes

The offense distribution in this district is very close to the national profile of guideline cases. Drug cases make up slightly less than one-half of the total. Fraud and embezzlement comprise the second most frequent type of case, occurring in a slightly higher percentage than the national figure. Other types of cases that make up six percent or less of the total guideline cases in the district include (in descending order of frequency) larceny, counterfeiting, firearms, and robbery. The district's percentage of guideline cases compared to pre-guideline cases is approximately 80-20, somewhat higher than the national proportion of about two-thirds guideline, one-third pre-guideline cases.

Approximately 85 percent of all cases in this office and district are resolved pursuant to a plea agreement, a figure slightly less than the national plea rate. The proportion of offenders in the district sentenced to prison versus those sentenced to probation is similar to the national figure of approximately three-fourths. Virtually all drug trafficking offenders sentenced in this office in the past year were sent to prison.

Judges in the district sentence within the guideline range more than 85 percent of the time, a few percentage points higher than the national figure. Downward departures for substantial assistance are by far the most common departure; downward departures for other reasons are nonexistent in this district, and upward departures are rare. Three of the five judges interviewed at the site said that they felt only occasionally that departure was warranted, while the other two expressed some frustration at not being able to impose what they considered an appropriate sentence. One stated that his "compliance rate" is 95 percent, and he tries to sentence within the range, yet added that he frequently feels the within guideline range sentence is inappropriate. There is an implied conflict in this remark, and it may be more clearly understood by a later comment in the same interview. When asked if he found areas of flexibility within the guidelines other than departure, this judge replied, "No. One may be able to manipulate the guidelines, but we're reasonably honest here."

Structural and Organizational Context

The Judiciary

The five judges, including one senior judge, ranged in experience from four to 26 years on the federal bench. Despite the relatively high number of criminal misdemeanor and felony cases in this district, only one judge mentioned caseload at all. This judge was bothered by the interval of six to seven weeks between a plea of guilty and sentencing. He remarked that the criminal docket here

is "punishing," adding that they are under pressure as a result of the Speedy Trial Act to keep the criminal docket current.

Cases are assigned randomly by computer according to the percentage of cases each judge carries. Senior judges have a lighter caseload. The clerk of the court said that theoretically the time between disposition and sentencing is 45 days, but acknowledged that in practice this timetable is rarely followed.

Judges received their guideline training at circuit judicial conference workshops, through videos and lectures, or at other workshops. All stated they had been offered sufficient opportunity for training. Three of the five volunteered that they rely on the probation officers for guideline calculation and assistance. They had high praise for the probation officers' understanding of guideline application.

Of the five judges interviewed, three were very supportive of guideline sentencing, one said that he applied the guidelines reluctantly, and one was vehemently opposed, stating, "The faster Congress repeals them, the better." A senior judge (appointed by President Lyndon Johnson) offered encouragement to the interviewers, telling them not to be discouraged if they hear negative talk about the guidelines. He said that critics have lightened up and are "seeing that they are working pretty well."

The Probation Office

The chief U.S. probation officer has been a federal probation officer for more than 20 years and a chief for eight. The number of probation officers in the district under his responsibility is about the same as the national average. The probation officers interviewed average nearly seven years of experience in the federal system, compared with an average of about eight years for probation officers interviewed at all sites. The chief does not have a caseload of his own, but reviews all cases in the district and occasionally takes a case and writes the presentence report "to keep up on problems." He considers the office caseload manageable, but probably "because the people are dedicated." One factor that helps in manageability, according to the chief, is that there are no set time limits for completing the presentence report. The local rule allows ten days after disclosure of the presentence report for informal resolution of guideline disputes, although in practice this period is sometimes extended. Informality seems to be the key here; probation officers intend to meet deadlines, but are flexible for reasons of fairness. The chief noted that judges always consider late objections to the presentence report.

A case is assigned to an officer in one of three units on the basis of geography. Probation officers have territories and the units are kept balanced. The office has specialists who only write presentence investigation reports, and other officers who do both presentence reports and supervision. The chief expressed a need for more probation officers to do presentence reports. He said that the Administrative Office's workload formula is unrealistic and does not reflect the complexity of the case.

Training in guideline application for supervisors is conducted by the chief probation officer using the Commission's outline "from the ground up." New officers go to orientation training. The chief has developed guideline fact sheets that are circulated as needed among probation officers to update information on application and amendments. Assistant U.S. attorneys and federal defenders also take part in the training process. The chief and one supervisor have attended a train-the-trainer seminar sponsored by the Commission. At the time of the site visit, no officers had participated in a temporary assignment at the Commission.

Generally, there seems to be a good working relationship between the U.S. attorney's office and probation. One probation officer said that the assistant U.S. attorneys view the probation officers as having the greater guideline expertise. He felt that the assistant U.S. attorneys' willingness to read presentence reports and discuss them helped to avoid disputes later on. Another probation officer described relations with the U.S. attorney's office as "mostly good," but added that sometimes in a cooperation situation probation may have difficulty getting the whole story from the assistant U.S. attorney. Judges, by their own account, have confidence in the probation officers' performance in conducting the presentence investigation, calculating the guidelines, and making recommendations. The defense attorneys interviewed also said that the probation officers are deserving of respect for the job they do. One defense attorney speculated that sentencing "would be a circus," if it were not for the probation officers calculating the guidelines for the court and narrowing the issues in dispute. Another defense attorney objected to the authority of the probation office under the guidelines, criticizing their role in interpreting plea bargains for the court and sometimes suggesting the court reject them.

The U.S. Attorney's Office

The U.S. attorney has been a practicing attorney for more than nine years, and in his position for about a year and a half. He is sympathetic to the judges' view that they have limited discretion under the guidelines. He supports the concept of the guidelines, but believes that judges need more discretion. He describes his district's approach as taking "a fairly hard-line and obey[ing] the rules so we don't have much flexibility and the defendant can't expect a good deal unless there are unusual circumstances."

The criminal division is organized into units: General Crimes, OCDETF, Financial Fraud, and Strike Force (Organized Crime and Racketeering). The assistants interviewed estimated that they have handled an average of 36 guideline cases all since January 1989, as compared with a reported average of 50 for assistant U.S. attorneys at all sites visited. The average length of experience in their current position at Site 12 is about four and one-half years. The deputy U.S. attorney described the workload of the office as very manageable, commenting, "We're in pretty good shape; we have good resources." The ratio of assistant U.S. attorneys to judges approximates that of the national average of about three to one.

Cases are received through grand jury subpoenas and investigative agencies that send case reports to the U.S. attorney's office. The U.S. attorney's office reacts immediately to drug cases or bank robberies. When asked about office priorities for taking cases, the deputy U.S. attorney stated that he "supposed" drug cases were a priority. There are no formal guidelines for accepting cases; the decision is ultimately up to the unit chief. Authority of the U.S. attorney seems to be somewhat decentralized, with unit chiefs also reviewing and approving or disapproving indictments and plea agreements. The exception is the Strike Force, whose actions are subject to review by the Department of Justice.

Guideline training has been offered in-house, sponsored by the district court and local bar, but not within the last year. Training is apparently on-the-job, with considerable reliance on the probation officers for expertise. Assistant U.S. attorneys in the past attended guideline training sessions sponsored by the Department of Justice and the American Bar Association, and later a train-the-trainer seminar conducted by the Commission.

One defense attorney expressed the opinion that the U.S. attorney's office is "extremely fair and competent," adding that there appears to be no vindictiveness by most assistants. The relationship between the U.S. attorney's office and probation was described as professional by probation officers.

Disputes are often settled informally; the assistant U.S. attorney calls the probation officer and they discuss differences of opinion.

The Federal Defender's Office

There is a federal defender's office at this site, but efforts by the Commission's research team to schedule interviews in advance of the site visit and even after arrival were unsuccessful. Although messages were left explaining the nature of the visit and requests for appointments were made both directly and through a communication from another federal defender's office, the attorney in charge of the office at Site 12 did not return telephone calls from the Commission. For this reason, nothing can be said based on firsthand information about the federal defender's office at this site.

Private Defense Attorneys

Private defense attorneys are a more diverse "group" than other court participants, and cannot be easily characterized. When asked to rate the guidelines knowledge of the various court participants, one judge said of private defense counsel, "It depends on the lawyer." Evidently some have educated themselves well in guidelines application while others have not. Judges who were asked to assess guideline knowledge of attorneys and probation officers as groups rated federal defenders as excellent or very good (on a 5-point scale ranging from excellent to very poor). One judge remarked that defense attorneys consider it their job to argue when it's unrealistic, but characterized them as "good fighters for their client." The U.S. attorney described the federal defenders as "knowledgeable." He commented that private defense attorneys are starting to educate themselves, but felt that public defenders are generally more knowledgeable in guideline application than private counsel.

The private defense attorneys who were interviewed had considerable experience as lawyers, ranging from seven to 31 years in practice. They estimated handling between 12 to 75 guideline cases received both through private retainer and court appointment. Caseloads are mainly drug and fraud cases.

Two of the private defense attorneys expressed frustration at perceived limitations in obtaining a downward departure. In this district, the judges are reluctant to depart downward without a motion for reasons of cooperation from the prosecution. Another frustration expressed by defense attorneys was that alternative sentences (such as probation with community service) are seldom imposed. Several assistant U.S. attorneys said that defense attorneys can be influential in achieving sentence reductions through adjustments in role, and in some cases arguing for the low end of the range based on the offender's previous good citizenship. One defense attorney mentioned that he tries to limit relevant conduct. The influence of defense attorneys on sentencing at this site, however, seems limited unless they are involved early enough in the case to affect the charging decision.

The relationship between defense attorneys and the probation officers is generally "professional." Defense attorneys referred to the respect of the district court for the work of the probation officers. Private defense attorneys' opinions were mixed as to whether the district court's reliance on the recommendations of probation in decision-making was appropriate or excessive.

Policies and Procedures Affecting Guidelines Implementation

Presentence Report Investigations and Disclosures/Dispute Resolution

Presentence reports written by probation officers in this office are subject to review by their supervisor and by the chief. Local rules require a five-day period to work out disputes informally and five days for responses from attorneys after disclosure of the report. This ten-day period may be extended. Generally, probation officers and the attorneys attempt to resolve disputes informally by conference. If this cannot be accomplished, the parties state their formal positions and the presentence report is revised if appropriate. Any remaining disputes are left up to the court to decide.

With regard to the content of the presentence report, probation officers are expected to report the full details of the offense by going further in the investigation than what is contained in the assistant U.S. attorney's case file. It is office policy to talk with the lead case agent, informants, and victims. If there is a plea agreement, probation officers have a copy of it. According to the chief, they analyze each case and lay out the court's options. He cited an example stating that if the assistant U.S. attorney gives up a gun, they would point out the impact of this in the presentence report. Also, probation identifies circumstances of the offense or offender not in the heartland, including reasons for the court to consider departure.

Charging

The Thornburgh memo is the guide for charging decisions by the U.S. attorney's office. There is no formal policy for acceptance of cases, and the unit chief makes the decision to accept or decline a case. Neither the guidelines nor mandatory minimums play a specific role in this decision, except to the extent that mandatory minimum cases usually have a bigger impact in terms of the seriousness of the case and number of defendants involved. The unit chief reviews the proposed indictment, along with the prosecution memo that includes the guideline range and statutory elements of the offense. Prior to sentencing, district policy requires calculation of the guideline range independent of the probation officer. The Strike Force is an exception to the review procedure in that they are subject to review by the Department of Justice.

According to a supervisory prosecuting attorney, information can be used when "anyone wants," provided they comply with the Thornburgh memo. Superseding indictments are used occasionally when the office receives additional information on a case, or rarely when an individual agrees to plead to a lesser charge, such as when the original charge is greater than the defendant's role in the offense.

Pretrial diversion or deferred prosecution is used for cases in which the offense is not serious enough to warrant a formal charge and the defendant could benefit from minimal supervision.

The U.S. attorney's office does not frequently take state cases for prosecution, possibly because there is not a particularly good working relationship with the state prosecutor (as described by the deputy U.S. attorney). The only exception might be drug cases, due to the lack of vigorous prosecution by the state.

Pleas

All plea agreements are written and are guided by the Thornburgh memo. There is no other office policy with regard to dismissing counts or stipulations. Assistant U.S. attorneys stipulate to

drug amounts and presence or absence of a gun, but look to the probation officer for a recommendation on acceptance of responsibility. Judges at this site will not accept binding plea agreements calling for a specific sentence (Rule 11(e)(1)(C)).

Substantial Assistance

When asked what is the strongest incentive to influence a defendant to plead guilty, the response of all assistant U.S. attorneys at this site was a government motion for a downward departure based on substantial assistance (U.S.S.G. §5K1.1). Downward departures for assistance are granted in this district with greater frequency than the national average. The amount of departure is not recommended by the prosecution, but left to the discretion of the court. The defendant's cooperation is evaluated on a case-by-case basis by the assistant U.S. attorney. One assistant U.S. attorney stated that if the defendant has been debriefed and testifies in court, the motion will be filed. A defense attorney, discussing the impact of substantial assistance, called it the "sole thing that the individual defendant can rely on that personally impacts the [sentence]." A defense attorney described rewards that he seeks for cooperating defendants -- when they do not qualify for a substantial assistance motion -- to include dismissal of counts, stipulating to the amount of drugs, and a recommendation of a sentence at the low end of the guideline range.

The chief probation officer expressed concern that plea bargaining and U.S.S.G. §5K1.1 are sources of disparity in guideline application. He gave an example of a large number of codefendants providing information and getting all types of reductions, while the one non-cooperating defendant is facing a mandatory minimum sentence.

Appeals

If the U.S. attorney's office believes there has been incorrect guideline application or a departure that they disagree with, they go to the Department of Justice for guidance on appealing a case. Only one of the four assistant U.S. attorneys has ever recommended an appeal of an adverse sentencing decision.

Acceptance of Responsibility/Chapter Three Adjustments

It seems to be the practice at this site that defendants who plead guilty usually receive a reduction for acceptance of responsibility. Assistant U.S. attorneys defer to probation to recommend the reduction. The practice of probation is "liberal," that is, to recommend it if at all possible. Three of the four judges who were asked about awarding acceptance after a conviction by trial replied that they would not grant it. Another judge felt that a defendant should not be penalized for standing trial. Defense attorneys agreed with the sentiments expressed by this judge. One defense attorney said he is troubled that only defendants who plead guilty get acceptance.

With regard to role in the offense, assistant U.S. attorneys report that it is frequently a subject of disputes in multi-defendant cases. The U.S. attorney's office does not have a policy on role adjustments, and one assistant U.S. attorney indicated that the probation officer will look at the case and make a determination.

Site 13

Introduction

Site 13 is the largest of five offices in a small district. The office is located in a small city and is served by one judge assisted by a magistrate. Interviews at the site were conducted with 19 persons, including two probation officers from a more rural area who came from another office in the district for the purpose of providing information about their office. The number of federal criminal cases filed in the district, both felonies and misdemeanors, is approximately one-half the national average.

Case Characteristics and Sentencing Outcomes

Whereas the national proportion of guideline cases to pre-guideline cases is approximately two-thirds/one-third, the figures are reversed in this district: two-thirds pre-guideline, one-third guideline. One possible explanation is the emphasis on the types of cases (check and bank fraud) that take much longer to develop for prosecution. In this district, the mix of cases differs from the national profile of guideline cases. Drug trafficking offenses are not at the top of the list, but are number three, making up less than 20 percent of the cases. The most frequently occurring type of guideline case is larceny followed by fraud/embezzlement, each comprising approximately one-fourth of reported cases. Counterfeiting, firearms, and robbery make up less than three percent each of the total guideline cases in the district.

The percentage of cases resolved pursuant to a guilty plea in this office and in the district as a whole is greater than 95 percent -- high compared to the national plea rate. The proportion of defendants in the district sentenced to prison versus those sentenced to probation was slightly more than 50 percent last year, considerably lower than the national figure of approximately three-fourths sentenced to imprisonment. This varied by offense. Drug trafficking defendants in the district in the past year were all sent to prison, approximately one-half of fraud/embezzlement defendants were imprisoned, but only about one-sixth of defendants convicted of larceny received a prison sentence.

Judges in the district sentence within the guideline range at a rate very close to the national figure. Downward departures, both for substantial assistance and for other reasons, and upward departures are close to the national averages. The judge at Site 13 said that he had not departed enough to have a policy on departures, and complained about the "hassles of departure language." He told of sentences he had imposed in the past that may have been unusual, but which he considered effective. He felt that "real criminals involved in serious crime are not a problem under the guidelines," but wished he had more discretion now because he has to send some people to prison that he would not otherwise. He mentioned specifically mothers with children at home because in effect he is sentencing "a woman and two children to uncertain care."

Structural and Organizational Context

The Judiciary

The judge interviewed (the only one at this site) was appointed to the federal bench more than 15 years ago. He is assisted by a magistrate who takes care of defendants' initial appearances, detention hearings, motions, and misdemeanor cases. The magistrate is required to file a report with a recommendation on whether the judge should deny or grant motions. According to the criminal docket clerk, there is no backlog of cases, and the Speedy Trial Act is observed. The judge remarked that he does not have a great deal of time and tries to limit evidentiary hearings. Data indicate that the workload of cases for judges in the district is considerably lower than the national average.

When asked if he had been offered sufficient opportunities to receive guideline training, the judge responded that he had, through a local seminar and district workshops and a train-the-trainer seminar sponsored by the Commission. He offered the opinion that the training most needed is for court-appointed lawyers. He thought that a few defense attorneys have some expertise at sentencing and appear to "work the system" for their client.

The judge interviewed is generally opposed to guideline sentencing, commenting that he doubts that he sentences any better under the guidelines than he did without them. He said that in the past he had imposed longer sentences than under the guidelines, but also that he had a reputation for giving many defendants probation with conditions attached. He acknowledged that the guidelines were designed for judges with attitudes like his in order to decrease disparity. He said that he usually sentences at the high end of the guideline range for narcotics and the low end for bank employees. He heartily endorses the five-year mandatory minimum sentence for firearms offenses.

The Probation Office

The office of the district chief probation officer is not located at Site 13, although the chief made the trip to the site and brought two officers with him to be interviewed. The supervisory probation officer in charge of the office has been a federal probation officer for 14 years and in a supervisory position for five years. The other probation officers interviewed at this site average eight years in the federal system. The supervisory probation officer for this office (and two smaller offices in the district) carries a small caseload in addition to the responsibility for administration, policies, procedures, and training. He described the office caseload as "manageable at best."

The supervisory probation officer serves as the training officer and personally conducts training in presentence report writing, investigation, supervision, and pretrial services. He attended a Commission train-the-trainer seminar. There is periodic district-wide training and ongoing training through staff meetings and individual assistance.

The relationship among probation and attorneys (both prosecution and defense) tends to be adversarial. Both the supervisory probation officer and the two other probation officers interviewed spoke of fighting two battles (one with prosecution, another with defense) and of defending guideline calculations in the presentence report.

A particular problem mentioned by the probation officers from another (rural) office in the district was that prosecuting and defense attorneys and judges are not sufficiently knowledgeable about the guidelines. The probation officer is in an awkward position of having to teach guideline application to other court participants. An example illustrating this point involved a case in which the probation officer told of being the only one in the courtroom (including defense, prosecution, and the judge) who realized that the case in progress was subject to the guidelines. The probation officer called this to the judge's attention, the proceedings were stopped, and the case was subsequently treated as a guidelines case. This lack of guideline awareness did not surface as a serious problem in interviews at the principal site, with the possible exception of some defense attorneys' guideline knowledge.

The U.S. Attorney's Office

The U.S. attorney has been a practicing attorney for nearly 20 years and has held his present position for almost half that time. He is a strong advocate of the guidelines, expressing the opinion

that there was no justice under the old system and that the guidelines will make the criminal justice system more equitable.

The criminal division is organized in three sections: drug task force, general crimes, and financial institution fraud. Bank fraud is a number one priority for the office, followed by white-collar/public corruption, and narcotics. Individual assistant U.S. attorneys interviewed reported a range of experience from 20 to 100 guideline cases since January 1989. The average length of time in their current position is just over one year, considerably less than the average of assistants interviewed from all sites. The first assistant described the workload of the office as "manageable," noting that they have the discretion to decline a case and use that as a means of controlling caseload. He reported that the office has increased in size considerably over the past two years.

The first assistant estimated that the office receives 95 percent of its cases upon referral from investigative agencies. Last year the U.S. attorney's office developed a full set of prosecution guidelines that was sent to the agencies. If a case meets those criteria, it is generally accepted, but the rules are not "hard and fast." As a case comes in, it is assigned by the chief or the deputy chief of the criminal division to an assistant on the basis of specialty. The assistant then has the authority to accept or decline a case. When a case is accepted, the assistant writes the proposed indictment and submits that along with the prosecution memo to the Indictment Review Committee. Members of the committee include the first assistant and the chief and deputy chief of the criminal division, and their function is to approve or disapprove or to recommend changes for all indictments.

New assistants are introduced to the basics of guideline application through a training video from the probation office that explains the methodology. The deputy chief of the criminal division is responsible for ongoing training. Updates are distributed in the form of the U.S. attorney's monthly bulletin with attached summaries of cases and guideline developments.

Probation officers' and assistant U.S. attorneys' opinions of each other vary, depending upon the point of view. Two of the assistant U.S. attorneys were very positive in their opinion of the probation officers, saying they are conscientious and their reports are very accurate. They characterized the relationship as "great." On the other hand, the supervisory probation officer stated that the assistant U.S. attorneys' knowledge of the guidelines is sometimes not good, and that there is a high turnover of assistants.

Private Defense Attorneys

There is no federal defender's office in this district. Interviews were conducted with four private defense attorneys who receive cases through court appointment and by referral from other lawyers. Their years of experience as lawyers range from 7 to 22, and the average number of guideline cases they estimated having handled is 17. This is about half the average number of guideline cases of defense attorneys interviewed in all sites, and is another statistic suggesting that the learning process of guideline application may be at an earlier stage at Site 13 than in other sites.

Three of the four defense attorneys said that their greatest influence on the sentencing process was in negotiating the charging decision (pre-indictment plea). Other areas of influence mentioned include role adjustments and advising the client of the appropriate attitude for receiving acceptance of responsibility. Cooperation is a factor in some cases, especially in multiple defendant cases in which one defendant informs or testifies against another. However, one defense attorney found it distasteful to "roll the client" in a situation like this. Another believed that his only influence lies in convincing the judge that there are grounds for departure.

Two of the defense attorneys expressed resentment at what they saw as the power of the probation officer. One attorney vehemently opposed to the guidelines referred to the probation officer as "the sentencing official," and was critical of their fact-finding role. Another defense attorney saw the probation officer's function as that of resolving disputes. He observed that disputes do not happen often, and that "the people here are fair." Describing the assistant U.S. attorneys at the site, one defense attorney said that they are not "overly aggressive" in applying relevant conduct and will on occasion negotiate it away.

Policies and Procedures Affecting Guidelines Implementation

Presentence Report Investigation and Disclosure/Dispute

Probation officers do nearly as many presentence reports on Class A misdemeanors for magistrate court as for felonies in district court. Supervision caseloads are down because, according to the supervisor, more defendants are going to prison.

Cases are assigned to probation officers on a rotating basis with geography being a consideration. Supervision is handled in the same way so that the numbers stay relatively even. In preparing the presentence report, probation officers gather "all relevant facts of the case" and then decide what is appropriate to include and what is not. If something is questionable, the supervisory probation officer makes the final decision, "keeping in mind [the] obligation to report everything to the court." Applicable grounds for departure are included. Before disclosure, presentence reports are reviewed twice by the supervisor who exercises quality control.

Presentence reports are disclosed to attorneys 25 days before sentencing. By statute, they have 10 days to return objections (in writing), but in practice this has been stretched to 20 days. Probation maintains a policy that the objection process is as formal as possible, and accepts no verbal objections from either government or defense. Officers are required to deal with each objection, regardless of whether it changes the guideline calculation. The supervisory probation officer remarked that assistant U.S. attorneys are punctual in getting objections back to the probation officer, but "defense attorneys are terrible." He said that they do not badger defense attorneys. If the officer does not have time to respond to a late objection, it is put into the addendum to be addressed by the judge. The report is received by the judge five days before sentencing.

Dispute Resolution

According to probation officers, there are not many disputes with the prosecution, and those that do occur are resolved informally "before it ever gets to paper." With defense attorneys, disputes are typically resolved in court. One probation officer said that if there is any gray area, the defense attorneys will take their chances in court rather than concede in meetings with probation. Another probation officer expressed frustration at the process when a defense attorney brings up an objection to the presentence report for the first time at sentencing and the judge allows it.

A probation officer from another site in the district complained about the lack of understanding of relevant conduct by defense attorneys. When responding to objections filed, probation uses a coversheet for the presentence report that states: "The following objections pertain to the guidelines; the following do not."

Charging

The supervisory assistant U.S. attorney cited the Thornburgh memo as the office policy for making charging decisions, reporting that they charge the most readily provable offense. The vital question to be answered in making charging decisions (and in plea negotiations as well) seems to be: "Is it defeating the purpose of the guidelines?" A number of pleas have been taken in cases that were not charged with a mandatory minimum but whose guideline range was greater than ten years. There may be other situations in which an offense carrying a mandatory minimum sentence might not be charged. One assistant U.S. attorney gave an example of a very minor participant agreeing to cooperate with the government.

Informations are used in any pre-indictment plea, regardless of the type of case. Once in a while an information is used where there is a plea to a charge not cited in the indictment. Superseding informations or indictments are frequently used, generally when an investigation continues and new information is learned about the offense. Superseding indictments often add counts.

Pretrial diversion or deferred prosecution is considered on a case-by-case basis, generally when the guideline range allows probation and there is an articulable reason for it, such as mitigating circumstances.

Cases are sent to the state for prosecution if they fall below the U.S. attorney's guidelines. For example, a bank or fraud case involving a dollar amount of less than $15,000 would go to the state for prosecution. If after 90 days there has been no action, the federal government takes another look. In an effort to pursue certain state cases, the U.S. attorney's office has been trying to get the state police to work with them and has had some success in drug cases. The federal government would like to prosecute the larger cases, but the supervisory assistant U.S. attorney admitted that it is a touchy area because they don't want to give the state the feeling that they're taking all the big cases and leaving the "trash."

Pleas

When asked about the type of plea agreements he was willing to accept, the judge replied (before answering the question) that plea agreements are the part of the sentencing guidelines least attractive to the judge. He said that 80 to 90 percent of plea agreements are a product of the government's charging decision and stated that he must read the presentence report to be aware of the scope of the whole offense. He accepts pleas only if he ascertains at the plea hearing that there is a factual basis for the plea. He described the circuit as "tough on Rule 11s; we do it like the book . . . or not at all in this circuit." He does not accept binding pleas and dislikes recommendations such as a sentence of probation. "If someone deserves probation, I'll get there, but don't bind me to it."

All plea agreements are written. The Thornburgh memo is the guide, and defendants must plead to the most readily provable offense or an equal charge. If the assistant U.S. attorney offers a plea to a misdemeanor count in exchange for dismissing a felony charge, the supervisor must approve. With regard to stipulations, the U.S. attorney's office has not resolved what the policy should be. The circuit has ruled that the court is not bound by stipulations in the plea agreement, and a problem may arise when they stipulate to certain facts and the court finds otherwise. The supervisory assistant U.S. attorney speculated that they would probably continue to stipulate to facts in the plea as long as the defendant knows that the judge will not be bound by it. One probation officer's version of this evolving policy is that the U.S. attorney's office tried to control the guidelines

through stipulations in the plea agreement but now realizes that the "probation officer is the interpreter" of the guidelines.

The supervisory assistant U.S. attorney remarked that when the guidelines first went into effect, their office was concerned that everything would go to trial. In fact, this has not happened, and defense counsel has not been deterred from plea negotiations. This observation is validated by the high plea rate (over 95%) in the district.

Substantial Assistance

In order to recommend a sentence reduction for substantial assistance, assistant U.S. attorneys must have the approval of their supervisors. The amount of reduction is not specified. The judge has warned assistant U.S. attorneys that they better not make any recommendation based on substantial assistance that is not "real." The judge also enforces a plea agreement to cooperate, informing the defendant at the hearing that he will go to the top of the range or "through the roof" if the defendant does not cooperate.

Appeals

When asked about problems and benefits of the guideline system, the first assistant U.S. attorney mentioned that the appellate caseload has "skyrocketed." Defendants are appealing even after a guilty plea. He said the office has been able to deal with the increase by hiring a new assistant whose primary responsibility is appeals. None of the four assistant U.S. attorneys interviewed said they had appealed a sentence.

Acceptance of Responsibility/Chapter Three Adjustments

There is no specific policy in the probation office for recommending the reduction for acceptance of responsibility or for other Chapter Three adjustments such as role in the offense and obstruction. The supervisory probation officer commented that they do have a very lengthy dialogue about acceptance. Another probation officer said that it is a gray area, but that there is a general rule that if the defendant goes to trial and claims he is still innocent, he will not receive the adjustment. However, he cited exceptions to this practice. The supervisory assistant U.S. attorney's perception is that probation recommends acceptance "no matter what," even after the defendant goes to trial and denies guilt. The supervisor said that so far they have objected without effect, but will continue to make an issue of it when the appropriate case comes along.

According to one assistant U.S. attorney, the "hottest" area of litigation is the defendant's role in the offense. He suggests to the probation officer what he believes is the defendant's role, but defense attorneys always attempt to litigate the issue. This assistant U.S. attorney reported that most of the appeals of drug cases were based on role in the offense adjustments.

Observations and Impressions

Because the percentage of guideline cases is low compared with the national figure, the site might be described as being in the early stages of guideline implementation. At present, probation officers are in the forefront of guideline application knowledge and seem conscientious about applying the guidelines. Apparently in some areas, judges and attorneys have either resisted or simply have not become well informed, while in other areas there are individuals who have made the adjustment and are knowledgeable in guideline application.

Appendix B:

The Pre-Guidelines Study

The Pre-Guidelines Study

Introduction

In 1988, an evaluation strategy was designed that called for a series of interviews to be conducted as the guidelines were being implemented. The strategy called for the interviews to be repeated two years after the guidelines had been in effect, and once more after the guidelines had been fully implemented (*i.e.*, the majority of cases were sentenced under the guidelines). It was anticipated that this design would provide the data to set the stage for case resolution practices before, during, and after the implementation of sentencing guidelines. However, a series of difficulties prevented the initial interviews from serving as a rigorous pretest in the assessment of the guidelines. Uncertainty brought about by the court challenges to the constitutionality of the Sentencing Commission, combined with limited staff resources and the mobility of federal practitioners, made the original plan difficult to implement.

Nonetheless, these interviews are instructive concerning pre-guideline practices of case resolution in ten jurisdictions.[1] The following section contains a description of the results of those interviews. It should be understood that the overview, description, and analysis are limited to the case resolution patterns and practices in the ten offices and are not intended as a definitive pre-guideline assessment of issues.

Jurisdictions participating in this initial phase of the project represented a wide range of size and geographic locations. In each site, Commission staff interviewed assistant U.S. attorneys, federal probation officers, and private and public defense counsel. The interviews were conducted during the latter part of 1987 and the first quarter of 1988. Although this period post-dates the implementation of the guidelines, the overwhelming number of cases in the judicial system were non-guideline cases. Therefore, the timeframe of the interviews does not present a major problem for analysis. A total of 130 individuals were interviewed in this phase of the evaluation. The following section presents a description of the findings from these interviews regarding case processing, plea negotiation, and disposition.

I. Charging Decisions

The initial interviews contained a series of questions that focused upon identifying the factors important to the charging decision by assistant U.S. attorneys. The principal areas of concern in the interviews were the initial decision whether to file charges, the specific charges to file, and the importance of sentencing exposure to the charging decision.

A. Deciding Whether to Charge

Not surprisingly, assistant U.S. attorneys overwhelmingly reported that evidentiary concerns were the principal consideration in their decision to charge. In each site where responses were obtained, assistant U.S. attorneys most often noted that the strength of evidence or the likelihood of conviction were the most important considerations. Typical responses reflected the view that offenses would not be charged unless there were a "reasonable chance of conviction."

However, in several sites, assistant U.S. attorneys frequently noted that serious offenses and/or offenders with a serious criminal history may have to be charged even if the evidence is weak. In

[1]The interview instruments are available upon request to the Sentencing Commission.

several sites, assistant U.S. attorneys frequently noted that cases with weaker evidence involving serious criminal behavior or notorious defendants may be indicted where otherwise they would not.

Furthermore, assistant U.S. attorneys in several jurisdictions reported an interactive effect between the seriousness of the offense and offender characteristics, *i.e.*, offenders with more lengthy records may be charged in situations with less evidence than minor or first offenders. In addition, it was frequently observed that while there are some offenses (*e.g.*, bank robbery) that would always be charged, the charging of other less serious offenses can depend upon offender characteristics. For example, defendants with longer criminal histories or having more serious involvement in the offense were viewed as more likely to be charged.

B. Deciding What to Charge

Assistant U.S. attorneys gave similar responses to questions regarding the factors determining what specific charges to file against an individual defendant. In almost every office, the most frequent response was that the selection of offenses to charge was guided by evidence and proof considerations. For the most part, assistant U.S. attorneys reported that all offenses with sufficient evidence would be charged. A typical response by one assistant U.S. attorney was, "We charge as much as we can prove -- every crime we can think of."

Assistant U.S. attorneys reported that a second important element in deciding what crimes to charge was a consideration of how the charges would appear to a jury. Respondents often stated that it was beneficial to select charges representing the range of total criminal behavior so that the jury would not think of the case as a one-count case. In addition, a number of assistant U.S. attorneys noted that it was important in complex cases to limit the charges so as not to confuse the jury with lengthy trial presentations.

A third consideration observed in two jurisdictions was that charging is influenced by the solicitation of cooperation and bargaining strategy. Respondents said that charging additional counts could persuade defendants to plead guilty or cooperate. However, it was noted in two other jurisdictions that bargaining strategy was not considered in the charging decision. One assistant U.S. attorney summarized these influences by noting that the charging decision was a function of (1) the evidence -- what you can prove, (2) what a jury can understand, and (3) what kind of leverage you need for plea bargaining and getting cooperation.

In all ten offices, assistant U.S. attorneys indicated that criminal behavior was generally charged in more than one count. While charging multiple counts was viewed as facilitating bargaining strategy, there also were practical limits to the numbers of counts that would be included. In some types of cases, particularly fraud, charging all behavior could result in hundreds of counts. A wide range of factors was noted that could influence the selection of counts to charge. These included the seriousness of the offense, available proof, and a concern for charging counts that would best represent the range of criminal conduct. In addition, victim characteristics were viewed as influencing the specific counts to be charged. Those cases in which the victim suffered large losses, had the best evidence, would make the best witness, and did not precipitate the offense would be selected for prosecution.

C. Sentencing Exposure

While sentencing exposure was generally viewed as important in the charging decision, it too had practical limitations. In eight of ten jurisdictions it was most frequently stated that enough exposure had to be given to the judge to impose an "adequate" sentence (from the assistant U.S. attorneys'

perspective). According to assistant U.S. attorneys, exceeding this amount may be seen as overkill because the judge will not impose over a certain length of sentence anyway. Charging additional counts may actually harm the government's case since it may make the assistant U.S. attorney appear unreasonable, can confuse the jury, and can anger the judge. A widespread viewpoint was that there is generally so much exposure that, as a practical matter, exposure is not a major consideration. Exposure, in most cases, does not affect the actual sentence. In many jurisdictions, however, a minority of attorneys noted that exposure was a principal consideration for them since they wanted the defendant to face as much prison time as possible.

D. Charging Scenarios

One method that was used to elicit the various aspects of the charging decision was asking respondents to indicate how they would handle a particular hypothetical case situation. All assistant U.S. attorneys were asked if they had a case involving a bank robbery with reasonable proof that the defendant was armed, whether there would be any circumstances in which they would charge unarmed robbery. There was considerable agreement on this across jurisdictions. In eight of the ten jurisdictions, assistant U.S. attorneys overwhelmingly stated that it would be difficult for them to envision a situation in which armed robbery would not be charged, although some assistant U.S. attorneys did indicate that in rare situations involving cooperation this may take place. In addition, a majority of assistant U.S. attorneys in eight offices believed that exposure was to some degree important in this decision. A number of assistant U.S. attorneys noted that the importance of exposure was often not so much in the actual time given to the defendant, but in demonstrating to the court the seriousness of the behavior. Many expressed the view that if the government does not take the offense seriously, the court may not treat it seriously. Other assistant U.S. attorneys noted that exposure was not the issue by itself; rather, certain offenses represent serious criminal behavior and should be charged accordingly. Thus, while exposure was viewed as being important, it was not a paramount issue.

E. Summary of the Charging Decision

Assistant U.S. attorneys reported that the charging decision was largely guided by concerns of offense seriousness and evidence considerations. Furthermore, in less serious cases, defendant characteristics, particularly prior record, can influence the charging decision. While it was agreed that sentencing exposure is important, in most cases, it is not a major consideration in charging since exposure is generally adequate and the judge will not give additional time beyond what he or she considers sufficient.

II. Case Resolution Process

A. Timing of the Plea

The process of case resolution was viewed as beginning at different points in the life of the case. This varied across sites as well as within sites. In four sites, a majority of assistant U.S. attorneys noted that discussions with defense counsel usually begin after indictment; however, in one other office, assistant U.S. attorneys overwhelmingly (seven of nine interviewed) noted that negotiation begins prior to the indictment. In the remaining jurisdictions, assistant U.S. attorneys were divided evenly about the timing of initial discussions with defense counsel. Within districts, responses often indicated that the initiation of plea negotiation depends upon the type of case. Fraud, tax, and other white-collar cases were identified as being most likely to involve pre-indictment negotiation. Furthermore, in several sites, assistant U.S. attorneys reported that cooperation was a critical factor

in the timing of case resolution. In one jurisdiction, assistant U.S. attorneys noted that perhaps 10 percent of non-cooperating defendants would have a pre-indictment agreement compared to 50 percent of the defendants who were cooperating with the government.

B. Pre-Indictment Pleas

As noted above with regard to timing, there was considerable variation within sites on the frequency of pre-indictment pleas. Responses by assistant U.S. attorneys indicated that the frequency of pre-indictment pleas ranged from "sometimes" to "often." This variation can be largely explained by the fact that in almost every jurisdiction it was reported that the availability of pre-indictment pleas depended upon the type of case. Pre-indictment agreements were more frequent in tax, fraud, and other white-collar cases and less likely to occur in drug cases. In one jurisdiction, assistant U.S. attorneys noted that the pre-indictment pleas were more likely in cases involving substantial investigation and less likely to happen in reactive cases, while in another office, it was noted that as much as 75 percent of fraud and white-collar cases involved a pre-indictment agreement.

C. The Importance of Cooperation

Across all districts, there was unanimous agreement that cooperation was of tremendous importance in the plea negotiation process. In multiple defendant cases and in cases involving conspiracy, cooperation was viewed as a major prosecution tool. One assistant U.S. attorney observed that "cooperation is the biggest single factor" in plea negotiations. This individual went on to state that the difference between cooperating and not cooperating is larger than the difference between pleading and not pleading guilty. Others noted that cooperation helps pull the case together -- without cooperation the evidence may be disjointed. The critical nature of cooperation was emphasized by an assistant U.S. attorney in another office who stated that some cases just cannot be made without cooperation. Finally, in another jurisdiction, it was noted that over 90 percent of the cases resolved prior to trial involved cooperation. This statement was reinforced by U.S. attorneys in four other jurisdictions stating that they were not interested in a plea without cooperation.

Assistant U.S. attorneys were asked what the incentives were for defendants to cooperate with the government. Across all districts, assistant U.S. attorneys reported that the incentive to cooperate consisted of reduced sentencing exposure in the form of a plea to fewer counts. In addition, in all but one jurisdiction, it was noted that a major incentive was having the government inform the court of the defendant's cooperation. Depending upon office practices, this could be either in the form of a letter to the judge or a statement at sentencing. The comments of one assistant U.S. attorney exemplify the importance of this communication. "A letter to the judge makes all the difference. The judge invariably takes this information into account. A letter is worth a lot more than dropping counts." In two jurisdictions, the government having "no recommendation" at sentencing was reported as an incentive to cooperate and in five jurisdictions, a sentencing "cap" also was used to obtain cooperation.

One indicator of the importance of cooperation in the plea negotiation process is the degree to which cooperating defendants who have been charged with an offense having a mandatory minimum sentence are allowed to plead to reduced charges. In six of the eight jurisdictions in which this question was asked, assistant U.S. attorneys noted that cooperating defendants facing a mandatory minimum sentence may be allowed to plead to lesser charges. However, there was substantial variation in this practice across districts. In one jurisdiction, assistant U.S. attorneys said that this

situation would be the exception and the cooperation would have to be substantial and extremely valuable. On the other hand, in another jurisdiction, this was viewed as a more frequent occurrence.

A common statement made by assistant U.S. attorneys across most jurisdictions was that with a mandatory sentence there is no incentive to cooperate. Such a perspective was expressed by defense attorneys in seven jurisdictions who indicated that they would advise their clients not to plead guilty when they had nothing to lose, such as an offense having a mandatory minimum sentence. Defense attorneys noted that in cases involving mandatory minimum counts, their strategy would be to do anything possible to get the government to drop this charge. In five jurisdictions defense attorneys most often mentioned that their strategy would involve a plea to a conspiracy charge (not carrying a mandatory minimum sentence), while in four other jurisdictions, defenders noted that their strategy would most often involve an offer of cooperation in exchange for dropping the mandatory minimum. In the remaining site, defense attorneys stated that prosecutors would either offer a plea to a possession charge or an increased number of charges that did not involve the mandatory minimum sentence. Regardless of the defense strategy, in each jurisdiction, defense attorneys indicated that the chances of getting the mandatory minimum charge dropped were not very good.

D. Summary of the Case Resolution Process

The case resolution process flows from the initial contact between the attorneys to discuss potential plea agreements through the preparation of the presentence report and sentencing. The path that a case takes through this process depends upon a variety of factors. The type of case and the degree of the defendant's cooperation with the government, were reported to be of considerable importance. Cases involving lengthy investigations such as fraud, tax, or other white-collar offenses were viewed as more likely to have negotiations and possible agreements prior to indictment. In addition, cooperation was universally viewed as a critical factor in case resolution. Cooperating defendants were more likely to have pre-indictment pleas than non-cooperators. Furthermore, cooperation was viewed as often integral to the ability of the government to make cases in certain situations. Depending upon the circumstances of the case, there was agreement that current practices allowed cooperating defendants facing an offense having a mandatory minimum sentence to plead to a lesser offense. There was, however, considerable variation between jurisdictions in the frequency of this practice.

III. Plea Negotiation Strategies

In the plea negotiation process, two approaches were the most commonly mentioned. One of these involved the reduction of specific charges or the number of counts and is known as charge bargaining. The second involves negotiation over certain elements of the offense that may affect sentencing and is known as fact bargaining. A series of interview questions were posed to determine the prevalence of these approaches to plea negotiations.

A. Charge Bargaining

Assistant U.S. attorneys were asked to indicate the most important considerations in their decision concerning which counts to reduce or dismiss as part of a plea agreement. Two principal dimensions characterized this decision -- exposure and scope of the offense. First, prosecuting attorneys said that they dismiss counts or other charges only if exposure is adequate. In most cases, they indicated that this meant retaining the most serious charge. If exposure is appropriate for an offense, the additional charges do not matter and can be dismissed with no cost. Assistant U.S. attorneys also indicated that the charges remaining after dismissal should reflect the range of

criminal behavior. Cases should not be dismissed to the extent that the judge or jury will not be able to understand the scope or seriousness of the defendant's criminal behavior. Because of these considerations, assistant U.S. attorneys indicated that defendants are generally required to plead to the most serious charge. However, assistant U.S. attorneys in many jurisdictions noted that in certain circumstances cooperating defendants may be allowed to plead to lesser offenses. Assistant U.S. attorneys stated that cooperating defendants would not be required to plead to the most serious charge even if, upon further investigation, it did not adequately reflect their conduct.

Concerning defendants charged with offenses having mandatory minimum sentences: in all jurisdictions, assistant U.S. attorneys noted that as a general rule defendants were required to plead to mandatory minimum offenses. However, in over half of the jurisdictions, it was observed that cooperating defendants may not have to plead to the charge carrying the mandatory minimum. In one jurisdiction, several assistant U.S. attorneys mentioned that this may depend upon the type of case. For example, in gun cases, the five-year mandatory minimum consecutive sentence required in 18 U.S.C. § 924(c) is often used as a bargaining strategy.

Defense attorneys responded in a similar manner indicating that their decision regarding the counts to which to plead was based on minimizing the risk faced by their client. To a large degree this meant attempting to reduce sentencing exposure and avoiding a plea to offenses with a mandatory minimum sentence.

B. Charge Bargaining Scenarios

In order to obtain more specific responses concerning the factors that are important in charge bargaining, assistant U.S. attorneys were presented with several scenarios and asked to indicate the circumstances that would warrant a reduction of charges. One of these cases involved a defendant who was charged with three armed bank robberies. Assistant U.S. attorneys who handled these types of cases were asked if there were circumstances in which the defendant would be allowed to plead to one bank robbery. There appeared to be considerable variation across jurisdictions on this issue. In four jurisdictions, this was reported as a common practice. In one jurisdiction, almost all the assistant U.S. attorneys noted that if there were no aggravating circumstances and that one count reflected the seriousness of the behavior and gave the judge the flexibility to sentence "appropriately," the other two counts would normally be dropped. Other assistant U.S. attorneys in these offices said that they would anticipate what the judge was likely to do and if no additional time was likely, the additional counts would be dismissed. As one assistant U.S. attorney stated, "I don't like to fight battles unless the victory is worth the fight." In other jurisdictions it appeared that this practice was less common. In three districts, while assistant U.S. attorneys acknowledged that these two charges may be dropped in certain circumstances (*e.g.*, providing very valuable cooperation), it was not a common practice. In one jurisdiction, it was noted that the defendant would be required to plead to all counts.

A second scenario was presented to prosecutors who handled drug cases. The hypothetical scenario involved a defendant being allowed to plead to an amount of drugs less than that originally charged. In eight districts it was generally observed that this could occur. Usually a defendant would be allowed to plead to lesser amounts of drugs in a situation that involved substantial cooperation. There was, however, variation in the frequency of this situation. In one office, it was noted by all assistant U.S. attorneys that this was a quite common situation, while in another office it would be quite rare. Generally, across all sites it appears that defendants are allowed to plead to having lesser amounts of drugs but this practice does not appear to be common, and substantial cooperation is most often required.

In all districts except one, there was unanimous agreement among the assistant U.S. attorneys that the information about dismissed robberies or the greater amount of drugs would come to the attention of the court and be considered in sentencing. Most often it was observed that this information comes to the court's attention through the presentence report in the government's version of the offense. One assistant U.S. attorney noted that they will engage in a "fiction for the purpose of the plea, but the court will always know from the government version the total amount involved." Similarly, an assistant U.S. attorney in another district noted that they will often state in the plea agreement what is agreed not to be charged, affirming that all the facts of behavior will come out; "We will absolutely never tell them it was just one robbery."

Defense attorneys in every jurisdiction agreed that the information about the dismissed counts is available to the court, generally through the presentence report, or information contained in the indictment. As one defender noted, the plea agreement limits the exposure -- not the information. In another jurisdiction, respondents said that there was standard language in the plea agreement to the effect that a full statement of all facts would be given to the probation office. Defense attorneys in each district noted that the plea agreement did not limit the information that the government provided to the probation officer. However, in several jurisdictions defense attorneys said that the assistant U.S. attorney may put a different "spin" on the information for cooperating defendants.

While defendants may plead to a reduced number of counts, sentencing may be influenced by what is included in the presentence report. Probation officers were asked how dismissed counts affect the sentence recommendation. In seven districts, the majority of probation officers noted that their sentencing recommendations were based on the "total offense behavior" rather than on the specific conviction offense(s). Typical of this viewpoint were the comments of one probation officer, "If the offense involved ten checks and the defendant pled to one, the recommendation would include all ten." Another probation officer noted, "We don't really care about the counts, we care what they did." In some jurisdictions, probation officers said that while they may not go into full detail about the dismissed counts, their recommendations would be the same regardless of the number of counts to which the defendant pleaded. In two offices, the probation officers stated that they confined their recommendations to only the offenses to which the defendant pleaded (or was convicted).

D. Fact Bargaining

Assistant U.S. attorneys as well as defense attorneys were presented with several case resolution scenarios involving various types of factual disputes and asked what effect such disputes would have on plea negotiations. The first of these situations involved a dispute over the actual amount of an embezzlement: the government alleged that $750,000 was involved, compared to the defense claims of $250,000. There was considerable variation among the responding attorneys suggesting that these practices may be more likely to be individually determined than site-specific. For example, in one district, three assistant U.S. attorneys indicated that they would allow the defendant to plead and then argue the actual amount at a sentencing hearing, while two other assistant U.S. attorneys said that they would insist on a plea to the entire amount. Defense attorneys in this jurisdiction indicated that they felt that an agreement could generally be worked out without resolving the difference. Overall a majority of assistant U.S. attorneys indicated that a plea agreement could be attained without resolving this dispute, particularly if there would be no difference in the sentence. As one assistant U.S. attorney observed, "The important thing is to get the defendant before the judge with enough exposure and let the court hold a sentencing hearing to resolve the dispute."

While in some jurisdictions defense attorneys felt that the amount of the difference would prevent a plea, defenders overall said that an agreement could be reached in spite of this difference. As

one defense attorney stated, they could agree to disagree on the amount, assert their position in the defendant's statement in the presentence report, and ask for a sentencing hearing, requesting the judge to disregard the difference. In many districts, defense attorneys noted that they would greatly prefer working out such differences informally and avoid a sentencing hearing or trial. It was noted by some defense attorneys that their strategy and the likelihood of attaining an agreement may depend upon whether the actual amount is charged in the indictment. In that case, it is unlikely that an agreement can be reached.

A second scenario involved a disagreement concerning the role of the defendant in a drug offense: the government asserted that the defendant was a drug supplier while the defense claimed the defendant was a courier. There was general agreement about how this situation would be handled. In all districts but one, a majority of assistant U.S. attorneys indicated that they believed a plea agreement could be attained without resolving this dispute. As one assistant U.S. attorney noted, "The issue here is not of guilt, the defendant is willing to admit guilt; it is how guilty which is an issue for sentencing." Similarly, several assistant U.S. attorneys in another district reported that this situation happens quite frequently, and they simply agree to disagree and argue it before the judge at sentencing. An assistant U.S. attorney in another district noted that since it was unlikely that the defendant would get any additional time (particularly with mandatory minimum cases), why not go ahead and take the plea?

Defense attorneys were in agreement that a plea could be negotiated in spite of the dispute about the role of the defendant. In seven districts, defense attorneys agreed that this type of dispute would not stand in the way of a plea. One defense attorney said that this type of dispute does not make a difference in the plea but can make a difference in sentencing. Regardless of whether the attorney thought a plea could be reached or not in this situation, there was a strong preference expressed for resolving this dispute informally. Such a resolution was viewed as being preferable to a sentencing hearing on this issue.

A third scenario presented a situation in which the government claimed that a defendant attempted to bribe a federal agent in a narcotics case. The defense was willing to admit the drug charge but denied the bribery. There was considerable variation in the opinions of assistant U.S. attorneys both within and across sites about how this case would be handled. In four jurisdictions, assistant U.S. attorneys felt that this behavior was so serious that they would not accept a plea without an admission of the bribery, particularly if the bribery is important to the drug case. However, in two districts, assistant U.S. attorneys overwhelmingly indicated that they would take a plea and then submit the facts of the bribery to the sentencing judge. There was no pattern to the responses from the assistant U.S. attorneys in the remaining jurisdictions.

There was more agreement among defense attorneys regarding how this situation would be handled, although there was still considerable across-site variation. In five districts, defense attorneys agreed that, given the seriousness of this offense, the dispute would need to be resolved before a plea agreement could be attained. However, in three other jurisdictions, defense attorneys indicated that they could reach a plea agreement through a strategy involving the dismissal of the bribery charge.

Another mechanism that may be employed in the resolution of factual disputes is the stipulation of facts in the plea agreement. Both assistant U.S. attorneys and defense attorneys were asked about this practice in their jurisdiction. There was general agreement that although it was possible to put stipulated facts in the plea agreements, this was done infrequently. In one district it was reported that it was common for the plea agreements to include detailed facts to which the offender was

pleading (although it was not clear that these were stipulated facts or in any way different from those stated in the indictment).

Another strategy to resolve disputed factual situations is through evidentiary hearings. There was agreement across all sites that although such hearings were held after a plea, they are rare. Several assistant U.S. attorneys noted that they attempt to avoid such hearings because they can be time consuming and judges do not like to hold them.

D. Summary of Plea Negotiation Strategies

The manner of case resolution was found to be dependent on a wide range of factors that vary by the individual case situation. However, these interviews revealed several common influences on bargaining strategy. First, charge bargaining was noted to be quite common, and the degree of negotiation depended upon exposure and the scope of the offense. Second, although it was reported that defendants were normally expected to plead to the most serious offense (including those having mandatory minimum sentences), those defendants who cooperate with the government may be allowed to plead to reduced charges. Third, cooperation was emphasized as a principal factor in case resolution. Fourth, there was agreement that even though counts would often be dismissed, the information on these criminal behaviors comes to the attention of the court and influences sentencing. Probation officers most often noted that their recommendations were based upon the "total offense behavior" rather than the counts to which the defendant pleaded. Finally, with regard to factual disputes, assistant U.S. attorneys and defense attorneys alike reported that in most situations factual disputes could be overcome and plea agreements could be reached regardless of differences concerning role or amounts of money or drugs involved in the offense. Most factual disputes were related to issues of sentencing and not guilt and could be resolved at a sentencing hearing if necessary. However both parties generally agreed that an informal process was preferred (and generally was effective) in resolving disputes. Sentencing hearings were rarely held.

IV. Conclusion

The analysis of the pre-guidelines interviews with assistant U.S. attorneys, defense attorneys, and probation officers revealed a range of variation as well as numerous consistencies in the case negotiation and resolution process. Much of the variation in responses was within jurisdiction. Such an outcome may be expected from the fact that individual attorneys have their own style of practicing their "craft." Although this might suggest the primacy of individual factors, a number of consistent patterns were found in this description of case processing in these ten jurisdictions. In particular, the strength of evidence, type of case, offense seriousness, the role and culpability of the defendant in the offense, the degree of cooperation with the government, and the adequacy of sentencing exposure were all found to be critical in determining where and how cases were resolved in these jurisdictions prior to guideline implementation.

The Federal Sentencing Guidelines

A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining

137983

The Federal Sentencing Guidelines:

A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining

United States Sentencing Commission

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Chapter Four

Disparity in Sentencing

Introduction

Historically, criminal sentencing in the United States has embraced a variety of philosophical perspectives, ranging from a theory that focuses on the offender and his/her potential for rehabilitation to a system that emphasizes the offense and an appropriate sanction for punishment and deterrence purposes. Until the mid-1980s, the federal sentencing system was guided by the rehabilitative philosophy. This focus on the offender manifested itself in an indeterminate sentencing structure in which disparity among similarly situated offenders was an inevitable consequence. The presumption was that such disparity was warranted due to the need to accommodate individual differences in offenders' likelihood of rehabilitation.

Congress, determined to move away from the rehabilitative model as the dominant rationale for sentencing, sought through the Sentencing Reform Act of 1984 to establish a sentencing structure grounded in four clearly articulated purposes: just deserts, deterrence, incapacitation, and rehabilitation. Consistent with this approach, Congress abolished parole and instituted a system of determinate sentencing. A primary goal of the new sentencing structure was the reduction of unwarranted sentencing disparity.[367]

As part of the congressionally mandated evaluation, Congress directed the Commission to examine the impact of the guidelines on disparities in sentencing. This chapter reviews the Commission's preliminary examination of sentencing disparity before and after guideline implementation. The impact evaluation of sentencing disparity seeks to determine whether the range of sentences for defendants with similar criminal records convicted of similar criminal conduct has narrowed as a result of guideline implementation.

Before focusing on methodological issues, it is important to understand how the Commission defines disparity and related terms. The literature is replete with a number of different definitions of disparity, contributing to problems in categorizing and replicating prior research. In evaluating the guidelines, the Commission uses the definition of disparity provided by Congress. That is, disparity exists when defendants with similar criminal records found guilty of similar criminal conduct receive dissimilar sentences (28 U.S.C. § 991(b)(1)(B)). For interpretive and comparative purposes, it is important to appreciate how this congressional definition of disparity relates to various diverging opinions on the subject. Section II of this chapter deals with definitional issues.

The data analysis in this chapter examines the range of sentences for defendants with similar criminal records convicted of similar criminal conduct before and after implementation of the guidelines. The chapter discusses avenues of future research on disparity in sentencing and presents findings from two preliminary studies.

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[367]For a more complete history of structuring discretion, *see* Mistretta v. U.S., 488 U.S. 361 (1989); Wilkins, Newton & Steer, The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem, 2 Crim. L.F. 355 (1991); Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883, 913-39 (1990); Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 8-14, 18-20, 28-31 (1988).

I. Overview of Disparity Literature[368]

The history of studying disparity in criminal sentencing from an empirical perspective can be traced back as far as 1919.[369] While much of the empirical work analyzing sentences was based on data drawn from experience in state courts, the findings may be similar to processes and behavior at the federal level. More specifically, the early studies focused primarily on the use of capital punishment and sought to discover if the correlates of whether or not capital punishment was imposed depended upon the seriousness of the offense, the offender's criminal history, or the defendant's race.[370] These studies, although provocative, were seriously limited by their use of bivariate statistical techniques.

Later studies used multivariate techniques to distinguish the independent effects of characteristics such as race, sex, or socio-economic status on various sentencing outcomes as possible bases of disparity.[371] In an effort to explain why offenders received different sentences, such studies often divided sentencing factors into two groups, legal and extra-legal factors. Legal factors generally included offense seriousness and prior criminal history, while extra-legal factors generally included considerations such as race, sex, and age.[372]

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[368]Much of this abbreviated literature review comes from testimony by Commissioner Ilene H. Nagel before the Subcommittee on Criminal Justice of the House Judiciary Committee in which she points out that early research on sentencing disparity followed a tradition, with increasing methodological sophistication, of exploring the relationship between the use of the defendant's race, sex, socio-economic status, and sentence outcome. *See* Hearings on Sentencing Guidelines Before the Subcomm. on Criminal Justice of the House Judiciary Comm. Hearing, 100th Cong., 1st Sess. 39 (1987).

[369]*See* Everson, The Human Element in Justice (1919).

[370]*See* Garfinkel, Research Note on Inter- and Intra-Racial Homicides, 27 Soc. Forces 369 (1949). A portion of Garfinkel's data also is reported in Johnson, The Negro and Crime, 217 Annals 93, 98-100 (1941); Baldus, The Dialectics of Legal Repression: Black Rebels Before the American Criminal Courts (1977). *See also* Sellin, The Penalty of Death 56-58 (1980); Baldus & Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L.J. 170 (1975); Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984); Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 73-87 (1984).

[371]*See* 2 Research on Sentencing: The Search for Reform (Blumstein, Cohen, Martin & Tonry eds., 1983) [hereinafter Research on Sentencing]; Unnever, Frazier & Henretta, Race Differences in Criminal Sentencing, 21 Soc. Q. 197 (1980); Chiricos & Waldo, Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition 40 Am. Soc. Rev. 753 (1975); Atkinson & Newman, Judicial Attitudes and Defendant Attributes: Some Consequences for Municipal Court Decision-Making, 19 J. of Pub. L. 68 (1970).

[372]*See, e.g.*, Hagan, Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint, 8 L. & Soc'y Rev. 357 (1974); Nagel & Hagan, Gender and Crime: Offense Patterns and Criminal Court Sanctions, 4 Crime and Justice 91 (Morris & Tonry, eds., 1983); Hagan & Bumiller, Making Sense of Sentencing: A Review and Critique of Sentencing Research, in 2 Research on Sentencing: The Search for Reform, *supra* note 371; Smith & Visher, Sex and

(continued...)

Despite the attention given by empirical and legal researchers to the question of sentencing disparity, there was a notable dearth in studies on sentencing disparity for federal rather than state offenders. This changed in the late 1970s and early 1980s when a number of researchers focused on disparity in sentences imposed on individuals convicted of federal crimes.[373]

With the implementation of sentencing guidelines, researchers are beginning to ask whether the new system will be able to meet the congressional mandate of reducing unwarranted sentence disparity.[374] While not addressing the substantive merits or methodological strengths or weaknesses of these most recent studies, the emergence of new literature re-emphasizes the interest that Congress, the public, and the research community have in the reduction of unwarranted sentencing disparity.

II. Definitional Issues

Sensitive to mounting public concern advocating change in the penalties provided for criminal defendants, Congress initiated wide ranging discussions of criminal justice reform. Specifically, in struggling with the issue of sentencing reform, Congress repeatedly returned to the question of disparity in federal sentencing. The Senate Report of the Comprehensive Crime Control Act of 1983 illustrates this concern:

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[372](...continued)
Involvement in Deviance/Crime: A Quantitative Review of the Empirical Literature, 45 L. & Soc'y Rev. 72 (1980); Wheeler, Weisburd & Bode, Sentencing the White-Collar Offenders: Rhetoric and Reality, 47 Am. Soc. Rev. 641 (1982); Nagel & Hagan, The Sentencing of White-Collar Criminals in Federal District Court: A Socio-Legal Exploration of Disparity, 80 Mich. L. Rev. 1427 (1982); Nagel, The Legal/Extra-Legal Controversy Revisited: A New Look at Judicial Decisions in Pretrial Release, 17 L. & Soc'y Rev. 4 (1983).

[373]*See, e.g.*, Partridge & Eldridge, Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit, Fed. Jud. C. (1974); Hagan & Nagel, White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York, 20 Am. Crim. L. Rev. 259 (1982); Nagel & Hagan, *supra* note 372, at 1427; Mann, Sarat & Wheeler, Sentencing the White-Collar Offender, 17 Am. Crim. L. Rev. 479 (1980); Wheeler, Weisburd & Bode, *supra* note 372; Diamond & Zeisel, Sentencing Councils: A Study of Sentence Disparity and its Reduction, 43 U. Chi. L. Rev. 109 (1975); Clancy, Bartolomeo, Richardson & Wellford, Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, 72 J. Crim. L. & Criminology 524 (1981); Seymour, 1972 Sentencing Study for the Southern District of New York, 45 N.Y. St. B.J. 163 (1975).

[374]Karle & Sager, Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis, 40 Emory L. J. 393 (1991); Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am. Crim. L. Rev. 161 (1991); Rhodes, Federal Criminal Sentencing: Some Measurement Issues with Application to Pre-Guidelines Sentencing Disparity, 81 J. Crim. L. & Criminology 1002 (1991).

> *[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.*[375]

> *These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence.*[376]

> *The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants.*[377]

> *By dividing the sentencing authority between the judge and the Parole Commission, however, current law actually promotes disparity and uncertainty. First, the dangers of an unfettered exercise of discretion can occur at the time that an offender is released on parole as well as at the initial sentencing. Second, the existence of the Parole Commission invites judicial fluctuation by encouraging judges to keep the availability of parole in mind when they sentence offenders.*[378]

The debate over federal sentencing practices culminated in the enactment of the Sentencing Reform Act of 1984. In the Act, Congress identified the elimination of unwarranted sentencing disparity as one of the principal purposes of the Sentencing Commission:

> *[to]... provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct...*[379]

In delineating the factors to be considered when imposing a sentence, Congress specifically directed courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct".[380] Thus, Congress mandated that both the Commission and the courts focus on the avoidance of unwarranted sentencing disparity.

Beyond the confines of Congress, others have debated the meaning and sources of disparity. In what has become a classic research volume on sentencing reform,[381] researchers argue that there are four types of sentencing disparity. First, there is the appearance of disparity that occurs when

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[375] S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983).

[376] *Id.*

[377] *Id.* at 41.

[378] *Id.* at 46.

[379] *See* 28 U.S.C. § 991(b)(1)(B).

[380] *See* 18 U.S.C. § 3553(a)(6).

[381] 1 Research on Sentencing at 75-77.

cases seem similar on the surface, but in fact differ in one or more key respects. For example, two defendants with identical prior criminal records convicted of the same burglary may receive very different sentences due to the fact that one of the defendants was the organizer of the crime and recruited the other. Thus, disparity may exist but it appears warranted.

Second, disparity may be deliberately introduced as a matter of public policy.[382] This is particularly common when legislators and government officials target a specific type of criminal behavior or offender for increased sanctions without regard to how the new penalty fits within the existing sentencing structure. For example, in response to public concerns about crack cocaine and its association with violence, Congress amended the criminal penalties for possession of five grams or more of crack cocaine to require a five-year prison term. However, defendants convicted of first offense possession of less than five grams of crack by law cannot receive more than one year in prison. Disparity arises due to very small differences in drug amounts, but it is a disparity deliberately created by legislators for public policy reasons.

The third type of disparity is particularly relevant to federal sentencing practices because it involves interjurisdictional disparity. Research has found that sentences across the country may vary significantly as a result of regional differences. For example, districts that include a substantial number of white-collar offenses may sentence these offenders to lesser terms of imprisonment than districts in which white-collar cases are rare.

Finally, disparity can be introduced by the discretion of individual actors in the criminal justice system, particularly judges. To the extent that judges sentence on the basis of their personal criminal justice philosophies and assign different weights to such factors as a defendant's criminal history, role in the offense, and use of a weapon, disparity is created. In addition, decisions made by individual prosecutors about whom and what to charge, as well as decisions by law enforcement agents about targets for investigation or arrest, are potential sources of disparity.

Although consistent with the previous discussion, the Commission's evaluation takes the most direct course by using the definition of disparity provided by Congress. That is, disparity exists when defendants with similar criminal records found guilty of similar criminal conduct receive dissimilar sentences (28 U.S.C. § 991(b)(1)(B)). The following section on measurement issues discusses the way in which this definition affects the data analysis.

III. Measurement Issues

A. Measuring Disparity Pre- and Post-Guideline Implementation[383]

Unwarranted sentence disparity assumes varying definitions depending upon the time period under discussion. As discussed in Volume I of this study, the pre-guideline and guideline periods present quite different contexts for studying disparity in sentencing. Prior to the guidelines, courts

[382]Morris, Anisonomy, or Treating Like Cases Unlike, in Madness and the Criminal Law 179 (1982).

[383]Technically, the "after" portion of the comparison will be limited to defendants sentenced after January 18, 1989, the date of the Mistretta decision. Because pre-Mistretta guideline data do not include courts that found the guidelines unconstitutional, the data including pre-Mistretta cases may be biased.

had virtually unfettered sentencing discretion, constrained only by the maximum or mandatory minimum set by statute. Sentences imposed by the courts were indeterminate, and as such were subject to reductions determined by the Parole Commission of up to two-thirds of the original sentence.

The federal criminal justice system, like other dynamic systems, changes regularly, but the change resulting from guideline implementation fundamentally altered judges' and practitioners' approaches to sentencing. Principally, with the abolition of parole, the sentence imposed under the guidelines essentially became the sentence served. With the sentence-altering potential of the Parole Commission eliminated, judges were required to impose "real time" sentences.

While concerns regarding the appropriateness and difficulties of comparing disparity under pre/post contexts remain, an impact evaluation would be incomplete without attempting such a comparison. The reader is cautioned, however, that fundamental decisions regarding basic sentencing premises undoubtedly have been altered in the transition from a discretionary to a more structured guidelines sentencing system. Accordingly, results should be interpreted keeping these contextual differences in mind.

B. Establishing a Basis for Comparison

The difficulty in identifying defendants found guilty of similar criminal conduct occurs in trying to attain consensus on what criminal conduct is "similar." While this issue can be debated, a logical measure for evaluating the impact of the guidelines is to take the factors shown to be relevant pre-guidelines that were used to develop offense groupings under the guidelines.[384] Thus, for example, robberies are defined as similar when they match a set of specific characteristics that relate to the dollar loss, object of the robbery, weapon use, victim injury, role in the offense, and so forth. Similarly, thefts, embezzlement, and larceny are treated as similar when matched on dollar loss, degree of planning, role in the offense, and so forth.

For purposes of the evaluation, a compromise in this definition had to be made to accommodate the small sample size created by the truncated period permitted for the evaluation. The compromise matches on as many relevant factors as possible while still permitting a sufficient number of cases for analysis. Consequently, this approach limits the degree to which residual disparity might actually be further reduced under the guidelines if perfect matches were available in sufficient numbers.

C. Identifying Defendants with Similar Criminal Records

The standard identified above defines the measurement for defendants convicted of similar criminal conduct. To address the second part of the disparity definition (*i.e.*, defendants with similar criminal records), the evaluation establishes a composite categorization that takes into account both the pre-guidelines' Parole Commission Salient Factor Score and the guidelines' Sentencing Commission Criminal History Category to permit a pre/post comparison.

[384]The Commission's past practices study analyzed approximately 10,000 pre-guideline cases and constructed similar groupings based on decisions by judges. Thus, the groupings identified as similar under the guidelines have an empirical base in pre-guideline practice. For further explanation, *see* Breyer, *supra* note 367; Nagel, *supra* note 367.

D. Measuring Sentence Variation (Distribution)

Having established a method for distinguishing defendants convicted of similar criminal conduct and setting the parameters for distinguishing defendants with similar criminal records, it is important to discuss the limitations of acceptable variation in sentencing. Congress established parameters that defined the Commission's flexibility in determining sentencing ranges for similar defendants:

> *If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.*[385]

The evaluation, therefore, looks not only at the difference in sentence variation pre- and post-guideline implementation, but also considers whether the range of sentences complies with the 25-percent range identified by Congress.

E. Determination of Outcome Variables

In terms of disparity and range of sentence length, two important research questions must be addressed:

1) Has the range of sentences (in terms of sentence length) imposed by the court for offenders with similar criminal history found guilty of similar offenses declined with the implementation of the guidelines? For example, if pre-guidelines offenders with one prior conviction convicted of bank robbery received sentences ranging from zero to 20 years, was the range under the guidelines zero to 20 years or was it reduced, for example, to an eight-to-ten-year range?

2) Apart from the court-imposed sentence, has the range of time served (or to be served) for those sentenced to prison declined after guideline implementation? For example, if a pre-guideline bank robber's "time to be served" ranged from zero to ten years, was the range under the guidelines the same or reduced?

1. Sentence Imposed by the Court

By abolishing parole and reducing the deduction for good time, the Sentencing Reform Act laid the foundation for "truth in sentencing" (*i.e.*, the sentence imposed should reflect the sentence served). As a first step, therefore, the impact evaluation compares the sentences actually imposed by the court pre-guidelines and guidelines for similar defendants convicted of similar offenses.

2. Length of Sentence to be Served by the Offender

The second measure of sentence length, time served (or to be served) in prison, is more difficult to define. Some of the defendants in the study, sentenced in the pre-guideline period, have not served their entire sentences. Therefore, actual time served is not available and some estimate must be provided. The following describes the problems inherent in the selection of a single measure of time served (or to be served).

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[385]28 U.S.C. § 994(b)(2).

As discussed above, the Sentencing Reform Act changed the fundamental nature of sentencing in the federal system by abolishing parole. A pre-guideline sentence to a large extent represents the maximum term of imprisonment assuming no reduction for good conduct or parole. Few individuals served or expected to serve such sentences; rather, most served between one-third and two-thirds of the original sentence imposed. Under the Sentencing Reform Act, individuals must serve their full sentence less a maximum reduction of 54 days per year for good behavior.[386]

While it appears reasonable to measure time served as the "actual time served" for specific offenses in each period, conceptual and methodological reasons prohibit its use. A key problem is that a number of defendants in both the pre-guideline and guideline periods remain in prison, providing no actual release dates for these offenders. While this should not pose a problem for the guideline defendants, it is quite problematic in the pre-guideline sample. Further, from a theoretical perspective, actual time served may not be the appropriate measure for the Commission's impact studies. The impact studies focus on issues surrounding sentencing, not issues affected by offenders' behavior in prison. A standard of "actual time served" takes into account misconduct subsequent to conviction and sentencing that is reflected in Parole Commission determinations of actual sentence length.

An alternative measure is "expected time to be served"; that is, the amount of time a defendant can expect to spend in prison at the time of sentencing. This standard serves as the basis for numerous prosecutorial, judicial, and defense decisions. For example, in order for a defense attorney to "sell" a prison sentence to his/her client in the plea negotiation context, the attorney should be able to state a specific amount of time that the client can expect to serve before being released — either via parole (pre-guidelines) or after having completed a set term in prison (guidelines).

The first possible release date, the presumptive parole date established by the Parole Commission for sentences of one year or more, can serve as a reasonable, albeit imperfect, measure for establishing expected time to be served for pre-guidelines sentences.[387] The U.S. Parole Commission's Annual Report describes the process for establishing this date:[388]

> *All prisoners, except those with a minimum term of ten years or more, receive an initial parole hearing within 120 days of commitment (or as soon thereafter as practicable) and are provided with a presumptive parole release date based upon the applicable parole release guidelines. The purpose of this procedure is to give the prisoner, at the beginning of his service of sentence, a date on which it is presumed that release will take place, provided that the prisoner maintains a good institutional conduct record and has developed adequate release plans.*

The presumptive parole date, therefore, represents one usable measure of the expected time to be served without consideration of offenders' misconduct while in prison. Similarly, guideline

[386]This is equivalent to a 13-percent reduction in sentence. Life sentences and sentences of one year or less do not qualify for this reduction.

[387]Pre-guideline sentences of one year or less receive reductions for good time; if guideline sentences were for one year or less, the sentence imposed serves as the expected time to be served.

[388]Annual Report of the U.S. Parole Commission, October 1, 1986 to September 30, 1987 at 1-2.

sentences imposed, less the maximum amount of credit for good behavior, can represent the expected time that a convicted offender will have to spend in prison for the convicted offense.[389]

The downside of using an expected "time to be served" measure is that it is likely to result in some distortion of pre-guideline sentences in the direction of assuming they were shorter in length than might otherwise be the case. Nevertheless, this seems the most strategic way to proceed. Because the spread of sentences pre-guidelines may be understated due to the choice of measure, this potential pre-guideline reduction should be kept in mind in comparing sentence spread pre- and post-guidelines.

There is one significant difference between the pre-guideline and guideline expected time to be served that must be noted. Under the guidelines, expected time to be served is known at sentencing. Presumptive parole dates are not established until after sentencing. If one assumes that some feedback mechanism regarding presumptive parole dates was available to judges, prosecutors, and defense attorneys at the time of sentencing, it seems appropriate to assume that before implementation of guidelines judges performed an informal calculus and sentenced with that presumptive release date in mind. It is important, therefore, to measure outcome both in terms of sentence imposed and expected time to be served.

IV. Methodology

A. Data Sources

The impact portion of the disparity study examines four major offense types: bank robbery, cocaine distribution, heroin distribution, and bank embezzlement. These categories were selected to ensure adequate samples at the aggregate level and to examine offense types that represent a varied cross-section of federal crimes (*i.e.*, street crimes, white-collar crimes, and drug offenses) that make up a large proportion of the federal caseload.

Data are drawn from FPSSIS,[390] an augmented FPSSIS dataset constructed by the Commission representing offenders sentenced in 1985, the Commission's guidelines sentence monitoring system, and the Federal Bureau of Prisons. A case, defendant, or offender represents a single sentencing event for a single defendant. Multiple defendants in a single sentencing event are treated as separate cases. If an individual defendant is sentenced more than once during the time period, each sentencing event is identified as a separate case.

The Administrative Office of the U.S. Courts collected sentencing factors as part of its FPSSIS data collection effort until September 30, 1990. These factors were incorporated in FPSSIS to assist the Commission with its development of guidelines and their collection proved time-consuming for

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[389]In their evaluation of the Minnesota Guidelines, the Minnesota Sentencing Guidelines Commission calculated the "duration" of pre-guidelines, indeterminate sentences on the basis of "target release date decisions" made by the Minnesota Parole Commission, less good-time — in essence, the same strategy employed here. Minnesota Sentencing Guidelines Commission, The Impact of the Minnesota Sentencing Guidelines 27 (1984).

[390]Federal Probation Sentencing and Supervision Information System of the Administrative Office of the U.S. Courts.

probation officers. Through its monitoring effort, the Commission collects similar information on defendants sentenced under the guidelines.

The elimination of this FPSSIS data collection means that several sentencing variables pre-guidelines and guidelines might have slightly different meanings. In developing measures for the analyses, every attempt has been made to make the variables comparable, and in some cases, pre-guideline and guideline variables have been recoded from original case documents to ensure their comparability.

The datasets contain information on pre-guideline defendants sentenced during fiscal year 1985 compiled in preparation for the Commission's past practices study prior to guidelines drafting. These data predominantly come from the Administrative Office of the U.S. Courts, with special data collection by the Commission to augment the existing dataset. Because the constitutional challenges to the guidelines delayed nationwide implementation for 15 months, there are far fewer guideline cases available for analysis than originally anticipated. Therefore, in order to increase the sample size, the guideline dataset for bank robbery, bank embezzlement, and heroin distribution offenses covers more than one fiscal year (*i.e.*, offenders sentenced between January 19, 1989, and September 30, 1990).

The cocaine study uses a different dataset. The Anti-Drug Abuse Act of 1986 set equivalencies for various types and amounts of drugs, and in so doing established different equivalencies for powder cocaine and cocaine base. Data available through FPSSIS do not distinguish between powder cocaine and cocaine base (crack). The guidelines incorporated the statutory equivalencies by equating one unit of cocaine base to 100 units of cocaine powder (*see* U.S.S.G. §2D1.1). For the evaluation study, the Commission's Monitoring Unit undertook a special data collection effort that produced a file identifying the particular type of cocaine. Consequently, the cocaine dataset represents a much shorter timeframe, from September 1990 to December 1990. Augmented FPSSIS serves as the pre-guideline data source for the sample of cocaine distribution cases.

Each dataset represents single counts of conviction, or multiple counts that generally would not enhance the sentence either pre-guidelines or guidelines. For example, a conviction on three counts of embezzlement would be included because under the guidelines it does not affect the guideline range whether the defendant was convicted on one or three counts. Similarly, conviction on a single or multiple counts of embezzlement pre-guidelines, while providing the offender with added statutory exposure, rarely resulted in additional time at sentencing. Also, a substantive count and an aiding and abetting count to the substantive count are included. Cases that involve additional counts that enhance the sentence (*e.g.*, a second bank robbery or a conviction under 18 U.S.C. § 924(c)) are eliminated from the sample.

The bank embezzlement dataset contains 1,143 cases (536 pre-guidelines and 607 guidelines); the bank robbery sample 1,376 cases (503 pre-guidelines and 873 guidelines); the heroin distribution sample 1,489 cases (542 pre-guidelines and 947 guidelines); and the cocaine distribution sample 1,944 cases (332 pre-guidelines and 1,612 guidelines).

B. Statistical Analyses

The statistical analyses focus on four offense categories and consist of a distributional analysis, with various measures of dispersion, and a test of statistical significance.

1. Distributional Analysis

This analysis focuses on sentence distribution and addresses the following question: Does the range of sentences for defendants with similar criminal records convicted of similar criminal conduct narrow following guideline implementation?

The analysis considers the distribution of sentences imposed by the court and a measure of time to be served by the offender both pre-guidelines and guidelines. Descriptive results are presented in terms of the minimum and maximum of the range, the median, mean, interquartile range, and variance. The analysis tests for statistically significant changes in the sample variance to determine whether the distribution of sentences has narrowed significantly as a result of guideline implementation.

2. Tests of Statistical Significance

The statistical analysis of the variation in imposed prison sentences or time served involves determining whether the variance of either quantity has decreased significantly under the guidelines. The usual test of this hypothesis involves forming the ratio of the sample variances and looking up the value for this ratio in a table of the F-distribution.

The most important assumption to the valid use of this procedure is that the data from which the variances have been computed follows a normal distribution. The test does not perform well otherwise, as it is likely to report significant differences when they in fact do not occur and conversely does not report significant differences when they do occur. The problem cannot be overcome by large samples.[391]

Before testing for statistical significance, it is important to determine whether the data support the assumption of a normal distribution. Generally, the distribution of either prison sentences or time to be served displays positive skewness, that is, a long righthand tail.[392] Usually in such situations the median is considerably less than the mean. This situation is most pronounced for offenses with low sentences, such as embezzlement, where the modal sentence is often little or no time and a relatively small number of cases face long prison terms.

A recent approach for testing the variance ratio when the data do not come from normal distributions is the use of the bootstrap method.[393] The key assumption of the bootstrap method is

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[391]For discussion of circumstances under which the test does not perform well, *see* Johnson & Johnson, A Comparative Study of Tests of Homogeneity of Variances, with Applications to the Outer Continental Shelf Bidding Data, 23 Technometrics 351 (1981).

[392]Some examples of these distributions can be seen in the box and whisker plots found later in this chapter.

[393]*See* Efron & Tibshirani, Bootstrap Methods for Standard Errors, Confidence Intervals, and Other Measures of Statistical Accuracy, 1 Statistical Science 54 (1986) for an introduction to the bootstrap. The particular method used here is found in Boos & Brownie, Bootstrap Methods for Testing Homogeneity of Variances, 31 Technometrics 69 (1989). *See also* Hall & Wilson, Two Guidelines for Bootstrap Hypothesis Testing, 47 Biometrics 757 (1991). It should be noted that when the data actually come from normally distributed data, the bootstrap procedure is equivalent to the F-test.

that when samples are randomly drawn from the population, the sample distribution may be used validly as an estimate of the underlying population distribution. The bootstrap procedure treats the sample as if it were the population. Bootstrap samples are drawn by resampling from the sample with replacement,[394] and computing the distribution of the appropriate statistic. In this case, the appropriate use is as a test statistic, *i.e.*, the variance ratio.[395]

The analyses herein report the p-value or probability that an equal or larger variance ratio would be found assuming that the samples are drawn from populations with identical variances. Large p-values tend to confirm that the two populations have identical variances, while small values suggest that the two populations are likely to have different variances.[396]

V. Findings

A. Distributional Analysis for Bank Robbery

Bank robbery represents a traditional federal offense that involves aspects of what might be called a "street crime." Based on actual offense conduct, this analysis groups offenders into relevant subcategories of similar offenders with similar offense characteristics. For example, research shows that defendants convicted of bank robbery seldom discharge or otherwise use a weapon, even if one is present during the offense; therefore, the few cases that involve weapon use or discharge are eliminated from the pre-guideline and guideline samples.

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[394]This analysis uses uniform resampling. Other available sampling schemes produce better computational efficiency, although not better statistical efficiency. *See* Do & Hall, On Importance Resampling for the Bootstrap, 78 Biometrika 161 (1991).

[395]The particular method employed in this research is from Boos & Brownie (1989). The bootstrap method is used to replicate the null distribution; *i.e.*, the distribution of the test statistic under the null hypothesis. This is done by pooling the samples (*e.g.*, the guideline and pre-guideline samples) and then drawing two samples from this pooled distribution. The number of observations in each sample is the same as the number of observations in each original sample. The variance of these two samples is computed and the ratio of the variance constitutes one observation in the bootstrap sample. This procedure is repeated a large number of times. (Boos and Brownie recommend 1,000 to 10,000 such samples. This analysis compromises by using 5,000 samples.) The distribution of these observations forms the complete bootstrap sample.

[396]This analysis consistently uses the pre-guideline variance in the numerator and the guideline variance in the denominator. A large value for this quantity suggests a decrease in variance under the guidelines.

The p-value (or observed significance level) for the test statistic is computed by determining the proportion of bootstrap samples that exceed the observed ratio of sample variances. If many of the bootstrap samples exceed the variance ratio, the observed sample variance ratio must be toward the center or the lefthand tail of the bootstrap distribution, indicating that the null hypothesis cannot be rejected in this case. This would happen when the variance ratio is small indicating that the guideline variance may be equal to or larger than the pre-guideline variance. Alternatively, if only a few bootstrap samples exceed the F-ratio, the F-ratio must be in the righthand tail of the bootstrap sampling distribution and, therefore, it is likely that the sample variances are from populations in which one of the population variances is much larger than the other.

In constructing a sample of similar offenders convicted of similar bank robberies, the data were subdivided into offenders:

- who took less than $10,000;
- who either acted alone or were equally culpable with other participants;
- who did not injure anyone;
- who did not cooperate with authorities;
- who pleaded guilty as opposed to going to trial;
- who robbed only one bank in each case;
- who had little or no prior criminal record for the first sample and a moderately serious criminal record in the second sample; and
- who were not career offenders as defined by statute.

To further distinguish each sample, the Commission subdivided each group into offenders who had no weapon and those who had a weapon but did not use it. Although departures from the guideline range represent statements by the court that the cases are atypical, the Commission cannot identify comparable cases during the pre-guidelines period and, therefore, departure cases, other than those for substantial assistance,[397] remain in each sample.[398] Categorizing offenders into similar offense and offender characteristics results in small sample sizes; therefore, results from this analysis may be affected and should be interpreted with caution.

Because the bank robbery sample becomes quite small as offenders and offenses become more similar, only the two categories of criminal history that occurred most frequently were analyzed. The first criminal history category represents offenders with very little or no criminal history. The second category represents offenders with a moderately serious criminal history (*i.e.*, offenders with at least one serious criminal conviction and other minor criminal convictions).

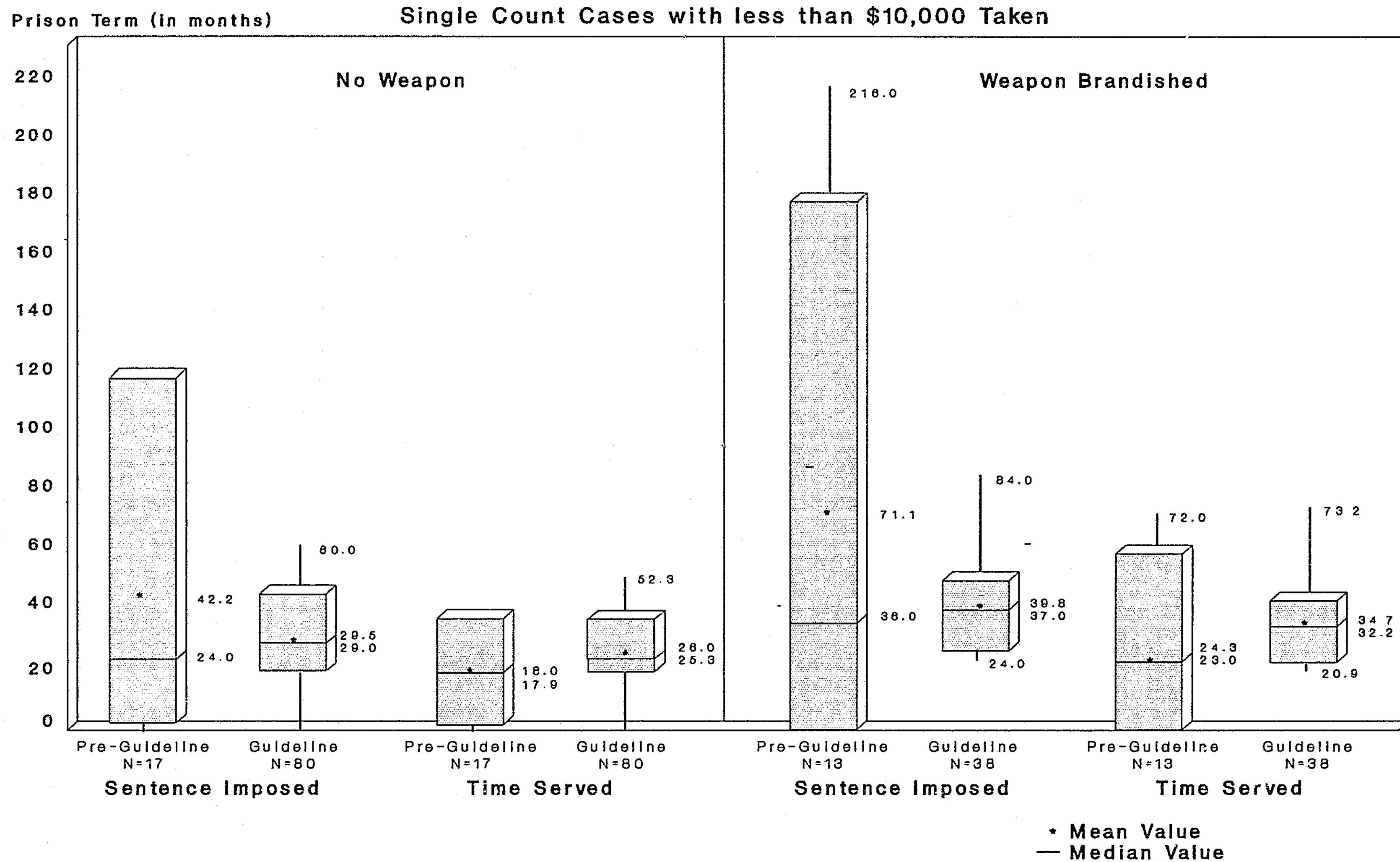
"Box and whisker" plots provide a graphic display of changes in the range of sentences from pre-guideline to guideline cases. The "box" represents the middle 80 percent of offenders and the "whiskers" represent 10 percent of offenders at the high and low ends of the sentencing range. Figures 4 and 5 illustrate the sentencing ranges for similarly-situated bank robbery offenders; Figure 4 represents the first criminal history category and Figure 5 represents the second, more serious, criminal history category (*i.e.*, Criminal History Category III). Each figure contains two sets of box and whiskers: the first represents offenses with no weapon present, while the second represents offenses in which a weapon was possessed and/or brandished. The first two plots in each set represent the range of sentences imposed by the court. The second two plots represent the range of expected time to be served for pre-guideline and guideline offenders. Tables 81 and 82 present the same information in tabular form, with additional measures of dispersion.

For the first category of similarly situated bank robbery offenders, offenders with little or no criminal history who committed the offense without a weapon (*see* Figure 4), sentences imposed by the court for pre-guideline offenders (n=17) range from zero months (probation) to 120 months; sentences imposed by the court for offenders under the guidelines (n=80) range from zero to 60

[397]Through augmented FPSSIS, the Commission was able to provide an approximate measure of cooperation pre-guidelines. This made it possible to eliminate this special group of offenders from the similar samples.

[398]For comparative purposes, the Commission provides the range of sentences imposed and time to be served after departures have been removed for guideline cases.

Figure 4
DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE BANK ROBBERY CASES
Offenders in Criminal History Category I



SOURCE: U.S Sentencing Commission

Table 81

BANK ROBBERY/NO CRIMINAL HISTORY
DOLLAR AMOUNT < $10,000 (n = 148)

Part A — No Weapon

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 17)	Guideline (n = 80)	Pre-Guideline (n = 17)	Guideline (n = 80)
Minimum	0.00	0.00	0.00	0.00
Maximum	120.00	60.00	40.00	52.27
Interquartile range	78.00	9.00	25.28	7.84
90th percentile - 10th percentile	116.00	21.00	36.20	16.98
Mean	42.24	29.45	17.98	25.99
Median	24.00	29.00	17.94	25.26
Sample Variance	1838.44	96.66	161.82	70.92
F statistic p-value	19.02	< .0001	2.22	.0260

Part B — Weapon Possessed/Brandished

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 13)	Guideline (n = 38)	Pre-Guideline (n = 13)	Guideline (n = 38)
Minimum	0.00	24.00	0.00	20.91
Maximum	216.00	84.00	72.00	73.17
Interquartile range	144.00	13.00	30.00	11.33
90th percentile - 10th percentile	180.00	24.00	60.00	20.91
Mean	71.08	39.79	24.30	34.74
Median	36.00	37.00	23.00	32.23
Sample Variance	6461.08	135.85	577.42	103.64
F statistic p-value	47.56	< .0001	5.57	.0004

Source: U.S. Sentencing Commission Evaluation Study

months, a dramatic reduction. The first box of pre-guideline sentences imposed by the courts shows that the middle 80 percent of pre-guideline offenders receive sentences between four and 120 months, with a median sentence of 24 months and an average or mean sentence of 42.2 months. The second box of guideline sentences imposed by the courts shows that the middle 80 percent of guideline offenders receive sentences between 21 and 42 months, with a median sentence of 29 months and a mean of 29.5 months. Subtracting the sentence at the bottom of the box from the sentence at the top of the box results in a decrease in the range of sentences imposed by the court for the middle 80 percent of offenders from 116 months pre-guidelines to 21 months under the guidelines.[399] In terms of statistical significance, the reduction in variance following guideline implementation is statistically significant at the .0001 level.

The analysis turns next to the question of estimated time to be served in recognition of the fact that solely analyzing sentence imposed by the court ignores some of the pre-guideline sentencing disparity that presumably was addressed by the Parole Commission. While parole guidelines could not correct for disparities in the "in" (prison)/"out" (probation) decision, they presumably responded to the time served question.

An examination of the second set of plots for offenders with little or no criminal history who committed bank robberies without a weapon shows that the time to be served by pre-guideline offenders (n=17) ranges from zero to 40 months, while the guideline offenders' (n=80) time to be served ranges from zero to 52.3 months, an apparent widening of the range under the guidelines. However, the middle 80 percent of pre-guideline offenders' time to be served ranges from four to 40 months, with a median of 17.9 months and a mean of 18 months. The middle 80 percent of guideline offenders' time ranges from 21 to 38 months, with a median of 25.3 months and a mean of 26 months. This represents a substantial decrease in the range of time to be served for the middle 80 percent from 36 months pre-guidelines to 17 months under the guidelines, a substantial reduction in the middle 80-percent range of time to be served.[400] Moreover, the reduction in variance is significant at the .05 level. Again, under the guidelines, for the vast majority of cases, there is a dramatic reduction in disparity.

For offenses in which a weapon was possessed and/or brandished (*see* Figure 4), sentences imposed by the court pre-guidelines (n=13) range from zero to 216 months, while sentences imposed for guideline offenders (n=38) range from 24 to 84 months. The middle 80 percent of pre-guideline offenders receive sentences ranging from zero to 180 months, with a median sentence imposed of 36 months and a mean of 71.1 months. Sentences imposed for the middle 80 percent of guideline offenders range from 27 to 51 months, with a median sentence imposed of 37 months and a mean of 39.8 months. As before, this represents a substantial decrease in the range of time to be served for the middle 80 percent, from 180 months pre-guidelines to 24 months under the

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[399]If departure cases are removed from the guideline sample, the range of sentences is further reduced under the guidelines from zero to 60 months including departures to 18 to 51 months excluding departures (n=67). For the middle 80 percent of guideline offenders excluding departures, the range is 24 to 42 months, not substantially different from the middle 80-percent range of guideline offenders including departures.

[400]The range of time to be served for guideline offenders excluding departures (n=67) reduces to 21 to 44 months, a substantial reduction from the zero-to-52-month range for guideline offenders including departures. The range for the middle 80 percent is not reduced by eliminating departure cases.

guidelines.[401] Again, this substantial reduction in variance is statistically significant at the .0001 level.

A comparison of time to be served tells a similar story, with ranges decreasing considerably following guideline implementation. Time to be served for pre-guideline offenders (n=13) ranges from zero to 72 months, while time to be served for guideline offenders (n=38) ranges from 20.9 to 73.2 months. The middle 80 percent of pre-guideline offenders' time to be served ranges from zero to 60 months, with a median time of 23 months and a mean of 24.3 months. For guideline offenders, the middle 80 percent of time to be served ranges from 23.5 to 44.2 months, with a median time of 32.2 months and a mean of 34.7 months. Again, this represents a substantial decrease in the range for the middle 80 percent, from 60 months pre-guidelines to 21 months under the guidelines.[402] The reduction in variance is statistically significant at the .05 level.

For offenders with little to no criminal history convicted of similar bank robberies, the distributional analysis shows that not only have the ranges of sentences imposed by the court under the guidelines narrowed sharply following guideline implementation, but the ranges of time to be served have narrowed considerably as well. The guidelines have reduced disparity beyond the leveling effect of the parole guidelines, even when departures are included.

The Commission examined similarly situated bank robbery offenders pre-guidelines and guidelines to test whether this narrowing effect holds for offenders with more serious criminal histories. Pre-guideline offenders with a moderately serious criminal history who committed bank robberies without a weapon (n=25) receive sentences imposed by the court that range from zero months to 180 months, while sentences imposed by the court for guideline offenders (n=57) range from 18 to 131 months (*see* Figure 5). The first box shows that the middle 80 percent of pre-guideline offenders receive sentences between six and 144 months, with a median sentence of 72 months and a mean of 78.6 months. The second box shows that the middle 80 percent of guideline offenders receive sentences between 30 and 56 months, with a median sentence of 37 months and a mean of 42 months. A comparison of the middle 80-percent range for pre-guideline and guideline offenders shows a decrease in this range from 138 months pre-guidelines to 26 months under the guidelines for sentences imposed by the court.[403] The reduction in variance under the guidelines is statistically significant at the .0001 level.

The second set of plots for offenders with a moderately serious criminal history who committed bank robberies without a weapon reports the range of time to be served by pre-guideline offenders (n=25) as zero to 60 months, while the time to be served for guideline offenders (n=57) ranges

[401]The range of sentences imposed is further reduced by eliminating departure cases from the guideline sample. Excluding departures (n=32), the range is 25 to 60 months, compared to a range of 24 to 84 months for guideline sentences including departures. The middle 80-percent range is not reduced further.

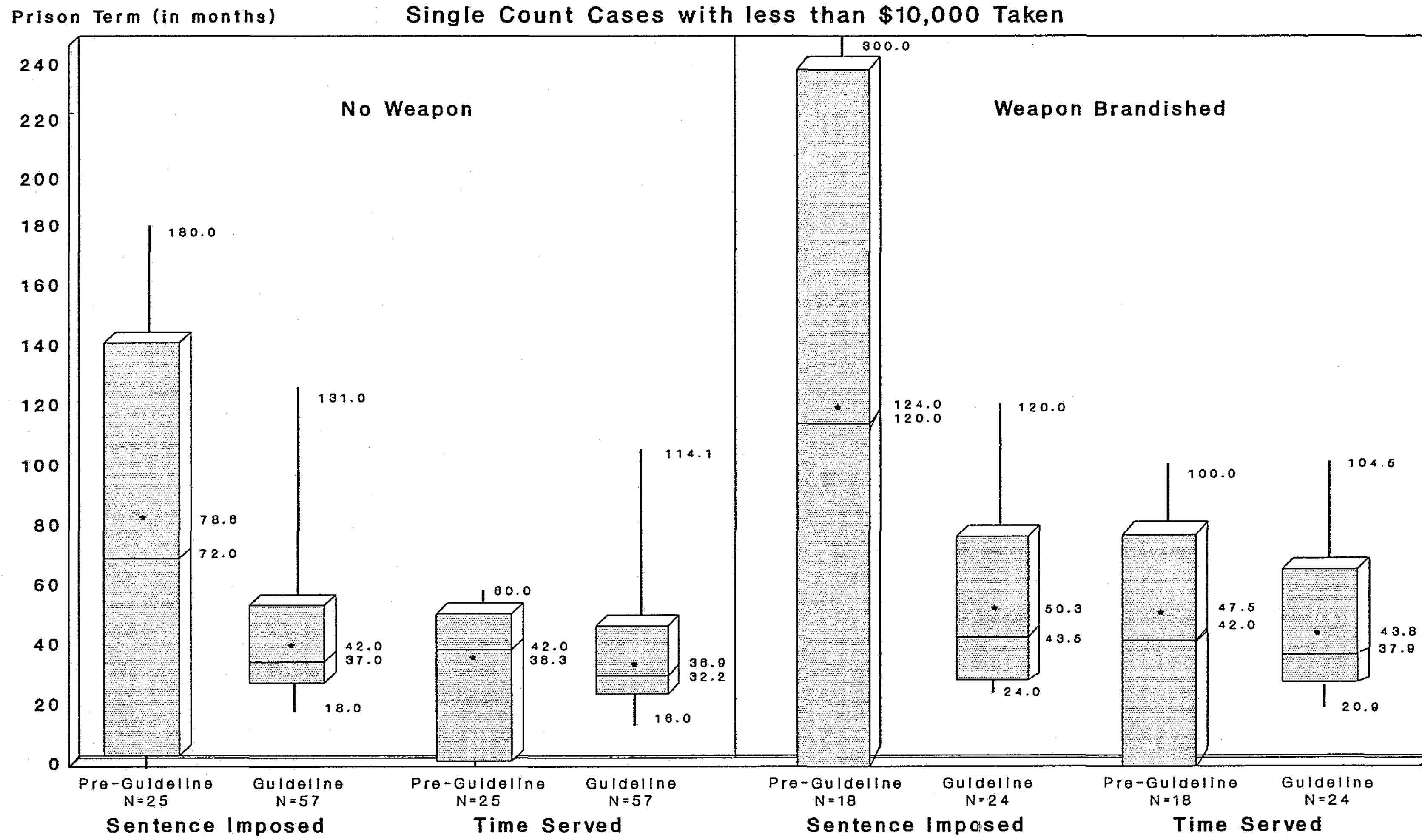
[402]The range of time to be served for guideline offenders excluding departures is 22 to 52 months, a further reduction from the 21-to-73-month range for guideline offenders including departures. The middle 80-percent range of time to be served for guideline offenders excluding departures reduces minimally.

[403]Eliminating departure cases (n=51) does not reduce further the guideline range including departures, and only minimally reduces the middle 80-percent range for these bank robbers with moderately serious criminal histories.

Figure 5

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE BANK ROBBERY CASES

Offenders in Criminal History Category III



SOURCE: U.S Sentencing Commission

Table 82

BANK ROBBERY/CRIMINAL HISTORY CATEGORY III
DOLLAR AMOUNT < $10,000 (n = 124)

Part A — No Weapon

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 25)	Guideline (n = 57)	Pre-Guideline (n = 25)	Guideline (n = 57)
Minimum	0.00	18.00	0.00	15.68
Maximum	180.00	131.00	60.00	114.12
Interquartile range	60.00	12.00	25.00	10.45
90th percentile - 10th percentile	138.00	26.00	49.28	22.65
Mean	78.56	42.02	38.29	36.87
Median	72.00	37.00	42.00	32.23
Sample Variance	2596.84	269.62	359.00	204.29
F statistic p-value	9.61	< .0001	1.76	.1616

Part B — Weapon Possessed/Brandished

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 18)	Guideline (n = 24)	Pre-Guideline (n = 18)	Guideline (n = 24)
Minimum	0.00	24.00	0.00	20.91
Maximum	300.00	120.00	100.00	104.53
Interquartile range	108.00	20.00	12.00	17.42
90th percentile - 10th percentile	240.00	48.00	80.00	41.82
Mean	124.00	50.25	47.49	43.77
Median	120.00	43.50	42.00	37.89
Sample Variance	5743.06	500.89	554.62	380.10
F statistic p-value	11.47	.0010	1.46	.2700

Source: U.S. Sentencing Commission Evaluation Study

from 16 to 114.1 months, an apparent increase in the range under the guidelines. However, an examination of the middle 80 percent of offenders tells a more important story. The middle 80 percent of pre-guideline offenders' time to be served ranges from five to 54 months, with a median time of 42 months and a mean of 38.3 months. The middle 80 percent of guideline offenders' time ranges from 26 to 49 months, with a median time of 32.2 months and a mean of 36.9 months. This represents a decrease in the range of time to be served for the middle 80 percent from 49 months pre-guidelines to 23 months under the guidelines, a substantial reduction in the range of time to be served following guideline implementation.[404] At this more serious criminal history level, the reduction in variance is not statistically significant.

For offenses in which a weapon was possessed and/or brandished (*see* Figure 5), sentences imposed by the court for these offenders with moderately serious criminal records pre-guidelines (n=18) range from zero to 300 months, while sentences imposed for guideline offenders (n=24) range from 24 to 120 months. The middle 80 percent of pre-guideline offenders receive sentences ranging from zero to 240 months, with a median sentence imposed of 120 months and a mean of 124 months. Sentences imposed for the middle 80 percent of guideline offenders range from 30 to 78 months, with a median sentence imposed of 43.5 months and a mean of 50.3 months. Again, this represents a decrease in the range of sentences imposed for the middle 80 percent from 240 months pre-guidelines to 48 months under the guidelines.[405] And, once more, this reduction in variance is statistically significant at the .05 level.

Finally, for pre-guideline offenders with moderately serious criminal records convicted of bank robbery in which a weapon was possessed and/or brandished (n=18), time to be served ranges from zero to 100 months, while post-guideline offenders' time to be served ranges from 20.9 to 104.5 months (n=24). The middle 80 percent of pre-guideline offenders' time to be served ranges from zero to 80 months, while the middle 80 percent of post-guideline offenders' time to be served ranges from 26 to 68 months. Like all other categories of bank robbery analyzed, the range of time to be served for the middle 80 percent substantially decreases for guideline cases; in this instance, from 80 months pre-guidelines to 42 months for guideline cases decided post-Mistretta.[406] Although some categories contain only a few cases, the ranges of sentences imposed by the court and time to be served by offenders decreases under the guidelines. For these similarly situated bank robbery offenders with moderately serious criminal records, disparity decreases considerably after guideline implementation, although the statistical test is not significant.

Summary: The data strongly suggest that in all matched categories similar offenders convicted of similar bank robberies receive dramatically more similar sentences under the guidelines than did comparable offenders pre-guidelines.

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[404]Eliminating departure cases (n=51) from the guideline sample reduces minimally the range (22 to 114 months) from the range for the guideline sample including departures (16 to 114 months). The middle 80-percent range is not reduced by removing departures.

[405]The range of time to be served for guideline offenders excluding departures (n=21) is somewhat reduced from 24 to 120 months including departures to 30 to 120 months excluding departures. The middle 80-percent range of guideline offenders excluding departures is reduced by five months from the range of guideline offenders including departures.

[406]Again, eliminating departure cases does not reduce substantially the range of sentences for guideline offenders with more serious criminal histories (four-month reduction). The range of middle 80-percent guideline offenders excluding departures is reduced by that same four months.

B. Distributional Analysis for Bank Embezzlement

Embezzlement serves as the impact evaluation's representative of a typical white-collar offense. For purposes of this analysis, similar offenders convicted of similar bank embezzlement include offenders:

- who acted alone;
- who planned the embezzlement (as opposed to committing a spontaneous theft);
- who did not cooperate with authorities; and
- who had little or no criminal history record.

Dollar loss assists in distinguishing among bank embezzlement cases; therefore, two categories of similar embezzlement offenses based on loss that include sufficiently large sample sizes are examined: 1) $10,000 - $20,000; and 2) $20,000 - $40,000.

For the first loss category, 27 pre-guideline offenders and 56 post-Mistretta guideline offenders embezzled between $10,000 - $20,000. For pre-guideline offenders, sentences imposed by the court range from zero to 48 months, while sentences imposed by the court for guideline offenders range from zero to 18 months (*see* Figure 6 and Table 83). The middle 80 percent of sentences imposed by the court for pre-guideline offenders ranges from zero to 12 months, with a median sentence imposed of zero and a mean of 4.3 months. For guideline offenders, the middle 80 percent of sentences imposed by the court ranges from zero to six months, with a median sentence imposed of four months and a mean of 3.8 months. This represents a six-month reduction in the range of sentences imposed by the court for the middle 80 percent, from 12 months pre-guidelines to six months under the guidelines.[407] The reduction in variance for similar offenders convicted of embezzlement with loss of $10,000 - $20,000 from pre-guidelines to guidelines is significant at the .05 level.

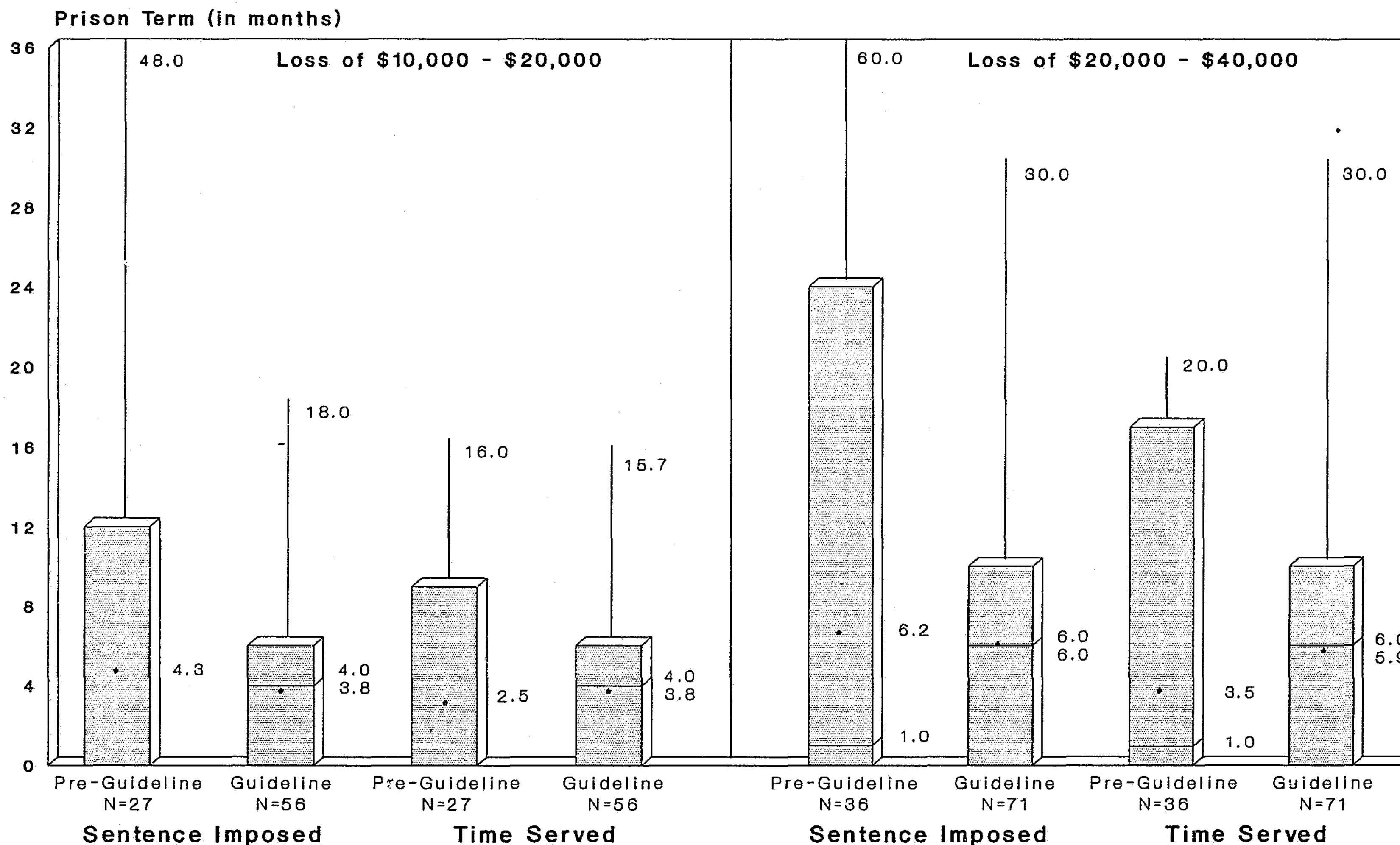
Time to be served for offenders convicted of embezzlement reveals a somewhat different pattern than bank robbery. This results primarily from the relatively short sentences imposed in the first instance. Congress directed that the Commission's guideline ranges could not exceed six months or 25 percent, whichever is greater. At the lower offense levels, the guidelines produce sentencing ranges from zero to six months. Additionally, Congress directed that sentences of less than 12 months would not be eligible for good conduct time, thus prohibiting changes to sentences imposed for these low level offenses. For pre-guideline offenders, time to be served ranges from zero to 16 months, with a similar zero to 16 month range for guideline offenders. For pre-guideline offenders, the middle 80 percent of time to be served ranges from zero to nine months, with a median sentence of zero months and a mean of 2.5 months. For guideline offenders, the middle 80 percent of time to be served ranges from zero to six months, with a median time of four months and a mean of 3.8 months. This represents a three-month reduction in the range of time to be served for the middle

[407]Elimination of departure cases (n=46) from the guideline sample does not reduce further the range of sentence imposed under the guidelines including departures. The middle 80 percent of guideline offenders excluding departures ranges from four to eight months, a reduction of two months from the zero-to-six-month range for guideline offenders including departures.

Figure 6

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE EMBEZZLEMENT CASES

Offenders in Criminal History Category I



NOTE: Unless indicated, medians are 0.

SOURCE: U.S Sentencing Commission

• Mean Value
- Median Value

Table 83

BANK EMBEZZLEMENT/NO CRIMINAL HISTORY (n = 190)

Part A — $10,000 - $20,000 Loss

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 27)	Guideline (n = 56)	Pre-Guideline (n = 27)	Guideline (n = 56)
Minimum	0.00	0.00	0.00	0.00
Maximum	48.00	18.00	16.00	15.68
Interquartile range	6.00	0.00	4.72	0.00
90th percentile - 10th percentile	12.00	6.00	8.97	6.00
Mean	4.26	3.84	2.47	3.80
Median	0.00	4.00	0.00	4.00
Sample Variance	98.20	8.36	18.46	7.26
F statistic p-value	11.76 .0256		2.54 .0474	

Part B — $20,000 - $40,000 Loss

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 36)	Guideline (n = 71)	Pre-Guideline (n = 36)	Guideline (n = 71)
Minimum	0.00	0.00	0.00	0.00
Maximum	60.00	30.00	20.00	30.00
Interquartile range	6.00	5.00	4.72	5.00
90th percentile - 10th percentile	24.00	10.00	17.00	10.00
Mean	6.22	5.96	3.55	5.93
Median	1.00	6.00	0.95	6.00
Sample Variance	163.78	23.10	30.14	420.94
F statistic p-value	7.09 .0134		1.34 .2874	

Source: U.S. Sentencing Commission Evaluation Study

80 percent, from nine months pre-guidelines to six months under the guidelines.[408] The reduction in variance is statistically significant at the .05 level.

The second category, representing embezzlements of between $20,000 - $40,000, consists of 36 pre-guideline offenders and 71 guideline offenders. Sentences imposed by the court for pre-guideline offenders range from zero to 60 months, while sentences imposed by the court under the guidelines range from zero to 30 months (*see* Figure 6 and Table 83). For pre-guideline offenders, the middle 80 percent of sentences imposed by the court ranges from zero to 24 months, with a median sentence imposed of one month and a mean of 6.2 months. The middle 80 percent of guideline offenders ranges from zero to ten months, with a median sentence imposed of six months and a mean of six months. This represents a decrease in range of sentences imposed for the middle 80 percent from 24 months pre-guidelines to ten months under the guidelines.[409] The reduction in variance is statistically significant at the .05 level.

Much the same pattern emerges from the analysis of time to be served in the $20,000 - $40,000 category. While the range of time to be served under the guidelines (0-30 months) is ten months wider than the range of time to be served pre-guidelines (0-20 months), the range for the middle 80 percent of offenders' time to be served under the guidelines is seven months (0-10 months) narrower than time to be served pre-guidelines (0-17 months).[410] This reduction in variance is not statistically significant.

Summary: The data suggest that there has been a reduction under the guidelines in both measures of range — sentence imposed and expected time to be served. However, perhaps a more important finding in the bank embezzlement analysis stems from an examination of the change in median sentences. The increase in the median sentence imposed and time to be served represents an important shift in sentencing patterns for embezzlement offenses. In addition to disparity being reduced, many more defendants convicted of embezzlement under the guidelines are receiving short sentences of imprisonment compared to pre-guideline practices in which more received probation.

C. Distributional Analysis for Heroin Trafficking

The Anti-Drug Abuse Act of 1986 requires that sentences for certain drug distribution, trafficking, manufacturing, importing, and exporting offenses be driven by the drug amounts. The statute prescribes mandatory minimum sentences corresponding to specified amounts of each major

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[408]Eliminating departure cases does not reduce further the time to be served range for guideline offenders. The range for the middle 80 percent of guideline offenders is reduced two months by excluding departure cases.

[409]Eliminating departure cases (n=60) from the guideline sample reduces substantially the range of sentence imposed for offenders in this category. That is, it further reduces the range, from zero to 30 months for guideline offenders including departures to zero to 16 months excluding departures. The middle 80-percent range is reduced only minimally by excluding departures from the guideline sample.

[410]As with the sentence imposed range for these offenders, the elimination of departure cases from the guideline sample substantially reduces the range of time to be served, from zero to 30 months including departure cases to zero to 15 months excluding departure cases. Again, the middle 80-percent range for guideline offenders only minimally reduces time to be served compared to guideline offenders including departures.

drug. Consequently, using drug amounts to distinguish similar offenses, the disparity analysis of heroin cases includes offenders:

- who trafficked in between 100 and 400 grams of heroin;[411]
- who did not possess a weapon in the commission of the offense;
- who did not cooperate with the government;
- who acted alone or were equally culpable with other participants; and
- who had little or no criminal history.

While statutorily-authorized departures for substantial assistance to the government have been removed from the guideline sample, other departures from the guideline range remain in the sample and can be seen primarily in the "whiskers," generally for the lower ten percent of offenders.

The pre-guideline sample of similar heroin offenders who distributed 100 to 400 grams, did not possess a weapon, did not assist authorities, were equally culpable, and had little or no criminal history consists of 40 offenders, while the guideline sample consists of 72 offenders (*see* Figure 7 and Table 84). Sentences imposed by the court for pre-guideline offenders range from zero to 180 months, while sentences imposed by the court for guideline offenders range from 15 to 97 months. The middle 80 percent of sentences imposed pre-guidelines ranges from zero to 78 months, with a median sentence of 36 months and a mean of 40.2 months. The middle 80 percent of sentences imposed under the guidelines ranges from 44 to 72 months, with a median sentence of 60 months and a mean of 58.1 months. This amounts to a decrease in the range of sentences imposed for the middle 80 percent from 78 months pre-guidelines to 28 months under the guidelines, more than a four-year reduction in the range of sentence imposed by the court.[412] This reduction in variance is statistically significant at the .0001 level.

For the pre-guideline offenders, time to be served ranges from zero to 60 months, while the guideline offenders' time to be served ranges from 13.1 to 84.5 months, an increase in the total range under the guidelines. However, the range decreases for guideline offenders when comparing the middle 80 percent. The middle 80 percent of pre-guideline offenders' time to be served ranges from zero to 43 months, with a median time to be served of 25.7 months and a mean of 22.4 months. The middle 80 percent of guideline offenders' time to be served ranges from 38.3 to 62.7 months, with a median time of 52.3 months to be served and a mean of 50.6 months. Therefore, the range of time to be served for the middle 80 percent has decreased from 43 months pre-guidelines to 24

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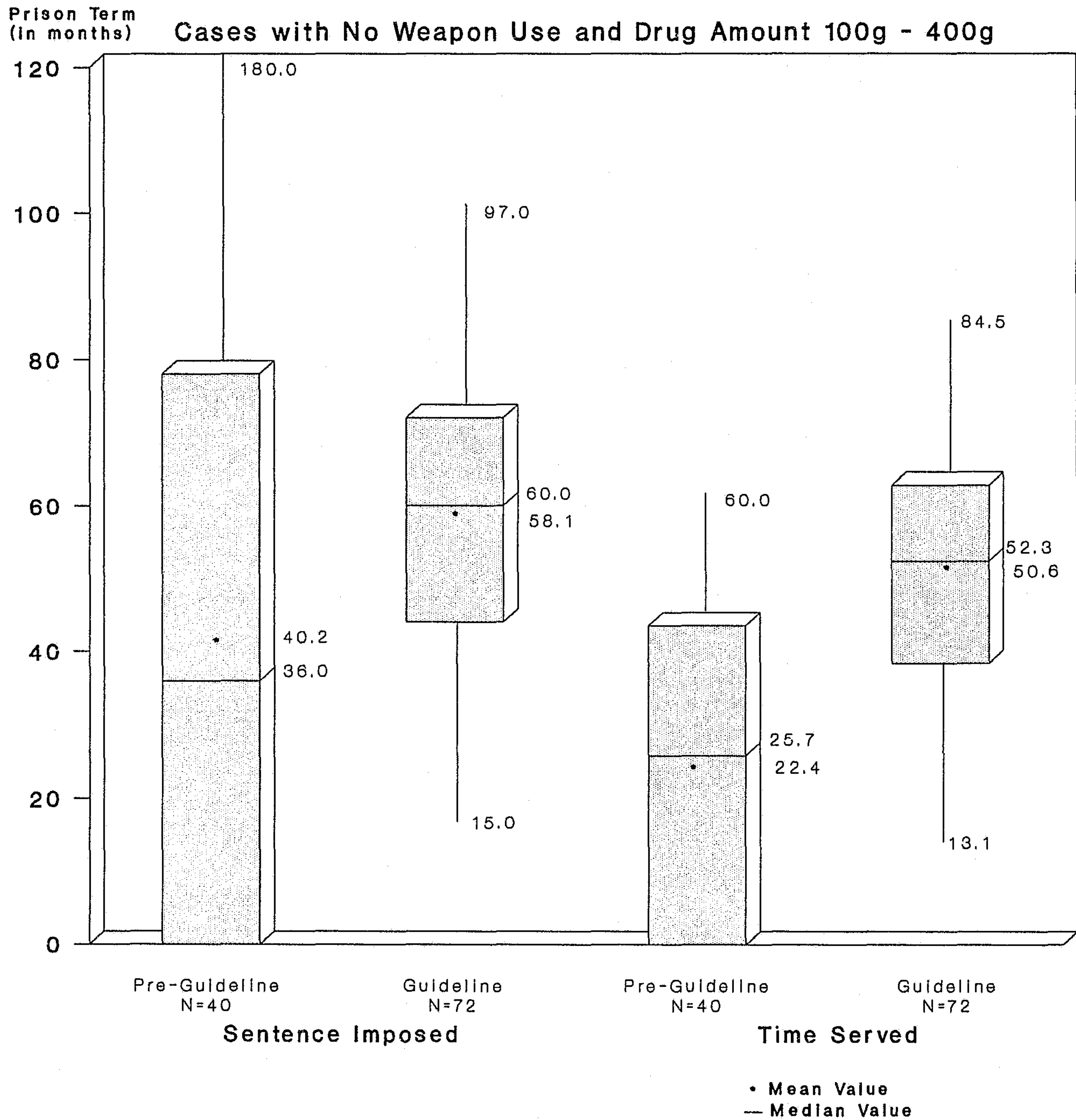
[411]Small sample sizes for the categories defined by Congress prohibit analyses in all but one category. Categories for the pre-guideline sample resulted in less than ten offenders for most categories.

[412]Elimination of the departure cases (n=64) from the guideline sample results in a further reduction, a reduction at the low end of the sentencing range. For guideline defendants including departures, sentence imposed ranges from 15 to 97 months, while sentence imposed for guideline defendants excluding departures ranges from 36 to 97 months. The middle 80-percent range for guideline defendants excluding departures is reduced further from a range of 44 to 72 months including departures to a range of 51 to 72 months excluding departures.

Figure 7

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE HEROIN CASES
Offenders in Criminal History Category I



NOTE: Sample consists of defendants who acted alone or as an equal participant, and who provided little or no assistance to authorities.

SOURCE: U.S Sentencing Commission

TABLE 84

Heroin Distribution/No Criminal History (n = 112)

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 40)	Guideline (n = 72)	Pre-Guideline (n = 40)	Guideline (n = 72)
Minimum	0.00	15.00	0.00	13.07
Maximum	180.00	97.00	60.00	84.50
Interquartile range	30.00	12.00	16.54	10.45
90th percentile - 10th percentile	78.00	28.00	43.46	24.39
Mean	40.18	58.13	22.44	50.63
Median	36.00	60.00	25.73	52.27
Sample Variance	1613.84	169.94	210.48	128.96
F statistic p-value	9.50	< .0001	1.63	.0748

Source: U.S. Sentencing Commission Evaluation Study

months under the guidelines.[413] The reduction in variance is not statistically significant at the .05 level.

Summary: Small sample sizes prevent most comparisons of heroin offenders convicted pre-guidelines and guidelines. However, in the one group with a sufficiently large sample size, the results for defendants convicted of distributing between 100 and 400 grams of heroin match those for bank robbery: disparity is reduced under the guidelines for both sentences imposed and time to be served.[414] That range is reduced even further at the low end after departures have been removed from the guideline sample.

D. Distributional Analysis for Cocaine Trafficking

Congress distinguished between cocaine and cocaine base (crack) in the Anti-Drug Abuse Act of 1986 by setting the penalties for crack cocaine significantly higher than those for powder cocaine. Therefore, the cocaine analysis examines the distribution of sentences pre-guidelines and guidelines solely for offenses involving powder cocaine. As with the analysis involving heroin distribution, similar cocaine offenses principally represent specific drug amounts. The cocaine analysis is limited to a single category with reasonably high sample sizes. For this study, similar cocaine offenders convicted of similar offenses include offenders:

- who trafficked in between 500 grams and two kilograms of powder cocaine;
- who did not possess a weapon in the commission of the offense;
- who did not cooperate with the government;
- who acted alone or were equally culpable with other participants; and
- who had little or no criminal history.

The final sample of similar offenders convicted of similar cocaine trafficking offenses includes 44 pre-guideline offenders and 81 guideline offenders.

For pre-guideline offenders convicted of cocaine distribution of between 500 grams and two kilograms, sentences imposed by the court range from zero months to 108 months, while sentences imposed by the court under the guidelines range from 36 to 120 months (*see* Figure 8 and Table 85). The middle 80 percent of sentences imposed pre-guidelines range from 12 to 60 months, with a median sentence of 30 months and a mean of 31.7 months. For the guideline sample, the middle 80 percent of sentences imposed range from 53 to 70 months, with a median sentence of 60 months and a mean of 61.9 months. This represents a decrease in the range of sentence imposed for the middle 80 percent from 48 months pre-guidelines to 17 months under the guidelines. The reduction in sample variance is significant at the .05 level.

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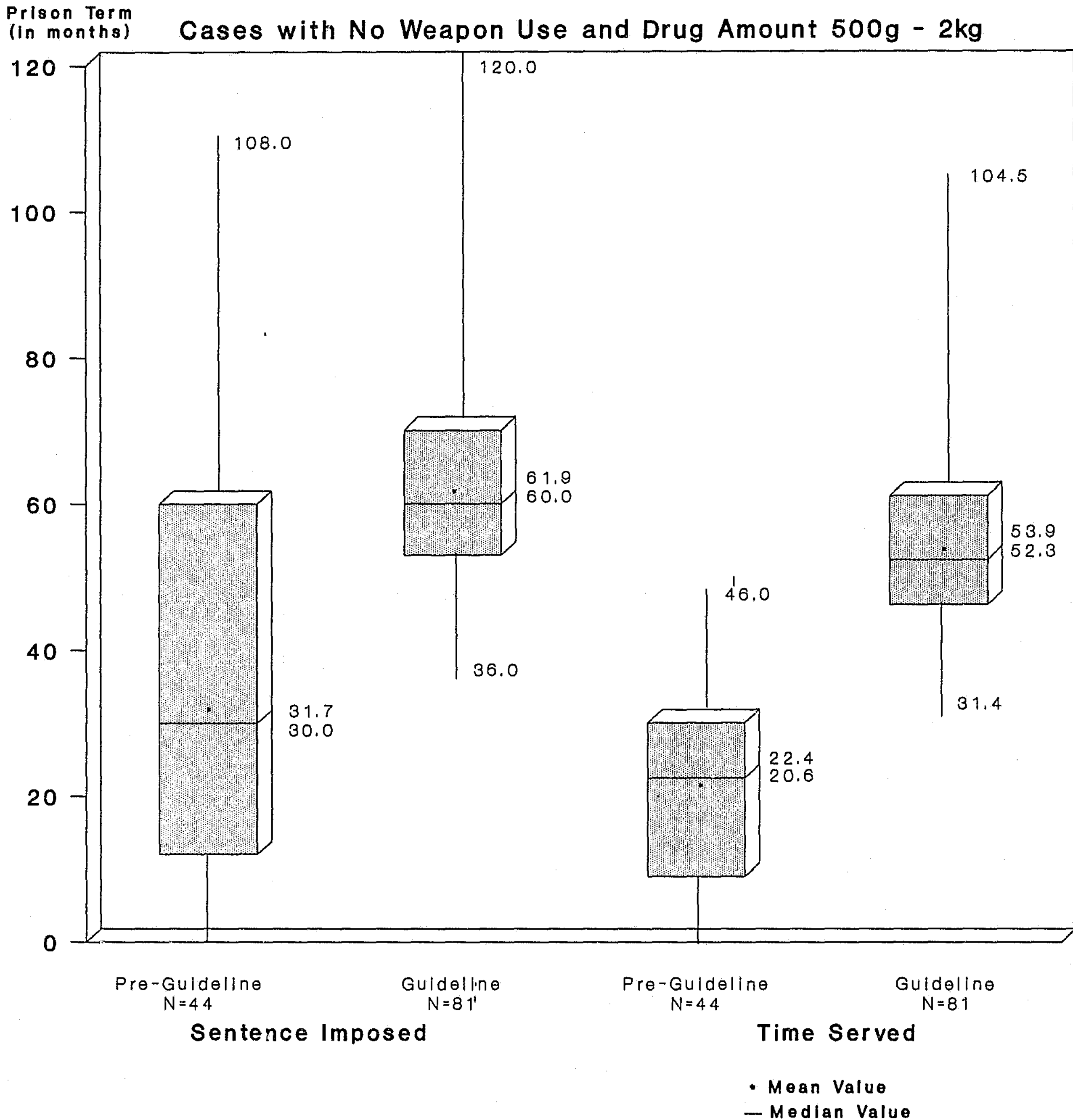
[413]As with sentence imposed, the reduction in range of time to be served for guideline defendants excluding departures (n=64) occurs at the low end of the range; *i.e.*, time to be served for guideline defendants including departures ranges from 13.1 to 84.5 months, while time to be served for guideline defendants excluding departures ranges from 31.4 to 84.5 months. The middle 80-percent range for guideline defendants excluding departures reduces by six months at the low end to a range of 44 to 63 months.

[414]Because the pre-guideline sample is drawn from data collected prior to the Anti-Drug Abuse Act of 1986, some of the leveling effect seen under the guidelines likely should be attributed to the mandatory minimum statutes contained in that legislation.

Figure 8

DISTRIBUTION OF PRISON TERM IMPOSED AND TIME SERVED FOR PRE-GUIDELINE AND GUIDELINE COCAINE CASES
Offenders in Criminal History Category I



NOTE: Sample consists of defendants who acted alone or as an equal participant, and who provided little or no assistance to authorities.

SOURCE: U.S Sentencing Commission

Table 85

COCAINE DISTRIBUTION/NO CRIMINAL HISTORY (n = 119)

STATISTIC	SENTENCE IMPOSED		TIME SERVED	
	Pre-Guideline (n = 44)	Guideline (n = 81)	Pre-Guideline (n = 44)	Guideline (n = 81)
Minimum	0.00	36.00	0.00	31.36
Maximum	108.00	120.00	46.00	104.53
Interquartile range	18.00	3.00	12.27	2.61
90th percentile - 10th percentile	48.00	17.00	21.03	14.81
Mean	31.66	61.85	20.60	53.93
Median	30.00	60.00	22.43	52.27
Sample Variance	525.49	115.35	119.88	87.82
F statistic p-value	5.66	.0022	1.70	.1720

Source: U.S. Sentencing Commission Evaluation Study

For pre-guideline offenders, time to be served ranges from zero to 46 months, while time to be served under the guidelines ranges from 31 to 104.5 months. For this middle 80 percent, time to be served pre-guidelines ranges from nine months to 30 months, with a median sentence of 22.4 months and a mean of 21 months. Under the guidelines, time to be served for the middle 80 percent ranges from 46 to 61 months, with a median sentence of 52.3 months and a mean of 54 months. This represents a reduction in the range of time to be served from 21 months pre-guidelines to 15 months under the guidelines.[415] The reduction in variance is not statistically significant.

Summary: The cocaine disparity study suggests that the range of sentences imposed and time to be served for similarly situated cocaine offenders has narrowed considerably following guideline implementation. The reduction in disparity is even more pronounced once departure cases are eliminated. Substantial variations appear in the top and bottom ten percent of sentences, a finding that suggests the need for future research in the area of departures and interaction of the guidelines with mandatory minimum penalties.

VI. Future Research Efforts

As the number of defendants sentenced under the guidelines increases, studies of the new system's impact on disparity become more viable. The Commission has initiated projects to examine guideline sentencing practices in three separate but related ways.

One study draws data from the Commission's monitoring system to look at court sentencing trends (Judicial Sentencing Patterns under the Guidelines). Similar to the method used in the distributional analysis, this study selects similar defendants based on similar underlying offense conduct and then sorts these defendants according to their prior criminal record. The analysis focuses on defendants sentenced within the guideline range determined by the court and those who received departure sentences, and asks a number of descriptive questions regarding such issues as placement within the guideline range by offense type, demographic characteristics of the defendants, and reasons for departures.

The second preliminary analysis (Judicial Discretion and Its Relationship to Disparity) looks at judicial discretion under the guidelines by examining where within the range judges sentence and whether judges make use of the flexibility available in the guidelines. In addition, the study looks at the use of alternatives to imprisonment to assess the extent to which judges are using several sentencing options for defendants with relatively low offense levels.

As part of its disparity study, the Commission had proposed to analyze the use of relevant and irrelevant factors to determine whether guideline implementation had altered the relative influence of these factors on sentence outcome. Completion of this study has been delayed because of unanticipated problems in data collection, data verification, and data analysis. For example, the elimination of the sentencing component of FPSSIS made additional, unanticipated data collection necessary. In addition, coding errors uncovered in the pre-guideline FPSSIS data not collected or coded by the Commission but necessary for this study made it necessary to revise the planned

[415]Examination of the guideline sample excluding defendants who received departure sentences (n=75) shows that the range for the middle 80 percent drops to 52 to 63 months, making the reduction in range more dramatic, from 21 months pre-guidelines to 11 months under the guidelines. The reduction in variance is not statistically significant excluding departures.

sampling strategies. Because a study of relevant and irrelevant sentencing factors would be useful in the examination of sentencing practices under the guidelines, the Commission is continuing to pursue these issues in the hope of eliminating the methodological problems so that meaningful analyses can be completed.

The following sections discuss preliminary work and findings from the first two studies.

A. Judicial Sentencing Patterns under the Guidelines

In an effort to examine judicial sentencing patterns under the guidelines, the Commission identified offenders with similar criminal records convicted of similar federal offenses.[416] The placement of sentences imposed for these offenders was reviewed after controlling for six personal offender characteristics: race, gender, age, marital status, employment status, and education.

The study focused on similar offenders convicted of four offense types:

Robbery:
- in which a gun was not used or possessed;
- no victim injured;
- $10,000 to $50,000 loss;
- single count of bank robbery;
- offender pleaded guilty and accepted responsibility; and
- had Criminal History Category I or II.[417]

Heroin:
- trafficking in 100 grams to 10 kilograms of heroin;
- no mitigating or aggravating role in the offense;
- no gun involved;
- offender pleaded guilty and accepted responsibility; and
- had Criminal History Category I.[418]

Cocaine:
- trafficking in 500 grams to 50 kilograms of cocaine;
- no mitigating or aggravating role in the offense;

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[416]Groups were chosen based on factors that would provide the greatest number of "similar" cases (*e.g.*, drug offenders were chosen based on factors that were most frequently found in the aggregate). Because most drug offenders did not use or possess guns and had a criminal history category of I, these specifications were made. However, it was necessary to aggregate some characteristics (*e.g.*, a range of drug amounts) in order to construct groups sufficiently large to allow for meaningful analysis.

[417]This group includes all eligible robbery cases sentenced in fiscal year 1990 (October 1, 1989, through September 30, 1990) that were identified in the Sentencing Commission's MONFY90 datafile.

[418]This group includes all eligible heroin distribution cases sentenced between October 1, 1989, and December 31, 1990, as identified in a special datafile of all heroin offenders developed for the evaluation study. This project involves review of all "opiate" distribution and trafficking cases identified from FPSSIS files for identification specific drug type.

- no gun involved;
- offender pleaded guilty and accepted responsibility; and
- had Criminal History Category I.[419]

Embezzlement:
- $1,000 to $20,000 loss;
- more than minimal planning;
- offender pleaded guilty and accepted responsibility; and
- had Criminal History Category I.[420]

This study examined sentences imposed by the court by classifying them within one of six categories: downward departure, bottom of the applicable guideline range, below the midpoint of the range, at or above the midpoint, top of the range, and upward departure. Sentences for which the entire guideline range was trumped by statutory minimums or maximums and departures for substantial assistance upon motion of the prosecutor were removed from the analysis, as these involve statutory factors overriding guideline application. Guideline ranges truncated by statutory considerations were included in the analysis when statutory minimums or maximums fell within the otherwise appropriate range.

1. Findings for Similar Offender Groups

In reviewing the findings for each of the four groups of similar offenders, it must be kept in mind that any variation is based on only a limited number of cases. Because each group is unique with regard to offense behavior, the profile of personal characteristics of offenders in each group is also unique.[421] These characteristics create small numbers of cases in many categories that limit the ability to find statistically significant and meaningful relationships within groups.[422]

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[419]This group includes all eligible cocaine distribution cases sentenced between September 1, 1990, and December 31, 1990, from a special data file of all cocaine offenders developed for the evaluation study. Note that "crack" distribution cases are not included among cocaine cases analyzed here because of the distinctions made for the treatment of these offenders by statute.

[420]This group includes all eligible embezzlement cases sentenced in fiscal year 1990 identified in the Sentencing Commission's MONFY90 datafile.

[421]Due to missing information on location of sentences for some cases, percentages presented in the text on group characteristics may not be identical to those presented in tables that compare group characteristics to location of sentences imposed.

[422]Because of the lack of variation on both the independent variables (*e.g.*, gender) and the dependent variable (location of guideline sentence), tests of significance were not appropriate on the group data as presented. Chi-square tests were run, as appropriate, on collapsed data. These tests compared downward departure plus bottom-of-the-range sentences to within-range sentences, or bottom-of-the-range sentences to within-range sentences. Because of small cell sizes for four "similar" groups, no tests of significance were appropriate on the two independent variables, gender and circuit. All significance levels referenced in this section involve chi-squared tests at the .05 level of probability.

a. Robbery Offenders

The profile of similar bank robbers indicates that 64.7 percent were White, 31.0 percent were Black, and 4.3 percent Hispanic. The great majority (94.8%) were male. Forty-seven percent were between the ages of 26 and 35, with another 32 percent older than 35. Seventy-four percent were unmarried. More than 60 percent had at least a high school education (34.5% high school graduates and 25.9% more than a high school education); 39.7 percent had not completed high school. The majority of offenders did not have steady employment — 31.0 percent were unemployed and 44.0 percent only partially employed during the last year. Thirty-five percent of the robbery cases occurred in the Ninth Circuit.

These analyses find no significant effects or inadequate numbers of cases for analysis for race, gender, age, marital status, employment status, education, or circuit on sentencing patterns for this group of robbery offenders (*see* Tables 86 through 92).

b. Heroin Offenders

A profile of offenders involved in heroin distribution indicates that 39.8 percent were Hispanic, 30.6 percent were Black, and 29.6 percent were White. Again, the great majority (90.0) were male. Forty-five and a half percent were between the ages of 26 and 35, with 19.1 percent younger than 26 and 35.5 percent older than 35. More than half (53.0%) were married. Close to half (48.9%) were fully employed, while 31.9 percent were unemployed for the last 12 months. Just under 61 percent had less than a high school education. Seventy-two percent of heroin offenders were sentenced in one of three circuits (Second, Fifth, and Ninth). All departures in the heroin study occurred in the First, Sixth, and Ninth Circuits.

Race of the defendant was found to be significantly related to location of guideline sentence for this group of heroin offenders. Whites convicted of heroin distribution were most likely (92.3%) and Hispanics least likely (56.7%) to be sentenced at the bottom of the range, with Blacks (82.6%) in the middle (*see* Table 93).

Cell sizes were inadequate to test or no significant relationships were found on the other personal characteristics (*i.e.*, gender, age, marital status, employment status, and education) and circuit (*see* Tables 94 through 99).

c. Cocaine Offenders

The personal profiles of cocaine offenders in this group indicate that 53.3 percent were White, 27.2 percent Black, and 19.5 percent Hispanic. Males represented 84.4 percent of the group; almost half (49.7%) of the cocaine group were White males. A greater proportion of Black offenders were female (37.0%) than of other racial groups (6.7% White females; 15.2% Hispanic females). Forty-five percent of offenders were between 26-35 years of age and another 34.4 percent were more than 35 years old. A high proportion (69.6) were unmarried. Slightly more than 56 percent were high school graduates or higher and 43.9 percent had less than a high school education. More than half were employed fulltime, 36.4 percent were partially employed, and 9.1 percent were unemployed for the full year prior to the offense. Of all cocaine offenders in this study, 38.9 percent were sentenced in the Eleventh Circuit.

Cell sizes were inadequate to test or no statistically significant relationships were found with respect to circuit or any of the personal characteristics, *i.e.*, race, gender, age, marital status, employment, and education (*see* Tables 100 through 106).

Table 86

Location of Guideline Sentence by Race

ROBBERY

Location of Sentence	White n	White (%)[a]		Black n	Black (%)[a]		Hispanic n	Hispanic (%)[a]	
Downward Departure	6	(8.7)		2	(6.5)		0	(0.0)	
Bottom of the Range	33	(47.8)	89.9%	11	(35.5)	90.3%	1	(25.0)	75.0%
Below the Midpoint	6	(8.7)		5	(16.1)		1	(25.0)	
At or Above the Midpoint	13	(18.8)		7	(22.6)		1	(25.0)	
Top of the Range	10	(14.5)		5	(16.1)		0	(0.0)	
Upward Departure	1	(1.5)		1	(3.2)		1	(25.0)	
Total	69	(100)		31	(100)		4	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY RACE

White
(1) Defendant Completed Drug Treatment Program
(1) Drug Dependence
(1) Limited Intelligence/Diminished Capacity
(1) Military Record
(1) Mental and Emotional Condition/Coercion and Duress
(1) Coercion and Duress

Black
(1) Mixed Blood/Adopted
(1) Counseling and Treatment

REASONS GIVEN FOR UPWARD DEPARTURE BY RACE

White
(1) Adequacy of Criminal History

Black
(1) Dollar Amount

Hispanic
(1) Convictions on Related Counts

Table 87

Location of Guideline Sentence by Gender

ROBBERY

Location of Sentence	Male n	Male (%)[a]		Female n	Female (%)[a]	
Downward Departure	6	(6.1)		2	(33.3)	
Bottom of the Range	41	(41.8)	90.8%	4	(66.7)	66.7%
Below the Midpoint	12	(12.2)		0	(0)	
At or Above the Midpoint	21	(21.4)		0	(0)	
Top of the Range	15	(15.3)		0	(0)	
Upward Departure	3	(3.1)		0	(0)	
Total	98	(100)		6	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY GENDER

Male
(1) Defendant Completed Drug Treatment Program
(1) Drug Dependence
(1) Limited Intelligence/Diminished Capacity
(1) Military Record
(1) Mental and Emotional Condition / Coercion and Duress
(1) Coercion and Duress

Female
(1) Counseling and Treatment
(1) Mixed Blood/Adopted

REASONS GIVEN FOR UPWARD DEPARTURE BY GENDER

Male
(1) Convictions on Related Counts
(1) Dollar Amount
(1) Adequacy of Criminal History

Table 88

Location of Guideline Sentence by Age

ROBBERY

Location of Sentence	18 - 25 n	18 - 25 (%)[a]		26 - 35 n	26 - 35 (%)[a]		36 and Over n	36 and Over (%)[a]	
Downward Departure	3	(13.0)		3	(5.8)		2	(5.6)	
Bottom of the Range	11	(47.8)	87.0%	22	(42.3)	90.4%	17	(47.2)	91.7%
Below the Midpoint	1	(4.4)		8	(15.4)		4	(11.1)	
At or Above the Midpoint	5	(21.7)		10	(19.2)		7	(19.4)	
Top of the Range	3	(13.0)		7	(13.5)		5	(13.9)	
Upward Departure	0	(0.0)		2	(3.9)		1	(2.8)	
Total	23	(100)		52	(100)		36	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY AGE

18-25
(1) Mixed Blood/Adopted
(1) Mental and Emotional Condition/Coercion and Duress
(1) Coercion and Duress

26-35
(1) Defendant Completed Drug Treatment Program
(1) Counseling and treatment
(1) Limited Intelligence/Diminished Capacity

36 - and Over
(1) Drug dependence
(1) Military record

REASONS GIVEN FOR UPWARD DEPARTURE BY AGE

26-35
(1) Convictions on related counts
(1) Dollar amount

36 and Over
(1) Adequacy of criminal history

Table 89

Location of Guideline Sentence by Marital Status

ROBBERY

Location of Sentence	Married n	Married (%)[a]		Not Married n	Not Married (%)[a]	
Downward Departure	2	(8.0)		6	(7.6)	
Bottom of the Range	13	(52.0)	92.0%	32	(40.5)	88.6%
Below the Midpoint	3	(12.0)		9	(11.4)	
At or Above the Midpoint	5	(20.0)		16	(20.3)	
Top of the Range	2	(8.0)		13	(16.5)	
Upward Departure	0	(0.0)		3	(3.8)	
Total	25	(100)		79	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY MARITAL STATUS

Married
(1) Drug Dependence
(1) Military Record

Not Married
(1) Mixed Blood/Adopted
(1) Defendant Completed Drug Treatment Program
(1) Counseling and Treatment
(1) Limited Intelligence/Diminished Capacity
(1) Mental and Emotional Condition/Coercion and Duress
(1) Coercion and Duress

REASONS GIVEN FOR UPWARD DEPARTURE BY MARITAL STATUS

Not Married
(1) Conviction on Related Counts
(1) Dollar Amount
(1) Adequacy of Criminal History

Table 90

Location of Guideline Sentence by Employment Status

ROBBERY

Location of Sentence	Fully Employed n	Fully Employed (%)[a]		Partially Employed n	Partially Employed (%)[a]		Unemployed n	Unemployed (%)[a]	
Downward Departure	2	(8.3)		3	(6.3)		3	(9.4)	
Bottom of the Range	12	(50.0)	91.7%	21	(43.8)	89.6%	12	(37.5)	87.5%
Below the Midpoint	4	(16.7)		4	(8.3)		4	(12.5)	
At or Above the Midpoint	5	(20.8)		8	(16.7)		8	(25.0)	
Top of the Range	1	(4.2)		10	(20.8)		4	(12.5)	
Upward Departure	0	(0)		2	(4.2)		1	(3.1)	
Total	24	(100)		48	(100)		32	(100)	

(Employment Status; bracketed percentages cover Bottom of the Range through Top of the Range.)

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EMPLOYMENT STATUS

Fully Employed
(1) Military Record
(1) Mixed Blood/Adopted

Partially Employed
(1) Completed Drug Treatment Program
(1) Limited Intelligence / Diminished Capacity
(1) Military Record
(1) Mental Emotional Condition/Coercion and Duress
(1) Other

Unemployed
(1) Drug Dependence
(1) Counseling/Treatment
(1) Coercion and Duress

REASONS GIVEN FOR UPWARD DEPARTURE BY EMPLOYMENT STATUS

Partially or Fully Employed
(1) Convictions on Related Counts
(1) Dollar Amount

Unemployed
(1) Adequacy of Criminal History

Table 91

Location of Guideline Sentence by Education Level

ROBBERY

Location of Sentence	Less than 12 Years n	(%)[a]		High School Graduate n	(%)[a]		More than 12 Years n	(%)[a]	
Downward Departure	2	(4.7)		3	(9.1)		3	(10.7)	
Bottom of the Range	17	(39.5)	93.0%	15	(45.5)	87.9%	13	(46.4)	85.7%
Below the Midpoint	6	(14.0)		4	(12.1)		2	(7.1)	
At or Above the Midpoint	10	(23.3)		7	(21.2)		4	(14.3)	
Top of the Range	7	(16.3)		3	(9.1)		5	(17.9)	
Upward Departure	1	(2.3)		1	(3.0)		1	(3.6)	
Total	43	(100)		33	(100)		28	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EDUCATION LEVEL

Less than 12 years
(1) No Specific Reason Given
(1) Mental and Emotional Condition/Coercion and Duress

High school graduate
(1) General Mitigating Circumstances
(1) Drug Dependence
(1) Coercion and Duress

More than 12 years
(1) Other
(1) Counseling and Treatment
(1) Military Record

REASONS GIVEN FOR UPWARD DEPARTURE BY EDUCATION LEVEL

Less than 12 years
(1) Dollar Amount

High school graduate
(1) Convictions on Related Counts

More than 12 years
(1) Adequacy of Criminal History

Table 92

Location of Guideline Sentence by Circuit
ROBBERY

United States Circuit

Location of Sentence	D.C N	D.C (%)*	1st N	1st (%)	1st in range	2nd N	2nd (%)	2nd in range	3rd N	3rd (%)	3rd in range	4th N	4th (%)	4th in range	5th N	5th (%)	5th in range
Downward Departure	0	(-)	0	(0.0)		1	(16.7)		3	(75.0)		1	(6.7)		0	(0.0)	
Bottom of the Range	0	(-)	1	(100)		1	(16.7)		0	(0.0)		2	(13.3)		2	(25.0)	
Below the Midpoint	0	(-)	0	(0.0)		4	(66.7)		0	(0.0)		1	(6.7)		4	(50.0)	100.0%
At or Above the Midpoint	0	(-)	0	(0.0)	100.0%	0	(0.0)	83.3%	1	(25.0)	25.0%	6	(40.0)	86.7%	0	(0.0)	
Top of the Range	0	(-)	0	(0.0)		0	(0.0)		0	(0.0)		4	(26.7)		2	(25.0)	
Upward Departure	0	(-)	0	(0.0)		0	(0.0)		0	(0.0)		1	(6.7)		0	(0.0)	
Total	0	(-)	1	(100)		6	(100)		4	(100)		15	(100)		8	(100)	

Location of Sentence	6th N	6th (%)	6th in range	7th N	7th (%)	7th in range	8th N	8th (%)	8th in range	9th N	9th (%)	9th in range	10th N	10th (%)	10th in range	11th N	11th (%)	11th in range
Downward Departure	0	(0.0)		0	(0.0)		1	(16.7)		2	(5.4)		0	(0.0)		0	(0.0)	
Bottom of the Range	6	(85.7)		2	(33.3)		3	(50.0)		20	(54.1)		4	(50.9)		4	(66.7)	
Below the Midpoint	0	(0.0)	100.0%	0	(0.0)		0	(0.0)		2	(5.4)		0	(0.0)		1	(16.7)	
At or Above the Midpoint	0	(0.0)		2	(33.3)	100.0%	1	(16.7)	66.7%	9	(24.3)	91.9%	1	(12.5)	100.0%	1	(16.7)	100.0%
Top of the Range	1	(14.3)		2	(33.3)		0	(0.0)		3	(8.1)		3	(37.5)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		1	(16.7)		1	(2.7)		0	(0.0)		0	(0.0)	
Total	7	(100)		6	(100)		6	(100)		37	(100)		8	(100)		6	(100)	

*Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Robbery File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY CIRCUIT

2nd Circuit
(1) Counseling and Treatment

3rd Circuit
(1) Drug Dependence
(1) Mental and Emotional Condition/Coercion and Duress
(1) Coercion and Duress

4th Circuit
(1) Military Record

8th Circuit
(1) Mixed Blood /Adopted

9th Circuit
(1) Defendant Completed Drug Treatment
(1) Limited Intelligence/Diminished Capacity

REASONS GIVEN FOR UPWARD DEPARTURE BY CIRCUIT

4th Circuit
(1) Dollar Amount

8th Circuit
(1) Adequacy of Criminal History

9th Circuit
(1) Conviction on Related Counts

Table 93

Location of Guideline Sentence by Race

HEROIN

Location of Sentence	White n	White (%)[a]		Black n	Black (%)[a]		Hispanic n	Hispanic (%)[a]	
Downward Departure	0	(0.0)		0	(0.0)		1	(3.3)	
Bottom of the Range	24	(92.3)	100.0%	19	(82.6)	100.0%	17	(56.7)	93.3%
Below the Midpoint	1	(3.9)		0	(0.0)		0	(0.0)	
At or Above the Midpoint	1	(3.9)		0	(0.0)		4	(13.3)	
Top of the Range	0	(0.0)		4	(17.3)		7	(23.3)	
Upward Departure	0	(0.0)		0	(0.0)		1	(3.3)	
Total	26	(100)		23	(100)		30	(100)	

[a] Column percents appear in parentheses.

Chi Square significant at $p \leq .05$ when comparing bottom of the range (and downward plus bottom of the range) sentences to within range sentences.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY RACE

Hispanic
(1) Pursuant to a Plea Agreement

REASONS GIVEN FOR UPWARD DEPARTURE BY RACE

Hispanic
(1) Adequacy of Criminal History

Table 94

Location of Guideline Sentence by Gender

GROUP II: HEROIN

Location of Sentence	Male n	Male (%)[a]		Female n	Female (%)[a]	
Downward Departure	2	(2.5)		0	(0.0)	
Bottom of the Range	59	(74.7)	96.2%	7	(100.0)	100.0%
Below the Midpoint	1	(1.3)		0	(0.0)	
At or Above the Midpoint	5	(6.3)		0	(0.0)	
Top of the Range	11	(13.9)		0	(0.0)	
Upward Departure	1	(1.2)		0	(0.0)	
Total	79	(100)		7	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY GENDER

Male
(1) No Reason Given
(1) Pursuant to a Plea Agreement

REASONS GIVEN FOR UPWARD DEPARTURE BY GENDER

Male
(1) Adequacy of Criminal History

Table 95

Location of Guideline Sentence by Age

HEROIN

Location of Sentence	18 - 25 n	18 - 25 (%)[a]		26 - 35 n	26 - 35 (%)[a]		36 and Over n	36 and Over (%)[a]	
Downward Departure	1	(7.1)		0	(0.0)		1	(3.1)	
Bottom of the Range	10	(71.4)	85.7%	31	(77.5)	100.0%	25	(78.1)	96.9%
Below the Midpoint	0	(0.0)		0	(0.0)		1	(3.1)	
At or Above the Midpoint	0	(0.0)		3	(7.5)		2	(6.3)	
Top of the Range	2	(14.3)		6	(15.0)		3	(9.4)	
Upward Departure	1	(7.1)		0	(0.0)		0	(0.0)	
Total	14	(100)		40	(100)		32	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY AGE

18-25
(1) Pursuant to a Plea Agreement

36 - and Over
(1) No Reason Given

REASONS GIVEN FOR UPWARD DEPARTURE BY AGE

18-25
(1) Adequacy of criminal history

Table 96

Location of Guideline Sentence by Marital Status

HEROIN

Location of Sentence	Married n	Married (%)[a]		Not Married n	Not Married (%)[a]	
Downward Departure	1	(2.3)		0	(0.0)	
Bottom of the Range	33	(75.0)	97.7%	31	(81.6)	97.4%
Below the Midpoint	1	(2.3)		0	(0.0)	
At or Above the Midpoint	2	(4.6)		3	(7.9)	
Top of the Range	7	(15.9)		3	(7.9)	
Upward Departure	0	(0.0)		1	(2.6)	
Total	44	(100)		38	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY MARITAL STATUS

Married
(1) Pursuant to a Plea Agreement

REASONS GIVEN FOR UPWARD DEPARTURE BY MARITAL STATUS

Not Married
(1) Adequacy of Criminal History

Table 97

Location of Guideline Sentence by Employment Status

HEROIN

Location of Sentence	Fully Employed n	Fully Employed (%)[a]		Partially Employed n	Partially Employed (%)[a]		Unemployed n	Unemployed (%)[a]	
Downward Departure	0	(0.0)		1	(6.7)		0	(0.0)	
Bottom of the Range	31	(79.5)	100.0%	9	(60.0)	93.3%	19	(86.4)	95.5%
Below the Midpoint	1	(2.6)		0	(0.0)		0	(0.0)	
At or Above the Midpoint	2	(5.1)		1	(6.7)		1	(4.6)	
Top of the Range	5	(12.8)		4	(26.7)		1	(4.6)	
Upward Departure	0	(0.0)		0	(0.0)		1	(4.6)	
Total	39	(100)		15	(100)		22	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EMPLOYMENT STATUS

Partially Employed
(1) Pursuant to a Plea Agreement

REASONS GIVEN FOR UPWARD DEPARTURE BY EMPLOYMENT STATUS

Unemployed
(1) Adequacy of Criminal History

Table 98

Location of Guideline Sentence by Education Level

HEROIN

Location of Sentence	Less than 12 Years n	(%)[a]		High School Graduate n	(%)[a]		More than 12 Years n	(%)[a]	
Downward Departure	1	(2.1)		0	(0.0)		0	(0.0)	
Bottom of the Range	35	(74.5)	97.9%	8	(72.7)	90.9%	15	(79.0)	100.0%
Below the Midpoint	1	(2.1)		0	(0.0)		0	(0.0)	
At or Above the Midpoint	4	(8.5)		0	(0.0)		1	(5.3)	
Top of the Range	6	(12.8)		2	(18.2)		3	(15.8)	
Upward Departure	0	(0.0)		1	(9.1)		0	(0.0)	
Total	47	(100)		11	(100)		19	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EDUCATION LEVEL

Less than 12 years
(1) Pursuant to a Plea Agreement

REASONS GIVEN FOR UPWARD DEPARTURE BY EDUCATION LEVEL

High school graduate
(1) Adequacy of Criminal Record

Table 99

Location of Guideline Sentence by Circuit
HEROIN

United States Circuit

Location of Sentence	D.C. N	D.C. (%)[a]	1st N	1st (%)		2nd N	2nd (%)		3rd N	3rd (%)		4th N	4th (%)	5th N	5th (%)	
Downward Departure	0	(-)	0	(0.0)		0	(0.0)		0	(0.0)		0	(-)	0	(0.0)	
Bottom of the Range	0	(-)	3	(75.0)		11	(78.6)		1	(100)		0	(-)	8	(61.5)	
Below the Midpoint	0	(-)	0	(0.0)	75.0%	0	(0.0)	100.0%	0	(0.0)	100.0%	0	(-)	0	(0.0)	100.0%
At or Above the Midpoint	0	(-)	0	(0.0)		1	(7.1)		0	(0.0)		0	(-)	2	(15.4)	
Top of the Range	0	(-)	0	(0.0)		2	(14.3)		0	(0.0)		0	(-)	3	(23.1)	
Upward Departure	0	(-)	1	(25.0)		0	(0.0)		0	(0.0)		0	(-)	0	(0.0)	
Total	0	(-)	4	(100)		14	(100)		1	(100)		0	(-)	13	(100)	

Location of Sentence	6th N	6th (%)		7th N	7th (%)		8th N	8th (%)	9th N	9th (%)		10th N	10th (%)		11th N	11th (%)	
Downward Departure	1	(20.0)		0	(0.0)		0	(-)	2	(11.8)		0	(0.0)		0	(0.0)	
Bottom of the Range	3	(60.0)		2	(100)		0	(-)	12	(70.6)		4	(100)		1	(100)	
Below the Midpoint	0	(0.0)	100.0%	0	(0.0)	100.0%	0	(-)	0	(0.0)	93.7%	0	(0.0)	100.0%	0	(0.0)	100.0%
At or Above the Midpoint	0	(0.0)		0	(0.0)		0	(-)	1	(5.9)		0	(0.0)		0	(0.0)	
Top of the Range	1	(25.0)		0	(0.0)		0	(-)	2	(11.8)		0	(0.0)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		0	(-)	0	(0.0)		0	(0.0)		0	(0.0)	
Total	5	(100)		2	(100)		0	(-)	17	(100)		4	(100)		1	(100)	

[a]Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Heroin File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY CIRCUIT

6th Circuit
(1) Cooperation (Status of Motion Unknown)

9th Circuit
(1) Cooperation (Status of Motion Unknown)
(1) Pursuant to a Plea Agreement

REASONS GIVEN FOR UPWARD DEPARTURE BY CIRCUIT

1st Circuit
(1) Adequacy of Criminal History

Table 100

Location of Guideline Sentence by Race

COCAINE

Location of Sentence	White n	White (%)[a]		Black n	Black (%)[a]		Hispanic n	Hispanic (%)[a]	
Downward Departure	3	(3.9)		1	(2.2)		5	(16.7)	
Bottom of the Range	57	(73.1)	96.2%	38	(88.4)	97.7%	20	(66.7)	83.3%
Below the Midpoint	6	(7.7)		1	(2.3)		2	(6.7)	
At or Above the Midpoint	7	(8.9)		2	(4.7)		1	(3.3)	
Top of the Range	5	(6.4)		1	(2.3)		2	(6.7)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)	
Total	78	(100)		43	(100)		30	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY RACE

White
(2) Cooperation Without Capacity
(1) Diminished Capacity

Black
(1) No Reason Given

Hispanic
(3) Pursuant to a Plea Agreement
(1) Physical Condition
(1) No Reason Given

Table 101

Location of Guideline Sentence by Gender

COCAINE

Location of Sentence	Male n	Male (%)[a]		Female n	Female (%)[a]	
Downward Departure	7	(5.2)		2	(8.3)	
Bottom of the Range	100	(73.5)	94.9%	21	(87.5)	91.7%
Below the Midpoint	10	(7.4)		1	(4.2)	
At or Above the Midpoint	10	(7.4)		0	(0)	
Top of the Range	9	(6.6)		0	(0)	
Upward Departure	0	(0.0)		0	(0.0)	
Total	136	(100)		24	(100)	

Note: 94.9% covers the Male rows Bottom of the Range through Top of the Range; 91.7% covers the same Female rows.

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY SEX

Male
(3) Pursuant to a Plea Agreement
(2) Cooperation Without Motion
(1) Diminished Capacity
(1) Physical Condition

Female
(1) No Reason Given

Table 102

Location of Guideline Sentence by Age

COCAINE

Location of Sentence	18 - 25 n	18 - 25 (%)[a]		26 - 35 n	26 - 35 (%)[a]		36 and Over n	36 and Over (%)[a]	
Downward Departure	2	(6.1)		4	(5.6)		3	(5.4)	
Bottom of the Range	28	(84.9)	93.9%	53	(73.6)	94.4%	41	(73.2)	94.6%
Below the Midpoint	2	(6.1)		6	(8.3)		3	(5.4)	
At or Above the Midpoint	0	(0.0)		5	(6.9)		5	(8.9)	
Top of the Range	1	(3.0)		4	(5.6)		4	(7.1)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)	
Total	33	(100)		72	(100)		56	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY AGE

<u>18-25</u>
(1) Pursuant to a Plea Agreement

<u>26-35</u>
(2) Cooperation Without Motion
(1) Pursuant to a Plea Agreement
(1) No Reason Given

<u>36 - and Over</u>
(1) Diminished Capacity
(1) Physical Condition
(1) Pursuant to a Plea Agreement

Table 103

Location of Guideline Sentence by Marital Status

COCAINE

Location of Sentence	Married n	Married (%)[a]		Not Married n	Not Married (%)[a]	
Downward Departure	2	(4.7)		7	(8.1)	
Bottom of the Range	34	(79.1)	95.4%	62	(71.3)	92.0%
Below the Midpoint	0	(0.0)		8	(9.2)	
At or Above the Midpoint	5	(11.6)		4	(4.6)	
Top of the Range	2	(4.7)		6	(6.9))	
Upward Departure	0	(0.0)		0	(0.0)	
Total	43	(100)		87	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY MARITAL STATUS

Married
(1) Physical Condition
(1) No Reason Given

Not Married
(3) Pursuant to a Plea Agreement
(2) Cooperation Without Motion
(1) Diminished Capacity
(1) No Reason Given

Table 104

Location of Guideline Sentence by Employment Status

COCAINE

Location of Sentence	Fully Employed			Partially Employed			Unemployed		
		(%)[a]		n	(%)[a]		n	(%)[a]	
Downward Departure	3	(4.7)		4	(10.0)		0	(0.0)	
Bottom of the Range	51	(79.7)		27	(67.5)		11	(100.0)	
Below the Midpoint	4	(6.3)	95.3%	1	(2.5)	90.0%	0	(0.0)	100.0%
At or Above the Midpoint	5	(7.8)		3	(7.5)		0	(0.0)	
Top of the Range	1	(1.6)		5	(12.5)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)	
Total	64	(100)		40	(100)		11	(100)	

Employment Status

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EMPLOYMENT STATUS

Fully Employed
(1) Physical Condition
(1) Diminished Capacity
(1) No Reason Given

Partially Employed
(3) Pursuant to a Plea Agreement
(2) Cooperation Without Motion
(1) No Reason Given

Table 105

Location of Guideline Sentence by Education Level

COCAINE

Location of Sentence	Less than 12 Years n	(%)[a]		High School Graduate n	(%)[a]		More than 12 Years n	(%)[a]	
Downward Departure	2	(3.6)		6	(12.0)		1	(6.7)	
Bottom of the Range	42	(75.0)	96.4%	37	(74.0)	88.0%	11	(73.3)	93.3%
Below the Midpoint	4	(7.1)		3	(6.0)		0	(0.0)	
At or Above the Midpoint	3	(5.4)		2	(4.0)		2	(13.3)	
Top of the Range	5	(8.9)		2	(4.0)		1	(6.7)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)	
Total	56	(100)		50	(100)		15	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURES BY EDUCATION

Less than 12 years
(1) Diminished Capacity

High school graduate or GED
(1) Pursuant to a Plea Agreement
(1) Cooperation without Motion
(1) Physical Condition
(1) Missing

More than 12 years
(1) Cooperation without Motion

Table 106

Location of Guideline Sentence by Circuit
GROUP III: COCAINE

United States Circuit

Location of Sentence	D.C. N	D.C. (%)[a]	D.C. Bottom–Top	1st N	1st (%)	1st Bottom–Top	2nd N	2nd (%)	2nd Bottom–Top	3rd N	3rd (%)	3rd Bottom–Top	4th N	4th (%)	4th Bottom–Top	5th N	5th (%)	5th Bottom–Top
Downward Departure	0	(0.0)		3	(25.0)		0	(0.0)		0	(0.0)		0	(0.0)		2	(18.2)	
Bottom of the Range	3	(100)		6	(50.0)		11	(73.3)		2	(100)		6	(66.7)		6	(54.6)	
Below the Midpoint	0	(0.0)	100.0%	0	(0.0)	75.0%	2	(13.3)	100.0%	0	(0.0)	100.0%	1	(11.1)	100.0%	0	(0.0)	81.8%
At or Above the Midpoint	0	(0.0)		1	(8.3)		0	(0.0)		0	(0.0)		2	(22.2)		3	(27.3)	
Top of the Range	0	(0.0)		2	(16.7)		2	(13.3)		0	(0.0)		0	(0.0)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)	
Total	3	(100)		12	(100)		15	(100)		2	(100)		9	(100)		11	(100)	

Location of Sentence	6th N	6th (%)	6th Bottom–Top	7th N	7th (%)	7th Bottom–Top	8th N	8th (%)	8th Bottom–Top	9th N	9th (%)	9th Bottom–Top	10th N	10th (%)	10th Bottom–Top	11th N	11th (%)	11th Bottom–Top
Downward Departure	0	(0.0)		0	(0.0)		1	(20.0)		3	(16.7)		0	(0.0)		0	(0.0)	
Bottom of the Range	6	(100)		8	(61.5)		3	(60.0)		11	(61.1)		3	(75.0)		57	(90.5)	
Below the Midpoint	0	(0.0)	100.0%	2	(15.4)	100.0%	0	(0.0)	80.0%	0	(0.0)	83.3%	1	(25.0)	100.0%	5	(7.9)	100.0%
At or Above the Midpoint	0	(0.0)		0	(0.0)		1	(20.0)		2	(11.10		0	(0.0)		1	(1.6)	
Top of the Range	0	(0.0)		3	(23.1)		0	(0.0)		2	(11.1)		0	(0.0)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)	
Total	6	(100)		13	(100)		5	(100)		18	(100)		4	(100)		63	(100)	

[a]Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, Evaluation Study - Cocaine File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY CIRCUIT

1st Circuit
(2) No Reason Given
(1) Physical Condition

5th Circuit
(2) Pursuant to a Plea Agreement

8th Circuit
(1) Diminished Capacity

9th Circuit
(2) Cooperation Without a Motion
(1) Pursuant to a Plea Agreement

d. Embezzlement Offenders

The profile of offenders convicted of embezzlement was unique in several respects compared to the other three offense groups. First, 77.4 percent of offenders were female. More than 59 percent were White, 33.6 percent Black, and 6.7 percent Hispanic. Few (5.6%) were unemployed during the year prior to the offense and 58.9 percent were fully employed. More than 49 percent had completed high school plus additional years of education, while an additional 45 percent had completed high school. A majority of offenders (56.5%) were between the ages of 26-35 years, and close to half (46.8%) were married. More than 65 percent were sentenced in one of four circuits (Second, Fifth, Sixth, or Eleventh).

Again, cell sizes were inadequate to test or no statistically significant relationships were found with respect to circuit or any of the personal characteristics, *i.e.*, race, gender, age, marital status, employment, and education (*see* Tables 107 through 113).

2. Trends Relating to all Offenses

In order to analyze judicial sentencing patterns across all offense categories and types, the Commission reviewed a 25-percent random sample of all cases sentenced in the last six months of fiscal year 1990. Little or no variations were found in departure rates across personal characteristics. However, some statistically significant relationships were found regarding the "point within the range"; *i.e.*, the likelihood of sentences at the bottom of the range as compared to sentences higher in the range.

Race was found to be statistically significant across all offense categories. Blacks were most likely and Hispanics least likely to be sentenced at the bottom of the applicable guideline range. Only slight variations between sentencing of Black and White offenders were found (*see* Table 114).

As shown in Table 115, women were statistically more likely to receive sentences at the bottom of the range (64.8% compared to 46.3% of men). Men were more likely to receive sentences at higher levels. No statistically significant or notable variations were found with respect to age, marital status, or education (*see* Tables 116, 117, and 118, respectively). Fully employed offenders were more likely to be sentenced at the bottom of the guideline range than those partially employed or unemployed (*see* Table 119). This relationship was statistically significant. While the majority of offenders in each circuit received sentences at the bottom of the range or departures below the range, the variations occurring across circuits did reach statistical significance (*see* Table 120).

3. Summary

A review of "similar type" group sentencing patterns highlights several factors of importance to an analysis of judicial sentencing. First, offenders similar with respect to offense and criminal history often vary little on many personal characteristics. This lack of variation within groups makes an analysis of personal characteristics difficult. In fact, it appears that even if the number of cases were sufficiently large to achieve statistical significance, the direction of variations may be different from offense to offense, as illustrated by the variations on sentencing by race.

Second, it must be noted that the majority of guideline cases are sentenced at the bottom of the available range. While variations from this pattern occur, they are limited to fairly small numbers of cases within any given category. Because the circumstances leading to this may be correlated to many known and unknown factors, interpretation of any findings is difficult.

Table 107

Location of Guideline Sentence by Race

GROUP IV: EMBEZZLEMENT

Location of Sentence	White n	White (%)[a]		Black n	Black (%)[a]		Hispanic n	Hispanic (%)[a]	
Downward Departure	11	(19.0)		1	((3.7)		1	(25.0)	
Bottom of the Range	39	(67.2)	81.0%	21	(77.8)	96.3%	2	(50.0)	75.0%
Below the Midpoint	8	(13.8)		2	(7.4)		1	(25.0)	
At or Above the Midpoint	0	(0.0)		3	(11.1)		0	(0.0)	
Top of the Range	0	(0.0)		0	(0.0)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)	
Total	58	(100)		27	(100)		4	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY RACE

White
(2) Family Ties and Responsibilities
(1) Family Ties and Responsibilities/Physical Condition
(1) Diminished Capacity
(1) Further Demonstrated Acceptance/Previous Employment Record
(1) Further Demonstrated Acceptance
(1) Cooperation Without a Motion
(1) No Prior Record/Restitution
(1) Criminal History Category Overrepresentative
(1) Other
(1) Defendant Testified Against Self

Black
(1) Family Ties and Responsibilities/First Felony Conviction

Hispanic
(1) Helping a Friend dying of AIDS

Table 108

Location of Guideline Sentence by Gender

GROUP IV: EMBEZZLEMENT

Location of Sentence	Male n	Male (%)[a]		Female n	Female (%)[a]	
Downward Departure	1	(5.0)		12	(16.4)	
Bottom of the Range	15	(75.0)	95.0%	50	(68.4)	83.6%
Below the Midpoint	4	(20.0)		8	(11.0)	
At or Above the Midpoint	0	(0)		3	(4.1)	
Top of the Range	0	(0)		0	(0)	
Upward Departure	0	(0)		0	(0)	
Total	20	(100)		73	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY GENDER

Male
(1) Helping a Friend Dying of AIDS

Female
(2) Family Ties and Responsibilities
(1) Family Ties and Responsibilities / First Felony Conviction
(1) Physical Condition / Family Ties and Responsibilities
(1) Diminished Capacity
(1) Further Acceptance of Responsibility / Previous Employment Record
(1) Cooperation Without a Motion
(1) No Prior Record / Restitution Made
(1) A Criminal History Category Overrepresentative
(1) Defendant Testified Against Self
(1) Other

Table 109

Location of Guideline Sentence by Age

GROUP IV: EMBEZZLEMENT

Location of Sentence	Age: 18 - 25 n	(%)[a]		26 - 35 n	(%)[a]		36 and Over n	(%)[a]	
Downward Departure	5	(17.2)		5	(9.8)		3	(23.1)	
Bottom of the Range	20	(69.0)	82.8%	35	(68.6)	90.2%	10	(76.9)	76.9%
Below the Midpoint	4	(13.8)		8	(15.7)		0	(0)	
At or Above the Midpoint	0	(0)		3	(5.9)		0	(0)	
Top of the Range	0	(0)		0	(0)		0	(0)	
Upward Departure	0	(0)		0	(0)		0	(0)	
Total	29	(100)		51	(54.3)		13	(13.8)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY AGE

18-25
(1) Cooperation Without a Motion
(1) Criminal History Category Overrepresentative
(1) Other
(1) Defendant Testified Against Self

26-35
(1) Family Ties and Responsibilities
(1) Family Ties and Responsibilities/Physical Condition
(1) Further Demonstrated acceptance
(1) No Prior Record/Restitution Made
(1) Helping a Friend Dying of AIDS

36 - and Over
(1) Family Ties and Responsibilities
(1) Family Ties and Responsibilities
(1) Diminished Capacity

Table 110

Location of Guideline Sentence by Marital Status

GROUP IV: EMBEZZLEMENT

Location of Sentence	Marital Status					
	Married			Not Married		
	n	(%)[a]		n	(%)[a]	
Downward Departure	8	(18.6)		5	(10.0)	
Bottom of the Range	29	(67.4)	81.4%	36	(72.0)	90.0%
Below the Midpoint	4	(9.3)		8	(16.0)	
At or Above the Midpoint	2	(4.7)		1	(2.0)	
Top of the Range	0	(0.0)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)	
Total	43	(100)		50	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY MARITAL STATUS

Married
(1) Family Ties and Responsibilities
(1) Physical Condition/Family Ties and Responsibilities
(1) Family Ties and Responsibilities/First Felony Conviction
(1) Diminished Capacity
(1) Further Demonstrated Acceptance
(1) Cooperation Without a Motion
(1) No Prior Record/Restitution Made
(1) Defendant Testified Against Self

Not Married
(1) Family Ties and Responsibilities
(1) Other
(1) Helping a Friend Dying of AIDS
(1) Criminal History Category Overrepresentative

Table 111

Location of Guideline Sentence by Employment Status

GROUP IV: EMBEZZLEMENT

Location of Sentence	Employment Status: Fully Employed n	(%)[a]		Employed n	(%)[a]		Unemployed n	(%)[a]	
Downward Departure	9	(16.4)		4	(12.1)		0	(0)	
Bottom of the Range	38	(69.1)	83.6%	23	(69.7)	87.9%	4	(80.0)	100.0%
Below the Midpoint	6	(10.9)		5	(15.2)		1	(20.0)	
At or Above the Midpoint	2	(3.6)		1	(3.0)		0	(0)	
Top of the Range	0	(0)		0	(0)		0	(0)	
Upward Departure	0	(0)		0	(0)		0	(0)	
Total	55	(100)		33	(0)		5	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EMPLOYMENT STATUS

Fully Employed
(1) Diminished Capacity
(1) Further Demonstration of Acceptance / Previous
(1) Physical Condition / Family Ties and Responsibilities
(1) Further Demonstration of Acceptance
(1) Family Ties and Responsibilities / First Felony Conviction
(1) Other
(1) No Prior Record / Restitution Made
(1) Defendant Testified Against Self
(1) Helped a Friend Dying of AIDS

Partially Employed

(2) Family Ties and Responsibilities
(1) Cooperation Without a Motion
(1) Criminal History Category Overrepresentative

Table 112

Location of Guideline Sentence by Education Level

GROUP IV: EMBEZZLEMENT

Location of Sentence	Less than 12 Years n	(%)[a]		High School Graduate n	(%)[a]		More than 12 Years n	(%)[a]	
Downward Departure	0	(0)		6	(14.3)		7	(15.2)	
Bottom of the Range	4	(80.0)	100.0%	30	(71.4)	85.7%	31	(67.4)	84.8%
Below the Midpoint	1	(20.0)		4	(9.5)		7	(15.2)	
At or Above the Midpoint	0	(0)		2	(4.8)		1	(2.2)	
Top of the Range	0	(0)		0	(0)		0	(0)	
Upward Departure	0	(0)		0	(0)		0	(0)	
Total	5	(100)		42	(100)		46	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY EDUCATION LEVEL

High school graduate
(2) Family Ties and Responsibilities
(1) Family Ties and Responsibilities/Physical Condition
(1) Family Ties and Responsibilities/First Felony Conviction
(1) Cooperation without a Motion
(1) No Prior Record/Restitution Made

More than 12 years
(1) Diminished Capacity
(1) Further Demonstrated Acceptance/Previous Employment Record
(1) Further demonstrated Acceptance
(1) Helping a Friend Dying of AIDS
(1) Defendant Testified Against Self
(1) Other
(1) Criminal History Category Overrepresentative

Table 113

Location of Guideline Sentence by Circuit
GROUP IV: EMBEZZLEMENT

United States Circuit

Location of Sentence	D.C. N	D.C. (%)[a]	1st N	1st (%)	2nd N	2nd (%)		3rd N	3rd (%)		4th N	4th (%)		5th N	5th (%)	
Downward Departure	0	(-)	0	(-)	2	(18.2)		0	(0.0)		0	(0.0)		2	(18.2)	
Bottom of the Range	0	(-)	0	(-)	8	(72.7)		3	(100.0)		4	(80.0)		5	(45.5)	
Below the Midpoint	0	(-)	0	(-)	1	(9.1)	81.8%	0	(0.0)	100.0%	0	(0.0)	100.0%	4	(36.4)	81.8%
At or Above the Midpoint	0	(-)	0	(-)	0	(0.0)		0	(0.0)		1	(20.0)		0	(0.0)	
Top of the Range	0	(-)	0	(-)	0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)	
Upward Departure	0	(-)	0	(-)	0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)	
Total	0	(-)	0	(-)	11	(100)		3	(100)		5	(100)		11	(100)	

Location of Sentence	6th N	6th (%)		7th N	7th (%)		8th N	8th (%)		9th N	9th (%)		10th N	10th (%)		11th N	11th (%)	
Downward Departure	5	(25.0)		0	(0.0)		0	(0.0)		1	(11.1)		1	(14.3)		2	.1)	
Bottom of the Range	12	(60.0)		3	(75.0)		4	(80.0)		5	(55.6)		6	(85.7)		15	(83.3)	
Below the Midpoint	2	(10.0)	75.0%	1	(25.0)	100.0%	1	(20.0)	100.0%	3	(63.3)	88.9%	0	(0.0)	85.7%	0	(0.0)	88.9%
At or Above the Midpoint	1	(5.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		1	(5.6)	
Top of the Range	0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)	
Upward Departure	0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)		0	(0.0)	
Total	20	(100)		4	(100)		5	(100)		9	(100)		7	(100)		18	(100)	

[a]Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission - Embezzlement File.

REASONS GIVEN FOR DOWNWARD DEPARTURE BY CIRCUIT

2nd Circuit
(1) Family Ties and Responsibilities/First Felony Conviction
(1) Helping a Friend Dying of AIDS

5th Circuit
(1) No Prior Record/Restitution Made
(1) Other

6th Circuit
(1) Diminished Capacity
(1) Further Demonstration of Acceptance/Previous Employment Record
(1) Family Ties
(1) Cooperation without a Motion
(1) Criminal History Category Overrepresentative

9th Circuit
(1) Defendant Testified Against Self

10th Circuit
(1) Physical Condition/Family Ties

11th Circuit
(1) Further Demonstration of Acceptance

Table 114

Location of Guideline Sentence by Race

ALL OFFENSES

Location of Sentence	White n	White (%)[a]		Black n	Black (%)[a]		Hispanic n	Hispanic (%)[a]	
Downward Departure	83	(8.4)		46	(8.7)		34	(10.1)	
Bottom of the Range	484	(49.2)	88.3%	283	(53.4)	89.2%	149	(44.2)	87.8%
Below the Midpoint	99	(10.1)		52	(9.8)		51	(15.1)	
At or Above the Midpoint	150	(15.3)		59	(11.1)		55	(16.3)	
Top of the Range	135	(13.7)		79	(14.9)		41	(12.2)	
Upward Departure	32	(3.3)		11	(2.1)		7	(2.1)	
Total	983	(100)		530	(100)		337	(100)	

[a] Column percents appear in parentheses.

Chi Square significant at $p \leq .05$

SOURCE: U.S. Sentencing Commission, April - September 1990 Departure Study Data File.

Table 115

Location of Guideline Sentence by Gender

ALL OFFENSES

Location of Sentence	Gender					
	Male			Female		
	n	(%)[a]		n	(%)[a]	
Downward Departure	143	(8.9)		30	(9.4)	
Bottom of the Range	741	(46.3)	88.0%	206	(64.8)	89.3%
Below the Midpoint	184	(11.5)		26	(8.2)	
At or Above the Midpoint	238	(14.9)		32	(10.1)	
Top of the Range	245	(15.3)		20	(6.3)	
Upward Departure	49	(3.1)		4	(1.3)	
Total	1600	(100)		318	(100)	

[a] Column percents appear in parentheses.

Chi square significant at $p \leq .01$

SOURCE: U.S. Sentencing Commission, April - September 1990 Departure Study Data File.

Table 116

Location of Guideline Sentence by Age

ALL OFFENSES

Location of Sentence	18 - 25 n	18 - 25 (%)[a]		26 - 35 n	26 - 35 (%)[a]		36 and Over n	36 and Over (%)[a]	
Downward Departure	48	(10.0)		76	(9.4)		61	(8.3)	
Bottom of the Range	254	(52.7)	86.9%	373	(46.0)	87.7%	359	(48.6)	88.8%
Below the Midpoint	48	(10.0)		92	(11.3)		85	(11.5)	
At or Above the Midpoint	66	(13.7)		122	(15.0)		98	(13.3)	
Top of the Range	51	(10.6)		124	(15.3)		113	(15.3)	
Upward Departure	15	(3.1)		24	(3.0)		22	(3.0)	
Total	482	(100)		811	(100)		738	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, April through September 1990 Departure Study Data File.

Table 117

Location of Guideline Sentence by Marital Status

ALL OFFENSES

Location of Sentence	Married n	Married (%)[a]		Not Married n	Not Married (%)[a]	
Downward Departure	47	(7.8)		100	(10.3)	
Bottom of the Range	320	(53.1)	89.9%	447	(46.0)	86.7%
Below the Midpoint	64	(10.6)		116	(11.9)	
At or Above the Midpoint	73	(12.1)		146	(15.0)	
Top of the Range	85	(14.1)		134	(13.8)	
Upward Departure	14	(2.3)		29	(3.0)	
Total	603	(100)		972	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, April - September 1990 Departure Study Data File.

Table 118

Location of Guideline Sentence by Employment Status

ALL OFFENSES

Location of Sentence	Fully Employed n	Fully Employed (%)[a]		Partially Employed n	Partially Employed (%)[a]		Unemployed n	Unemployed (%)[a]	
Downward Departure	66	(9.5)		31	(8.5)		50	(9.6)	
Bottom of the Range	377	(54.5)	88.4%	182	(49.9)	89.0%	209	(40.2)	86.5%
Below the Midpoint	72	(10.4)		41	(11.2)		66	(12.7)	
At or Above the Midpoint	88	(12.7)		56	(15.3)		76	(14.6)	
Top of the Range	75	(10.8)		46	(12.6)		99	(19.0)	
Upward Departure	14	(2.0)		9	(2.5)		20	(3.8)	
Total	692	(100)		365	(100)		520	(100)	

Employment Status

[a] Column percents appear in parentheses.

Chi square significant at $p \leq .01$

SOURCE: U.S. Sentencing Commission, April - September 1990 Departure Study Data File.

Table 119

Location of Guideline Sentence by Education Level

ALL OFFENSES

Location of Sentence	Less than 12 Years n	(%)[a]		High School Graduate n	(%)[a]		More than 12 Years n	(%)[a]	
Downward Departure	66	(10.0)		45	(9.0)		36	(8.8)	
Bottom of the Range	303	(45.7)	87.2%	254	(51.0)	89.2%	206	(50.2)	87.6%
Below the Midpoint	73	(11.0)		55	(11.0)		50	(12.2)	
At or Above the Midpoint	103	(15.5)		64	(12.9)		53	(12.9)	
Top of the Range	99	(14.9)		71	(14.3)		50	(12.2)	
Upward Departure	19	(2.9)		9	(1.8)		15	(3.7)	
Total	663	(100)		498	(100)		410	(100)	

[a] Column percents appear in parentheses.

SOURCE: U.S. Sentencing Commission, April - September 1990 Departure Study Data File.

Table 120

Location of Guideline Sentence by Circuit
ALL OFFENSES

United States Circuit

Location of Sentence	D.C. N	D.C. (%)[a]		1st N	1st (%)		2nd N	2nd (%)		3rd N	3rd (%)		4th N	4th (%)		5th N	5th (%)	
Downward Departure	0	(0)		6	(10.9)		11	(8.9)		4	(6.5)		14	(6.6)		33	(8.9)	
Bottom of the Range	22	(73.3)		23	(41.8)		53	(42.7)		30	(48.4)		116	(54.5)		160	(43.4)	
Below the Midpoint	3	(10.0)	100.0%	9	(16.4)	81.8%	13	(10.5)	87.1%	6	(9.7)	91.9%	24	(11.3)	91.1%	46	(12.5)	88.1%
At or Above the Midpoint	1	(3.3)		4	(7.3)		14	(11.3)		7	(11.3)		23	(10.8)		63	(17.1)	
Top of the Range	4	(13.3)		9	(16.4)		28	(22.6)		14	(22.6)		31	(14.6)		56	(15.2)	
Upward Departure	0	(0)		4	(7.3)		5	(4.0)		1	(1.6)		5	(2.4)		11	(3.0)	
Total	30	(100)		55	(100)		124	(100)		62	(100)		213	(100)		369	(100)	

Location of Sentence	6th N	6th (%)		7th N	7th (%)		8th N	8th (%)		9th N	9th (%)		10th N	10th (%)		11th N	11th (%)	
Downward Departure	16	(9.9)		5	(6.9)		16	(9.1)		46	(12.4)		12	(8.0)		22	(6.9)	
Bottom of the Range	95	(58.6)		39	(53.4)		89	(50.6)		177	(47.6)		71	(47.3)		170	(53.0)	
Below the Midpoint	11	(6.8)	85.8%	13	(17.8)	93.2%	17	(9.7)	88.6%	39	(10.5)	83.1%	16	(10.7)	90.0%	37	(11.5)	91.9%
At or Above the Midpoint	14	(8.6)		8	(11.0)		30	(17.1)		56	(15.1)		25	(16.7)		46	(14.3)	
Top of the Range	19	(11.7)		8	(11.0)		20	(11.4)		37	(10.0)		23	(15.3)		42	(13.1)	
Upward Departure	7	(4.3)		0	(0)		4	(2.3)		17	(4.6)		3	(2.0)		4	(1.3)	
Total	162	(100)		73	(100)		176	(100)		372	(100)		150	(100)		321	(100)	

[a]Column percents appear in parentheses.

Chi square significant at $p \leq .01$

SOURCE: U.S. Sentencing Commission, April - September 1990 Departure Data File.

Variations by race were significant at the aggregate level only for within-range sentences across all offense categories, not in departure rates. The finding that Hispanic offenders were slightly less likely to be sentenced at the bottom of the applicable range is consistent with the finding of the heroin offense group, but not the cocaine offense group. While this study cannot elaborate on these findings, previous work at the Commission has shown that Hispanics, probably due to alien status, are least likely to be sentenced to community alternatives, such as probation or community confinement.

Other significant within-range variations across all offenses were found for gender, employment status, and circuit. Again, any of these variations may be correlated with factors not addressed or fully investigated in this study.

B. Judicial Discretion and Its Relationship to Disparity[423]

The sentencing guidelines were developed to produce more uniform and proportionate sentences by reducing unwarranted disparity through a structured sentencing system. Some critics claim that the guidelines have eliminated judicial discretion. Recent research by the Commission using its monitoring database explores empirically the parameters of judicial discretion within the new sentencing guidelines structure. The study focuses on the degree to which the courts exercise the discretion available under the guidelines.

1. Background: Judicial Options in the Decisionmaking Process

Judicial discretion always has occurred within the framework of legislative, prosecutorial, and correctional restraints. The statutory language of the federal criminal code regulates sentencing within wide intervals of discretion through statutory minimums and maximums. This relatively broad legislative parameter is restricted further by a growing number of mandatory minimum provisions applicable to some of the most frequently prosecuted federal crimes (*i.e.*, controlled substance and firearm violations).

Prosecutors limit judicial discretion through their charging decisions in that charges must be brought and convictions secured before judges can impose a sentence. In this limited sense, prosecutorial action delineates the boundaries of judicial discretion through a series of decisions at the investigative, indictment/information, and plea negotiation stages. At sentencing, prosecutorial actions with respect to recommendations or stipulations and motions for a reduced sentence (*e.g.*, substantial assistance) also play a role in affecting judges' sentencing decisions.

Prior to the guidelines, the Parole Commission set the actual amount of punishment to be meted out through its release decisions, vacating much of the meaning of "sentence imposed" by determining the more relevant "time served."

In accordance with congressional objectives, the sentencing guidelines introduced a more structured and by definition, less discretionary system in which judges impose non-parolable sentences. Under this framework, two main factors are considered in calculating a defendant's sentence: (1) offense conduct — the type, seriousness, and specific characteristics of the offense; and (2) offender characteristics — primarily criminal history, the existence and seriousness of the

[423]This research was presented by Katzenelson & McDanal, Sentencing Guidelines and Judicial Discretion in the Federal Court System, 50th Annual Meeting of the Am. Soc. of Criminology (1991).

defendant's previous criminal activities.[424] Prior to sentencing, judges resolve factual disputes pertaining to any of the factors relevant to the case that have a direct impact on the guideline range.

Under the guideline structure, the offense level and criminal history category determine the guideline range, which is expressed in months. The range from which the sentence is selected reflects the meeting point of the offense and offender characteristics in the Sentencing Table, as shown in Figure 9. A court has complete discretion to sentence at any point within the applicable guideline range. For the higher ranges, the range can be as wide as 82 months, a choice that can represent a seven-year difference in the defendant's sentence. The impact of this "point-within-the-range" decision is particularly important in a system without parole. At the lower ranges, where the range is smaller, sentencing alternatives such as probation, community confinement, or split sentences are available on a discretionary basis in lieu of incarceration.

The actual sentence imposed by the court reflects a series of decisions directly affecting the guideline calculations and hence the relevant range: acceptance or rejection of the plea agreement; review and revision of factual findings and relevant conduct; and consideration of motions, particularly government motions for sentence reduction for cooperation and substantial assistance. Based on the final range as determined by the court, the judge selects a sentence within the range or departs above or below it.

The following sections analyze the degree to which courts exercise available discretionary options and examine some of the offense, offender, and other variables correlated with these options.

2. Methodology

The Commission's monitoring database of guideline cases sentenced in fiscal year 1990 includes 22,727 cases for which court determination of pertinent guideline factors was available for analysis.[425] The first phase of analysis describes the range, distribution, and dispersion of the dependent variable, sentence imposed. The second phase presents a picture of judicial decisions in bivariate (and some trivariate) analyses with a series of factors such as crime type and offense level, offender's race and sex, mode of conviction, and criminal history category.

3. Findings

a. Sentence as a Relational Measure of Discretion

Table 121 provides an aggregate profile of sentence characteristics within all possible guideline ranges.[426] As a general observation, mean sentences are closer to the lower end of the range than to its middle or higher end. Medians are consistently smaller than means for the lower guideline

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[424]For further explanation, *see* Wilkins, Newton & Steer, *supra* note 367; Breyer, *supra* note 367; Nagel, *supra* note 367.

[425]While 29,011 cases were sentenced under the guidelines in fiscal 1990, only those cases with a Report on the Sentencing Hearing (or some comparable document) were included in this analysis. The total number of cases included in each table may vary due to the exclusion of cases for which information on one or more of the variables was missing.

[426]The base for each category is sentences for cases with a particular final guideline range, whether the actual sentence fell within that range or outside it.

Figure 9

SENTENCING TABLE

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

KEY

A -- Probation available (see §5B1.1(a)(1))

B -- Probation with condition of confinement available (see §5B1.1(a)(2))

C -- New "split sentence" available (see §§5C1.1(c)(3),(d)(2))

SOURCE: USSC 1990 Guideline Manual, p5.2

Table 121

AGGREGATE SENTENCE CHARACTERISTICS BY GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Final Guideline Range	Aggregate Sentence Characteristics				
	Number	Mean	Median	Standard Deviation	Skewness
0 to 6	3,159	1.0	0.0	4.1	16.4
1 to 7	698	3.4	2.0	5.3	6.7
2 to 8	767	4.1	3.0	4.8	7.4
3 to 9	9	7.3	9.0	3.0	-0.3
4 to 10	628	6.6	6.0	9.9	12.4
6 to 12	1,160	8.3	6.0	8.0	5.4
8 to 14	641	10.5	9.0	14.8	11.0
9 to 15	81	11.6	12.0	3.0	-0.7
10 to 16	854	12.4	10.0	11.2	5.8
12 to 18	612	16.1	14.0	18.6	7.3
15 to 21	862	20.3	16.0	21.9	5.4
18 to 24	410	24.9	20.0	29.9	5.0
21 to 27	751	27.7	21.0	33.3	7.3
24 to 30	434	30.6	24.0	33.4	6.5
27 to 33	619	32.8	27.0	24.9	4.1
30 to 37	258	39.4	33.0	30.6	3.1
33 to 41	595	36.5	33.0	24.0	7.2
37 to 46	264	44.2	40.0	26.2	2.8
41 to 51	550	45.0	41.0	21.2	2.0
46 to 57	202	54.1	48.0	30.2	4.5
51 to 63	973	56.5	60.0	29.9	4.6
57 to 71	229	65.0	60.0	36.7	6.7
63 to 78	817	67.3	63.0	29.8	3.0
70 to 87	201	81.4	72.0	60.9	10.2
77 to 96	78	90.9	79.0	52.7	3.6

78 to 97	531	76.2	78.0	28.7	-0.3
84 to 105	34	97.7	88.0	26.3	1.3
87 to 108	110	92.0	95.5	28.8	-0.3
92 to 115	78	100.0	96.0	42.6	1.0
97 to 121	462	94.5	97.0	42.1	0.6
100 to 125	24	109.3	118.0	42.8	0.8
108 to 135	102	104.8	119.0	44.3	1.4
110 to 137	46	118.3	115.0	35.5	0.3
120 to 150	22	122.5	120.0	62.0	0.9
121 to 151	493	114.2	121.0	50.9	1.2
130 to 162	14	141.9	132.5	55.4	0.7
135 to 168	153	138.0	135.0	42.2	-0.0
151 to 188	412	142.3	151.0	53.5	1.2
168 to 210	225	154.9	168.0	59.2	-0.4
188 to 235	242	179.7	188.0	61.1	-0.7
210 to 262	224	206.4	210.0	66.9	-0.1
235 to 293	147	226.0	235.0	69.3	-0.3
262 to 327	142	258.3	262.0	102.8	0.6
292 to 365	95	283.3	292.0	86.1	-0.4
324 to 405	32	349.1	360.0	88.3	0.9

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Data presented includes those cases that received zero months imprisonment.

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

ranges, indicating that for these ranges the mean is affected by a few relatively high sentences. However, in the higher guideline ranges, the relationship is reversed: the mean is reduced below the median by a few relatively low sentences. As expected, the standard deviation progressively increases for the higher ranges in proportion with the availability (*i.e.*, interval width) of greater sentence selection.

Ranges with a minimum of up to ten months (Levels A, B, and C in Figure 9) offer a variety of discretionary sentencing alternatives. These include straight probation, probation with some form of intermittent, community, or home confinement, and a sentence in which at least half the minimum term is served in prison followed by supervised release with either community or home confinement. At the other extreme, judges at the higher offense levels can exercise considerable discretion by selecting the appropriate prison sentence within ranges up to almost seven years wide.

Judicial discretion can be further expressed using the width of the computed guideline ranges (the difference between the maximum and the minimum of the range). The 45 different ranges in the Sentencing Table have widths or intervals from seven months at the lowest ranges to 82 months (disregarding "life"). Table 122 looks at sentence characteristics by interval length (*i.e.*, interval I including ranges with a width of 7 to 11 months; interval II, 12 to 23 months; interval III, 24 to 47 months; and interval IV, 48 to 82 months). When grouped by interval of variation, aggregate sentences present a similar profile to that in Table 121. (Note that the sentence measures in Tables 121 and 122 also include sentences outside the ranges. This can result from such factors as departures, statutory minimum and maximum requirements that "trump" the guideline range,[427] or substantial assistance reductions.)

To further depict judicial decisionmaking, an additional variable was computed: the position of each sentence in relation to its guideline range. The "Sentence Position Relative to Range," expressed as one of six possible positions (departure below the range, in the first, second, third, or fourth quarter of the range, or departure above the range), is a measure of discretion independent of the specific guideline range or its width.

Table 123 displays the position of sentences for the entire population. The majority of sentences are actually at the range extremes: 8,505 or 43 percent of all cases fall at the minimum of the range; 3,152 or 16 percent of all cases fall at the maximum of the range. This implies relatively little use of the middle range of available intervals when upward and downward departures are included (approximately 22% of the cases).

Table 124 looks at the relative positioning of sentences within the grouped intervals to determine whether the utilization of the ranges varies with an increase in their width. Below the range sentences are least frequent in the first interval, due to the less severe penalties available, including alternative sentences. At these levels, departures based on substantial assistance might also be less feasible. Sentences in the fourth quarter of the range become less frequent for the wider-interval ranges, again probably due to the increase in absolute sentence severity. Finally, the slightly higher relative sentence positions in Interval IV are partially driven by the inclusion of many career

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[427]This refers to cases in which a mandatory minimum penalty is higher than the otherwise applicable guideline range maximum, or a statutory maximum is lower than the otherwise applicable guideline range minimum. In both cases, the statute supersedes the otherwise applicable guideline range and determines the sentence (*i.e.*, the statutorily-mandated sentence becomes the guideline sentence).

Table 122

AGGREGATE SENTENCE CHARACTERISTICS BY WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Width of Guideline Range	Aggregate Sentence Characteristics				
	Number	Mean	Median	Standard Deviation	Skewness
I (7-11 mos.)	13,352	15.1	9.0	22.4	5.4
II (12-23 mos.)	3,175	67.1	63.0	35.3	5.8
III (24-47 mos.)	2,031	121.0	121.0	53.4	0.8
IV (48-82 mos.)	882	224.2	235.0	86.4	0.5
I-IV (total)	19,440	44.1	18.0	62.8	2.6

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Data presented includes cases that received zero months imprisonment.

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 123

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range	Number	Percent
Downward Departure	3,036	15.3
1st Quarter	9,211	46.4
2nd Quarter	2,440	12.3
3rd Quarter	934	4.7
4th Quarter	3,515	17.7
Upward Departure	711	3.6
TOTAL	19,847	100.0

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences.

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 124

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY INTERVAL WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range	Interval Width of Guideline Range				
	I (7-11 months)	II (12-23 months)	III (24-47 months)	IV (48-82 months)	TOTAL
Downward Departure	11.3%	20.6%	29.7%	26.1%	2,991
1st Quarter	48.9%	42.3%	42.3%	37.2%	9,041
2nd Quarter	14.0%	8.7%	9.1%	10.2%	2,420
3rd Quarter	4.6%	6.2%	2.6%	5.7%	915
4th Quarter	18.0%	17.8%	13.8%	15.4%	3,374
Upward Departure	3.3%	4.3%	2.6%	5.4%	672
TOTAL	13,353	3,168	2,021	871	19,413

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences.

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

offenders who by statutory directive to the Commission are sentenced at or near their statutory maximum terms of imprisonment.

Theoretically, placing defendants in a given guideline range implies that factors relevant to sentencing have been taken into account. This should result, for each given range, either in the "bunching" of all sentences around the mean sentence, or in a random and even distribution of the sentences across the entire range. Neither of these theoretical scenarios is reflected in the findings. The question then becomes: Which additional factors appear to be associated with the relative positioning of a defendant's sentence? The following section examines a number of offense, offender, and criminal justice variables in an attempt to explain part of this within-range variation in sentencing.

b. Correlates of Sentencing Discretion

While offense levels are determined on the basis of relevant offense characteristics, defendants with widely different offense types may fall within the same sentencing range. Table 125 and Figure 10 examine the effect offense type has on the relative position of a defendant's sentence within the range. The crime categories selected, based on primary offense of conviction, were violent crimes (including homicide, assault, kidnapping, and robbery), economic crimes (including larceny, fraud, tax offenses, embezzlement, and forgery), and drugs (including trafficking, distribution, importation, and manufacturing of controlled substances).

As expected, there is a statistically significant difference in the way judges utilize the available sentence range for different offense categories.[428] In general, violent crimes receive sentences at the higher end of the range more often than do the other two categories (24% versus 14% for economic and 17% for drug violations), while more than half of the economic crimes are sentenced at or near the minimum of the range. It is interesting to note that almost one-fourth of all drug cases (22%) receive below-range sentences. This might represent a judicial decision to depart due to offense or offender characteristics, such as very minimal roles played by some defendants (such as facilitators or paid couriers) or, more likely, sentence reductions based on the government's motion for a reduction due to substantial assistance.

When controlling for guideline range width, the same general finding about offense types emerges with some variations. The relative sentence for violent offenders is most severe in the higher guideline ranges with intervals of 12 months or more, while the reverse is true for drug offenders (*see* Table 126). Below-range sentences are especially notable in drug cases, with percentages increasing as case severity increases. This finding might point to the fact that higher level drug offenders are more likely to provide substantial assistance and benefit from downward departures. Finally, virtually all economic crime cases (99%) were within the lowest guideline ranges (7 to 11-month width), with almost 11 percent sentenced below the range and another 57 percent at or near the minimum.

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[428]Large sample sizes, such as those in this study, produce very high power at fixed significance levels. In other words, despite the fact that only the approximate correctness of the null hypothesis (of row and column independence) is at issue, even small departures from expected values will be likely to cause rejection of the null hypothesis. Another way to examine this issue would be to analyze the difference between observed and expected values to determine whether such differences are of practical meaning. For further discussion, *see* Cochran, The Chi-Square Test of Goodness of Fit, 23 Annals of Mathematical Stat. 315 (1952); or Stuart & Ord, 2 Advanced Theory of Statistics, 817 (1991).

Table 125

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE*
BY SELECTED OFFENSE TYPES
(October 1, 1989 through September 30, 1990)

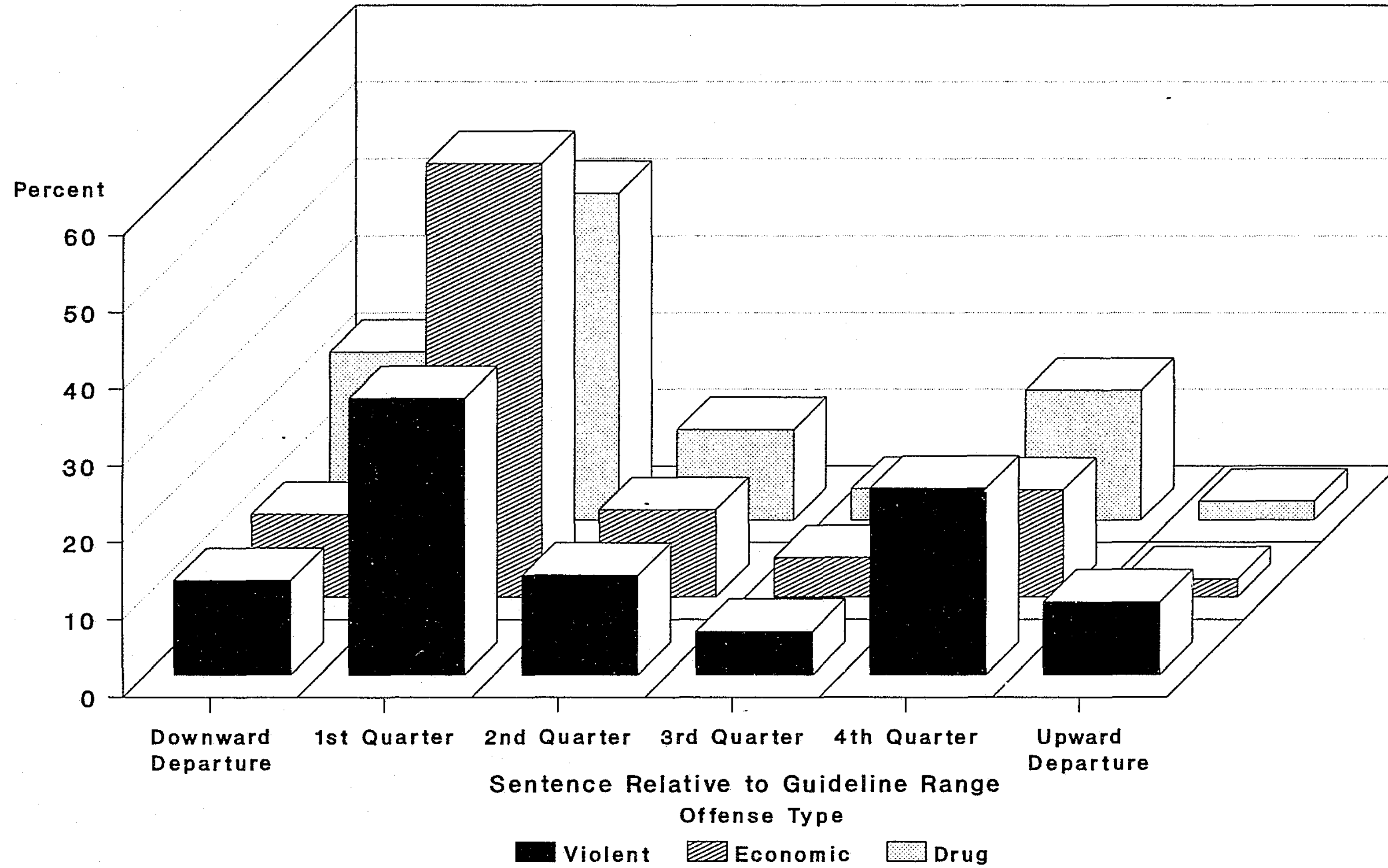
Sentence Position Relative to Guideline Range**	OFFENSE TYPE					
	Violent		Economic		Drug	
	Number	Percent	Number	Percent	Number	Percent
Downward Departure	122	12.1	490	10.8	1,808	22.1
1st Quarter	361	35.9	2,569	56.5	3,494	42.6
2nd Quarter	129	12.8	518	11.4	969	11.8
3rd Quarter	56	5.6	233	5.1	335	4.1
4th Quarter	243	24.2	635	14.0	1,391	17.0
Upward Departure	94	9.4	105	2.3	203	2.5
TOTAL	1,005	100.0	4,550	100.0	8,200	100.0

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Violent offenses include Homicide, Robbery, Kidnapping, and Assault. Economic offenses include larceny, embezzlement, tax offenses, fraud, and forgery and counterfeiting. Drug offenses exclude simple possession.

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Figure 10
SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY SELECTED OFFENSE TYPES



SOURCE: USSC FY90 Data File.

Table 126

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY OFFENSE TYPE AND WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	Type of Offense and Width of Guideline Range											
	I (7-11 months)			II (12-23 months)			III (24-47 months)			IV (48-82 months)		
	Violent	Economic	Drug	Violent	Economic	Drug	Violent	Economic	Drug	Violent	Economic	Drug
Downward Departure	13.9%	10.7%	15.3%	7.9%	14.3%	23.1%	16.7%	0.0%	31.7%	16.7%	--	28.0%
1st Quarter	41.2%	57.0%	42.8%	31.9%	20.0%	44.5%	38.2%	0.0%	41.8%	26.7%	--	38.2%
2nd Quarter	15.8%	11.4%	16.5%	11.6%	11.4%	8.4%	9.8%	0.0%	9.3%	10.0%	--	9.9%
3rd Quarter	3.1%	5.0%	3.2%	7.6%	22.9%	5.7%	2.0%	0.0%	2.9%	8.9%	--	5.7%
4th Quarter	20.2%	13.9%	20.4%	28.0%	20.0%	15.9%	26.5%	100.0%	12.2%	23.3%	--	14.2%
Upward Departure	5.9%	2.1%	1.9%	13.0%	11.4%	2.4%	6.9%	0.0%	2.2%	14.4%	--	3.9%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	--	100.0%
	425	4,476	3,201	354	35	2,390	102	2	1,712	90	0	714

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences.

** Significant at the .01 level (for intervals III and IV, significance only when Economic category is excluded).

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

A defendant's past criminal record apparently impacts judicial sentencing decisions, independent of the final guideline range. Defendants were grouped into low, moderate, and high criminality levels based on their guideline criminal history points (low: 0 or 1; moderate: 2 to 6; and high: 7 or more points or career offenders).[429]

Table 127 and Figure 11 illustrate a consistent and statistically significant relationship between sentence position and criminal history. Judges impose lower sentences on offenders with little or no prior criminality, with 70 percent below, at, or near the minimum of their ranges, compared to only 51 percent and 44 percent, respectively, for the two higher criminal history groups. The 29 percent of highest criminal history cases sentenced at or near the maximum of the range is influenced by the inclusion of career offenders.

This relationship appears to hold even when controlling for the width of the guideline ranges (*see* Table 128). As the widths of the intervals increase, so does the tendency to provide lower sentences within the range to defendants with low prior criminality.

Independent of offense type or criminal history, defendants who pleaded guilty receive relatively lower sentences than do defendants convicted at trial (*see* Table 129). This court sentencing "bonus" is in addition to a reduction of two offense levels for acceptance of responsibility, which is much more frequently granted in guilty pleas than in trial cases. This relationship strengthens as the overall seriousness of the case, expressed by interval width, increases (*see* Table 130). Of special interest are the downward departure sentences for ranges 24 or more months wide. While only ten to 12 percent of defendants convicted at trial receive downward departure sentences, 36 percent of defendants who pleaded guilty receive such departures, often originated by the government as part of a plea agreement.

Courts in the 12 federal circuits vary in the degree to which they utilize available guideline ranges (*see* Table 131). However, at this early stage of guideline implementation, there is insufficient data to determine whether this variation is random or a reflection of regional differences or other factors.

Women, comprising 16 percent of the sample, appear to fare better in the system overall (*see* Table 132) and within the various guideline intervals (*see* Table 133) than men, with sentences positioned generally below or near the minimum of their respective ranges.

No clear pattern of variation emerges in sentence position relative to range by the defendant's race (*see* Table 134). Whites receive a slightly higher percentage of sentences below the range and less within the fourth quarter, while Hispanics are sentenced slightly less within the first quarter of the range. The direction of the variation is not discernible even when controlling for interval width and is statistically significant only in the two lower intervals (*see* Table 135).

Moving away from the "typical" to all the "possible" defendant permutations (*i.e.*, possible combinations among the different attributes of relevant independent variables), variations will occur in the dependent variable — the defendant's sentence relative to his/her guideline range, reflecting the exercise of judicial discretion. No specific conclusions should be drawn about any interactions

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[429]The guidelines assign criminal history points for previous sentences of incarceration under 60 days (1 point), 60 days to one year and one month (2 points), and more than one year and one month (3 points), as well as points for committing the instant offense while under criminal justice sentence or within two years of release from incarceration.

Table 127

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE*
BY CRIMINAL HISTORY
(October 1, 1989 through September 30, 1990)

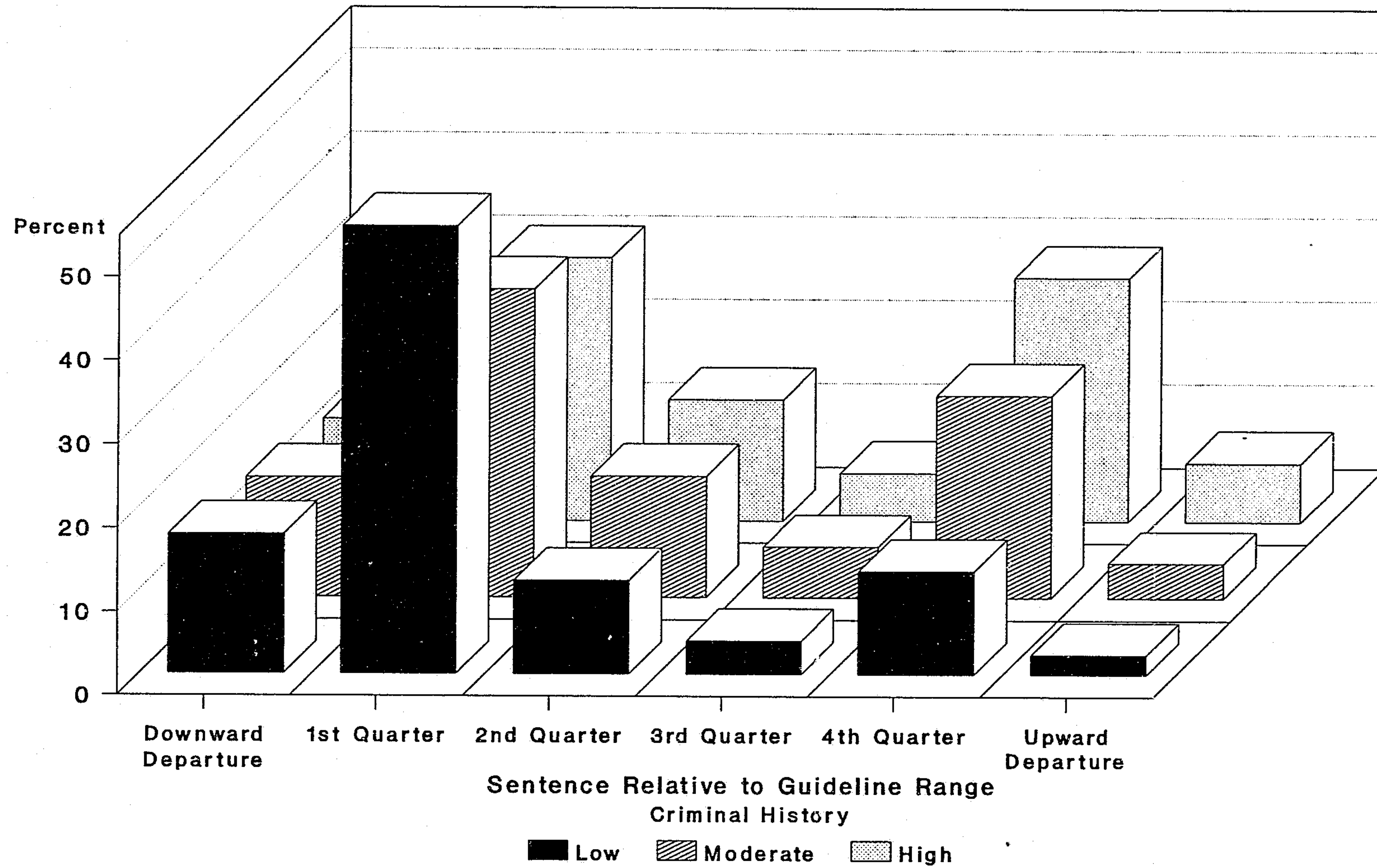
Sentence Position Relative to Guideline Range**	CRIMINAL HISTORY					
	Low		Moderate		High	
	Number	Percent	Number	Percent	Number	Percent
Downward Departure	2,032	16.7	625	14.3	353	12.1
1st Quarter	6,532	53.5	1,606	36.8	919	31.5
2nd Quarter	1,362	11.2	633	14.5	423	14.5
3rd Quarter	487	4.0	264	6.1	168	5.8
4th Quarter	1,499	12.3	1,054	24.2	853	29.2
Upward Departure	288	2.4	180	4.1	206	7.1
TOTAL	**12,200**	**100.0**	**4,362**	**100.0**	**2,922**	**100.0**

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Criminal history is derived from guideline criminal history points: Low - 0 or 1 point; Moderate - 2 through 6 points; High - 7 or more points (or career offender).

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Figure 11
SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY CRIMINAL HISTORY



SOURCE: USSC FY90 Data File.

Table 128

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY CRIMINAL HISTORY AND WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	Criminal History and Width of Guideline Range											
	I (7-11 months)			II (12-23 months)			III (24-47 months)			IV (48-82 months)		
	Low	Moderate	High	Low	Moderate	High	Low	Moderate	High	Low	Moderate	High
Downward Departure	12.8%	9.6%	6.8%	23.6%	17.6%	11.8%	30.6%	31.0%	25.8%	22.8%	29.2%	27.9%
1st Quarter	57.2%	36.4%	29.5%	44.9%	39.2%	33.2%	47.0%	34.7%	37.1%	40.1%	37.0%	33.7%
2nd Quarter	12.3%	16.9%	17.5%	8.2%	9.3%	11.0%	7.6%	12.5%	9.6%	13.5%	8.3%	8.0%
3rd Quarter	3.9%	6.6%	4.8%	5.5%	6.2%	10.4%	2.0%	3.5%	3.3%	4.2%	4.6%	8.0%
4th Quarter	11.8%	26.3%	34.0%	14.6%	23.5%	24.4%	11.0%	15.3%	19.8%	14.7%	15.3%	16.4%
Upward Departure	2.1%	4.2%	7.4%	3.3%	4.3%	9.3%	1.9%	3.0%	4.4%	4.8%	5.6%	6.1%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	8,572	2,843	1,827	2,012	774	356	1,162	464	364	334	216	312

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Criminal history is derived from guideline criminal history points: Low - 0 or 1 point; Moderate - 2 through 6 points; High - 7 or more points (or career offender).

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 129

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE*
BY MODE OF CONVICTION
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	MODE OF CONVICTION			
	Plea		Trial	
	Number	Percent	Number	Percent
Downward Departure	2,688	16.8	173	7.6
1st Quarter	7,582	47.3	883	38.8
2nd Quarter	1,933	12.1	306	13.4
3rd Quarter	720	4.5	139	6.1
4th Quarter	2,628	16.4	621	27.3
Upward Departure	489	3.1	157	6.9
TOTAL	**16,040**	**100.0**	**2,279**	**100.0**

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Plea includes pleas of guilty and *nolo contendre*. Trial includes bench and jury trials.

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 130

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY MODE OF CONVICTION AND WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	Mode of Conviction and Width of Guideline Range							
	I (7-11 months)		II (12-23 months)		III (24-47 months)		IV (48-82 months)	
	Plea	Trial	Plea	Trial	Plea	Trial	Plea	Trial
Downward Departure	12.1%	5.6%	23.5%	5.9%	36.5%	9.9%	35.6%	12.2%
1st Quarter	49.6%	35.2%	43.5%	38.5%	41.3%	44.5%	35.4%	40.0%
2nd Quarter	13.7%	16.8%	8.2%	11.5%	8.5%	11.8%	9.0%	12.2%
3rd Quarter	4.5%	5.8%	5.9%	7.8%	2.1%	4.4%	5.1%	7.0%
4th Quarter	17.2%	29.8%	15.7%	28.3%	10.2%	23.4%	10.8%	21.7%
Upward Departure	3.0%	6.8%	3.3%	8.0%	1.4%	6.0%	4.1%	7.0%
Total	100.0% 11,335	100.0% 857	100.0% 2,472	100.0% 512	100.0% 1,428	100.0% 483	100.0% 491	100.0% 345

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. Plea includes pleas of guilty and *nolo contendre*. Trial includes bench and jury trials.

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 131

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY CIRCUIT*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range	UNITED STATES CIRCUIT											
	D.C	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
Downward Departure	14.9%	16.8%	21.9%	19.5%	15.2%	10.2%	15.8%	12.2%	16.1%	18.3%	13.8%	14.5%
1st Quarter	51.5%	40.6%	45.3%	49.3%	46.3%	44.0%	50.4%	51.3%	41.8%	44.6%	46.2%	50.2%
2nd Quarter	8.1%	11.7%	11.5%	9.0%	12.4%	14.1%	9.4%	12.0%	14.0%	13.1%	11.6%	12.0%
3rd Quarter	3.0%	5.1%	3.8%	4.1%	4.7%	6.6%	3.4%	4.6%	5.7%	4.3%	4.7%	4.0%
4th Quarter	19.6%	20.2%	14.7%	15.7%	17.9%	21.4%	16.7%	16.5%	18.0%	15.4%	20.0%	17.0%
Upward Departure	3.0%	5.5%	2.9%	2.4%	3.5%	3.7%	4.3%	3.4%	4.4%	4.2%	3.9%	2.5%
TOTAL	100.0% 235	100.0% 470	100.0% 1,364	100.0% 758	100.0% 2,115	100.0% 3,449	100.0% 1,656	100.0% 715	100.0% 1,413	100.0% 3,252	100.0% 1,287	100.0% 3,133

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences.

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 132

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE*
BY GENDER OF DEFENDANT
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	GENDER			
	Male		Female	
	Number	Percent	Number	Percent
Downward Departure	2,368	15.5	488	16.5
1st Quarter	6,605	43.1	1,839	62.0
2nd Quarter	2,005	13.1	231	7.8
3rd Quarter	782	5.1	78	2.6
4th Quarter	2,956	19.3	290	9.8
Upward Departure	605	4.0	41	1.4
TOTAL	15,321	100.0	2,967	100.0

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences.

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 133

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY GENDER OF DEFENDANT AND WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	Gender of Defendant and Width of Guideline Range							
	I (7-11 months)		II (12-23 months)		III (24-47 months)		IV (48-82 months)	
	Male	Female	Male	Female	Male	Female	Male	Female
Downward Departure	11.4%	13.1%	20.1%	23.8%	28.6%	39.5%	26.2%	20.0%
1st Quarter	44.5%	65.5%	41.3%	52.8%	41.7%	45.9%	36.7%	48.0%
2nd Quarter	15.1%	8.8%	9.3%	4.3%	10.0%	4.6%	10.7%	4.0%
3rd Quarter	5.1%	2.5%	6.5%	4.3%	2.8%	1.8%	6.0%	4.0%
4th Quarter	20.2%	9.2%	18.4%	13.3%	14.3%	6.9%	15.2%	18.0%
Upward Departure	3.8%	1.0%	4.5%	1.5%	2.7%	1.4%	5.2%	6.0%
Total	100.0% 9,834	100.0% 2,334	100.0% 2,660	100.0% 324	100.0% 1,688	100.0% 218	100.0% 785	100.0% 50

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences.

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 134

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE*
BY RACE
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	RACE							
	White		Black		Hispanic		Other	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Downward Departure	1,545	17.3	707	14.0	511	13.9	76	15.1
1st Quarter	4,159	46.5	2,358	46.8	1,612	43.9	249	49.5
2nd Quarter	1,093	12.2	567	11.2	499	13.6	59	11.7
3rd Quarter	384	4.3	225	4.5	227	6.2	21	4.2
4th Quarter	1,458	16.3	997	19.8	703	19.2	74	14.7
Upward Departure	310	3.5	190	3.8	117	3.2	24	4.8
TOTAL	8,949	100.0	5,044	100.0	3,669	100.0	503	100.0

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. 'White Hispanic' and 'Black Hispanic' have been combined into the 'Hispanic' category; as such the numbers reported underrepresent 'Black' defendants. The 'Other' category includes defendants who are 'American Indian or Alaskan Native' or 'Asian or Pacific Islander.'

** Significant at the .01 level

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

Table 135

SENTENCE POSITION RELATIVE TO GUIDELINE RANGE BY RACE OF DEFENDANT AND WIDTH OF GUIDELINE RANGE*
(October 1, 1989 through September 30, 1990)

Sentence Position Relative to Guideline Range**	Race of Defendant and Width of Guideline Range															
	I (7-11 months)				II (12-23 months)				III (24-47 months)				IV (48-82 months)			
	White	Black	Hispanic	Other	White	Black	Hispanic	Other	White	Black	Hispanic	Other	White	Black	Hispanic	Other
Downward Departure	13.9%	8.6%	9.6%	12.3%	23.5%	18.5%	17.7%	22.5%	32.4%	28.0%	27.1%	25.7%	27.4%	25.1%	25.4%	29.4%
1st Quarter	49.8%	49.6%	42.3%	51.9%	38.4%	42.4%	49.6%	42.3%	40.2%	43.3%	43.8%	48.6%	32.3%	41.0%	40.2%	35.3%
2nd Quarter	13.4%	13.1%	16.5%	13.1%	8.2%	9.5%	8.6%	7.0%	10.6%	8.7%	8.6%	8.6%	11.9%	6.7%	14.8%	11.8%
3rd Quarter	4.0%	4.2%	6.8%	4.3%	6.2%	5.7%	7.2%	4.2%	2.5%	3.2%	2.5%	0.0%	5.8%	7.0%	3.3%	5.9%
4th Quarter	15.7%	21.6%	21.2%	13.9%	18.9%	18.6%	15.4%	18.3%	12.6%	13.1%	16.0%	11.4%	17.1%	15.0%	12.3%	17.7%
Upward Departure	3.2%	3.0%	3.5%	4.6%	4.9%	5.3%	1.6%	5.6%	1.7%	3.8%	2.0%	5.7%	5.5%	5.3%	4.1%	0.0%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	6,390	3,060	2,263	374	1,288	810	795	71	763	689	406	35	328	359	122	17

* Includes information on cases for which a report on the sentencing hearing was available, and for statistical purposes excludes life sentences. 'White Hispanic' and 'Black Hispanic' have been combined into the 'Hispanic' category; as such the numbers reported underrepresent 'Black' defendants. The 'Other' category includes defendants who are 'American Indian or Alaskan Native' or 'Asian or Pacific Islander.'

** Significant at the .01 level (race is not significant in intervals III and IV, and remained insignificant following the removal of the infrequent 'other' category).

SOURCE: U.S. Sentencing Commission 1990 Fiscal Year Data File, MONFY90.

at this phase of analysis without employing further multivariate techniques controlling for relevant independent variables.

4. Conclusions

This study examined two issues: the extent of judicial discretion under the sentencing guidelines and the relationship between that discretion and a series of independent variables (mode of conviction, circuit, gender, race, offense type, and criminal history record).

As to the first issue, there is evidence of the availability of judicial discretion within the new system, based both on the structural analysis of the guidelines and the empirical findings presented with respect to fiscal year 1990 sentences. Given this apparent availability of discretion, the question of the degree to which judges utilize their options in sentence selection becomes important. Clearly, as Congress intended, guideline ranges present a narrower range of choices than was presented by the pre-guidelines sentencing framework. Within these parameters, it appears that judges utilize their discretion by "pushing against" the guideline boundaries (*i.e.*, tending to sentence at the upper and lower extremes).

As to the second issue, indications are that the use of sentencing discretion varies with a number of factors, such as offense type, criminal history, and mode of conviction. Additional research is planned to address this issue using multivariate techniques to isolate the separate and interactional impact of relevant variables on the discretionary "outcome" variable.

Chapter Five

Use of Incarceration

Introduction

The Sentencing Reform Act directed the Sentencing Commission, as part of its evaluation study, to examine the impact of the guidelines on the use of incarceration. For purposes of this study, the Commission defines use of incarceration as the likelihood that a convicted offender will receive a sentence of imprisonment under the guidelines and, if imprisoned, the length of that imprisonment. Consequently, this impact study addresses the questions of how many offenders are sentenced to prison (under pre-guideline and guideline law) and for how long.

Congress ensured that incarceration rates would increase under the guidelines as a result of specific and general directives to the Commission in the Act to increase the use of imprisonment for certain classes of offenses and offenders. For example, the Act directs the Commission to ensure that offenders with at least two prior convictions for violent crimes or controlled substance offenses, who are convicted of a third violent or controlled substance offense, receive a sentence at or near the statutory maximum.[430] Additionally, the Act directs the Commission to ensure that the guidelines "reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."[431]

Moreover, in developing the initial set of guidelines, the Commission's empirical review of pre-guideline sentencing practices showed that convictions for "white-collar" economic crimes (such as embezzlement, fraud, and tax evasion) were considerably less likely to result in sentences that included imprisonment than substantially equivalent "blue-collar" crimes of larceny, theft, and property damage or destruction. In light of the legislative history supporting proportional and more substantial sentences for economic crimes in general,[432] the Commission made a policy decision to adopt a guideline structure under which economic and non-economic offenses of comparable seriousness were to be treated similarly.

Against this backdrop, the Commission examined the extent to which the guidelines have changed the rate of incarceration. Before proceeding with this assessment, it is important to place the research issues in context. The guidelines represent an attempt to restrict and structure the discretion of the principal actors in the federal criminal justice system. The evaluation literature shows that similar efforts in state and local jurisdictions have often met with considerable

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[430]*See* 28 U.S.C. § 994(h).

[431]28 U.S.C. § 994(m). In addition, section 994(i) instructs the Commission to "assure that the guidelines specify a sentence to a substantial term of imprisonment" for defendants who have two or more prior convictions; defendants who derive a substantial portion of their income from crime; defendants who commit an offense in furtherance of a racketeering conspiracy involving three or more persons in which the defendant played a supervisory role; defendants who commit a crime of violence while on release pending trial, sentencing, or appeal; and defendants who commit drug trafficking offenses involving a substantial quantity of a controlled substance.

[432]S. Rep. No. 225, 98th Cong., 1st Sess. 76-77, 177 (1983).

resistance.[433] The academic literature suggests that criminal justice agencies, and particularly courts, maintain a certain equilibrium in their everyday operations and are resistant to externally generated attempts to change their behavior. At the point of sentencing, this homeostatic character is represented by the concept of the "going rate" — the informal standard of punishment, commonly recognized within any jurisdiction as appropriate for frequently encountered crimes. A number of studies have demonstrated the creative ways in which judges and criminal justice practitioners attempt to maintain the standards of the "going rate" in the face of outside attempts to modify those practices.[434]

Despite predictions of increased sentence severity under the guidelines,[435] it nevertheless may be the case that sentencing severity does not increase, or that sentencing patterns change in ways unanticipated by the Commission. If patterns of "no change" or "unintended change" are observed, departure and plea negotiation practices under the guidelines should be examined (*see* Chapters Three and Six of this report for a more detailed discussion of these issues). Thus, whether and to what degree the guidelines result in a greater rate of imprisonment sentences is very much an empirical question.

I. Objectives of Research

The primary purposes of research on the use of incarceration is to study the impact of the implementation of the guidelines on: 1) the rate of incarcerative and non-incarcerative sentences imposed; and 2) the average length of expected time to serve in incarceration for all offenses and for select groups of offenses. The research design focuses on quantitative analyses of change in the outcome variables (*i.e.*, the in/out decision and the length of incarceration) for offenders sentenced in the federal court system. Specifically, the research questions include:

- To what extent has the total number of offenders sentenced to prison changed from 1984 to 1990?
- To what extent has the total number of offenders sentenced to probation changed from 1984 to 1990?
- To what extent has the proportion of offenders sentenced to prison or probation changed from 1984 to 1990?
- How have specific acts of Congress or policies of the Sentencing Commission affected the number of offenders sentenced to prison in specific offense categories such as drugs, robbery, and economic crimes?
- During the period 1984 to 1990, how has the length of sentence changed for offenders sentenced to prison?

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[433]Interviews with judges and practitioners in 12 sites across the nation confirm that the guidelines have generated, to varying degrees, such resistance (*see* Chapter Three of this report).

[434]For an early example of research noting the "going rate" concept, *see* Loftin, Heumann & McDowall, Mandatory Sentencing and Firearm Violence: Evaluating an Alternative to Gun Control, 17 L. & Soc. Rev. 287 (1983).

[435]The Commission's Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987) estimated that the guidelines would result in a much smaller proportion of convicted offenders receiving "straight" probation (*i.e.*, probation without confinement conditions). Similarly, the report predicted that the length of prison sentences would rise significantly under the guidelines.

II. Measuring Sentencing Outcomes with Respect to Incarceration

From the standpoint of evaluating use of incarceration, sentencing can be analyzed as a two-step process: the incarceration decision (*i.e.*, prison or no prison) and, if an imprisonment sentence is imposed, the length of the imprisonment term. For this reason, two separate measures of imprisonment sentencing are required — an "in/out" variable and a sentence length variable.

In/out: This variable is relatively easy to measure in both the pre-guideline and guideline periods. Sentenced offenders are classified as "in" if their sentences involve commitment to the Federal Bureau of Prisons. Sentenced offenders are classified as "out" if they are sentenced to a term of probation. Sentences that contain a term of commitment to the Bureau of Prisons followed by some form of supervision after imprisonment are included in the "in" category because such sentences include a term of imprisonment.[436]

Sentence length: Guideline implementation represents a shift from an indeterminate to a determinate sentencing system. For this reason, a precise measure of sentence length across both systems is difficult (if not impossible) to calculate. In the case of sentences imposed under the guidelines, the actual amount of time the offender will serve in prison is the sentence imposed, less a maximum of 54 days per year "good conduct time" for satisfactory prison behavior beginning after the first year of imprisonment. In contrast, in the pre-guideline period, the prison time an offender actually would serve typically was reduced substantially from the sentence announced by the court as a result of discretionary decisions made by the U.S. Parole Commission. Moreover, pre-guideline offenders received the benefit of substantially more generous "good time" provisions that further reduced the sentence imposed.

Upon review of the various ways sentence length might be measured (*see* Chapter Four for a full discussion of these issues), the Commission decided that the most viable measure for this study would be "expected time to be served," allowing for assumed good time and parole reductions. This term represents the amount of time an offender can expect to spend in prison at the time of sentencing, a roughly equivalent standard that can be measured pre-guidelines and guidelines.[437]

A. Defining Crime Categories

In order to analyze a cross section of federal crimes, the use of incarceration study examined sentences for offenders convicted in three broad offense categories: drugs, robbery, and economic crimes. This variety of offense types allowed the Commission to identify patterns of incarceration that may be endemic to some offense categories but not others. Furthermore, certain offenses occur more frequently than others in the federal system. This assessment attempted to capitalize on the most frequently occurring offense types in order to obtain larger sample sizes.

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[436]Separate analyses of these mixed or "split" sentences are not meaningful because they describe different types of sentences under the pre-guidelines and guidelines systems. The Sentencing Reform Act abolished the former version of a split sentence — a prison term (typically a portion of which was suspended) followed by a period of probation, and authorized imposition of a period of supervised release to follow a term of imprisonment.

[437]Results should be interpreted with caution because the choice of measure may result in an underestimation of pre-guidelines sentence length.

For purposes of this study, the category of "drug offenses" includes marijuana, heroin, and cocaine. These drug offenses cover a wide range of illegal activities, including distribution, importation, manufacture, possession, and regulatory/recordkeeping violations. The more serious trafficking violations in this offense category are subject to statutory mandatory minimum sentences.[438]

The category "robbery" includes the major offenses of bank and postal robbery (both armed and unarmed), along with other types of robbery offenses that appear less frequently in the federal system. This category may contain sentences affected by mandatory enhancements for additional, related convictions of using or carrying a firearm during the commission of the robbery offense.[439] For purposes of contrast, this analysis looks at robbery with mandatory enhancements included and excluded.

The category of "economic offenses" includes fraud (bank, postal, and other fraud), embezzlement (bank, postal, and other embezzlement), and tax evasion. No mandatory sentences for these economic offenses were enacted by Congress during the time period under study.

B. Competing Interventions

The impact of the guidelines on the use of incarceration must be analyzed in relation to other legislative and policy changes occurring within the same timeframe that may have influenced the system. Any impact study, therefore, must attempt to disentangle the effects of the guidelines from those of other legislative and policy changes.

This concern is of particular importance for drug offenses, an area in which recent legislative initiatives, in addition to the Sentencing Reform Act, have substantially altered the sentencing structure. For example, the Anti-Drug Abuse Act of 1986 established mandatory minimum sentences for a variety of drug offenses, while the 1988 Anti-Drug Abuse Act expanded the reach of the mandatory sentences applicable to substantive trafficking offenses to include convictions for conspiracy and attempt offenses. Because drug offenses comprise the largest category of offenders sentenced under the guidelines, it is essential that any aggregate analysis of drug sentences consider the effects of these recent major drug laws along with the effects of the guidelines.

Congress ensured that the rate and length of imprisonment sentences would increase dramatically by mandating longer sentences for certain "armed career criminals,"[440] as well as for offenders

[438]The drug offense category used in this study excludes the FPSSIS category of "other controlled substances," which includes a wide variety of other controlled substance offenses ranging from prescription drug violations to LSD trafficking. Some of these offenses are affected by mandatory minimum statutes, while others are not. For purposes of maximum contrast to sentences of offenders convicted of robbery and economic crimes (in which the majority of cases are not affected by mandatory sentencing), the analysis of offenders sentenced for drug offenses focuses on those cases involving the three aforementioned "street" drugs.

[439]*See* 18 U.S.C. § 924(c). While these enhancements constitute, overall, a small percentage of total cases sentenced, they may represent a larger percent of the robbery category and, when applied, could increase the average length of sentences in this offense category.

[440]*See* 18 U.S.C. § 924(e).

convicted of violent or drug crimes involving the possession or use of weapons.[441] The guidelines necessarily must be consistent with these statutory provisions.

Against this background, the analysis attempts to take account of significant legislative interventions — (1) the Anti-Drug Abuse Act of 1986 and (2) the Anti-Drug Abuse Act of 1988 — and two significant interventions related to the sentencing guidelines — (1) initial implementation in November 1987 and (2) the United States Supreme Court's Mistretta decision upholding the guidelines' constitutionality in January 1989. Because of early, widespread legal challenges to the guidelines, it is difficult to pinpoint the demarcation of the guidelines' impact.[442] Nevertheless, during the time period for this study, it is clear that Congress intended and provided for three separate interventions (the two anti-drug abuse acts and initial guideline implementation) to influence sentencing policy in the direction of increased imprisonment. The study hypothesizes that these planned-for interventions, together with the Mistretta decision which cleared the way for nationwide guideline implementation, have increased the rate and length of imprisonment sentences.

C. Methodological Procedures

The presence of intervening legislation such as the 1986 and 1988 drug acts, along with other historical events that may have influenced sentencing practices, suggests that a simple pre/post model is inadequate to evaluate the use of incarceration; rather, a time series analysis appears to be a more rigorous and appropriate methodology. Using this strategy, sentencing data are aggregated into monthly observations and plotted over lengthy periods, before and after implementation of the guidelines.[443] Relevant policy changes, such as enactment of the drug laws and implementation of the guidelines, can be analyzed as interventions in the series and modeled for the size and form of their effects. The temporal ordering of "shocks" to the time series will permit, to some extent, an analysis of the effects of individual policies. Furthermore, interrupted time series analysis can model interventions that produce incremental or abrupt changes. This feature is particularly useful for the evaluation in light of the fact that application of the guidelines was "phased-in" as offenses occurred on or after November 1, 1987, and were processed through the

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[441]See *e.g.*, 18 U.S.C. §§ 924(c), 929(a).

[442]A variety of factors contribute to this difficulty. For example, while approximately 200 district court judges and one court of appeals (the Ninth Circuit) ultimately ruled the guidelines unconstitutional, these decisions were scattered over 12 months. The extent to which these courts applied the guidelines prior to ruling them unconstitutional, and even subsequent thereto, is difficult to ascertain and apparently varied considerably from court to court. In addition, while some jurisdictions by happenstance or explicit decision followed a uniform sentencing procedure upon a determination of constitutional invalidity, others did not. In some jurisdictions (*e.g.*, the Fourth and Fifth Circuits) there were very few decisions invalidating the guidelines, with the result that guideline implementation went forward largely without significant interruption in those areas. In marked contrast, courts in other jurisdictions (*e.g.*, the Central District of California, Southern District of Florida) uniformly sentenced without guidelines after striking them down. And, in still other jurisdictions, some individual judges applied the guidelines while others did not. These are but a few examples of why the constitutionality litigation vastly complicates and confuses the early period of guideline implementation.

[443]For a more complete explanation of this time series approach, or ARIMA, *see* Appendix C.

system to the point of sentencing.[444] Similarly, it is a useful device in measuring the impact of each of the drug acts, the penalty provisions of which applied prospectively to offenses occurring after the effective date of each act.

D. Data Sources

The primary source of data for the analysis is the Federal Probation Sentencing and Supervision Information System (FPSSIS) files from the Administrative Office of the U.S. Courts. These computerized files are available from July 1984 through August 1990. FPSSIS records have been matched with data from the Sentencing Commission's monitoring database, the Federal Bureau of Prisons, and the U.S. Parole Commission in order to obtain the relevant variables to compute the outcome variable "expected time to be served." Records on individual sentences in each of these datasets have been merged into one database.

E. Statistical Models and Analyses

ARIMA models are constructed through an iterative strategy of identifying, diagnosing, and estimating mathematical components. Unlike regression models that are developed on theoretical grounds and tested for causal relationships, ARIMA models are built empirically from the data and test for changes in an underlying process due to some intervention. As such, they are especially valuable in assessing the impact of legislation, agency policy decisions, or discrete events. A major limitation of ARIMA models is that they provide little insight as to why something did or did not happen. Thus, ARIMA models are often supplemented with qualitative investigations in order to understand more fully why change does or does not occur.

Tables 136 and 137 summarize the results of the statistical models. Significant interventions are noted by the t-values and discussed below. Data shown in the graphs of sentences and averages of expected time to be served (Figures 12 through 19) are the bases for the statistical models.

Data represented in Figures 12 through 19 can be compared with the corresponding t-values in Tables 136 and 137 in order to assess which interventions produced statistically significant impacts.[445] For example, Figure 12 illustrates data for "Total Sentences" (the total number of prison, probation, and combined prison/supervision sentences) with vertical lines at the date of each intervention. In Table 136, the corresponding category of "Total Sentences" indicates that after the Mistretta decision, total number of sentences to both prison and probation increased significantly (t=3.94).

[444] Studies show that following a change in sentencing policy, a phenomenon characterized as a "racheting process" can occur in which sentence severity gradually increases (or rarely, decreases) as judges and practitioners, as well as policymakers, adjust to the new policy. *See, e.g.*, Casper, Brereton & Neal, The Implementation of California's Determinate Sentencing Law (1981) and McCoy & Tillman, Controlling Felony Plea Bargaining (1986).

[445] For more detailed tables of the models' parameter estimates, standard errors, and t-values, *see* Appendix D.

Table 136

t-Values for Incarceration Models[a]

	Anti-Drug Abuse Act of 1986	Guidelines	Anti-Drug Abuse Act of 1988	Mistretta
Total sentences	—	—	—	3.94
Total sentences to prison	3.16 -9.12	2.16 33.10	-3.85 -7.78	3.13 1.95
Total sentences to probation	—	—	—	—
Proportion of prison/total sentences	4.26	—	—	3.02
Proportion of probation/total sentences	-4.26	—	—	-3.02
Total drug sentences to prison	—	—	-3.05 -8.31	4.14 4.67
Proportion of prison/total sentences	—	3.18	2.29 8.88	—
Total robbery sentences to prison	NA	—	NA	4.64
Proportion of prison/total sentences	NA	—	NA	2.64
Total economic crime sentences to prison	NA	—	NA	2.44
Proportion of prison/total sentences	NA	—	NA	3.53

[a] Robbery and economic crimes were not tested for Anti-Drug Abuse Act of 1986 and 1988.

Table 137

t-Values for Mean Prison Sentence Models[a, b]

	Anti-Drug Abuse Act of 1986	Guidelines	Anti-Drug Abuse Act of 1988	Mistretta
Mean sentences to prison	3.09	4.25 9.29	—	5.09 21.35
Mean sentences	5.16	3.13 9.12	—	5.06 22.15
Mean drug sentences to prison	3.69	3.91 12.84	—	3.06 17.36
Mean drug sentences	4.80	3.98 13.07	—	3.72 20.32
Mean robbery sentences to prison	NA	7.40	NA	7.44
Mean robbery sentences	NA	6.18 -4.58	NA	8.60
Mean economic sentences to prison	NA	—	NA	-2.30 -3.70
Mean economic sentences	NA	—	NA	—

[a] Robbery and economic crimes were not tested for the Anti-Drug Abuse Acts of 1986 and 1988.

[b] Mean sentences to prison are calculated only for convictions resulting in prison sentences; mean sentences are calculated for all convictions.

III. Findings

A. General Trends in Numbers of Offenders Sentenced

Figure 12 plots the number of cases sentenced from July 1984 through June 1990 in the federal system. The number of cases sentenced rose during this period from a low of 2,418 in December of 1984 to a high of 4,087 in January of 1990, a 69-percent increase. This upward trend is evident prior to the Anti-Drug Abuse Act of 1986 and appears to taper off slightly until November 1988, at which time a brief downward trough is evident before it resumes an increase in early 1989.

The brief trough in sentencing, followed by the immediate upswing after the Supreme Court's ruling in Mistretta v. United States, likely is due to the postponement of cases in many districts awaiting the decision on the constitutionality of the guidelines. Cases postponed prior to the ruling (resulting in the trough) were brought into court for sentencing shortly after the decision on January 18, 1990, causing the significant intervention identified by the model (*see* findings reported in Table 136). Because of the close proximity of the Anti-Drug Abuse Act of 1988 and the Mistretta interventions, increases occurring after January 1989 may be a result of either or both interventions.

Figure 12 also shows a steady trend upward from 1984 in the number of defendants sentenced to prison. Table 136, listing t-values, indicates that all interventions, except the Anti-Drug Abuse Act of 1988, produced significant positive impacts on the number of cases sentenced to prison. Thus, it appears that each intervention provided an additional surge in an already initiated trend of increased use of incarceration.

Figure 13 plots changes in the numbers of prison sentences for drug trafficking, economic crimes (fraud, tax offenses, and embezzlement), and robbery. As shown in this figure, all three offense categories experienced increases in the numbers of offenders sentenced to prison from 1984 to 1990.

Of the three categories, drug offenses clearly experienced the largest change in numbers of defendants sentenced to prison during the time period of the study, rising from 431 offenders during the first month to 1,037 in the last month studied. While this upward trend began well before the Anti-Drug Abuse Act of 1986 and continued thereafter, only the Mistretta decision represented a statistically significant increase in the numbers of drug offenders imprisoned (*see* Table 136). As with the number of total sentences, a temporary but significant decline in drug sentences occurred prior to the Mistretta decision.

The numbers of robbery and economic offenders sentenced to prison also increased during this period, although less dramatically. The number of robbery offenders sentenced to prison increased from 79 to 96 cases in the first and last months of study, respectively, while economic offenders increased from 249 to 415. Only the Mistretta intervention shows a significant impact for these two offense types (*see* Table 136).

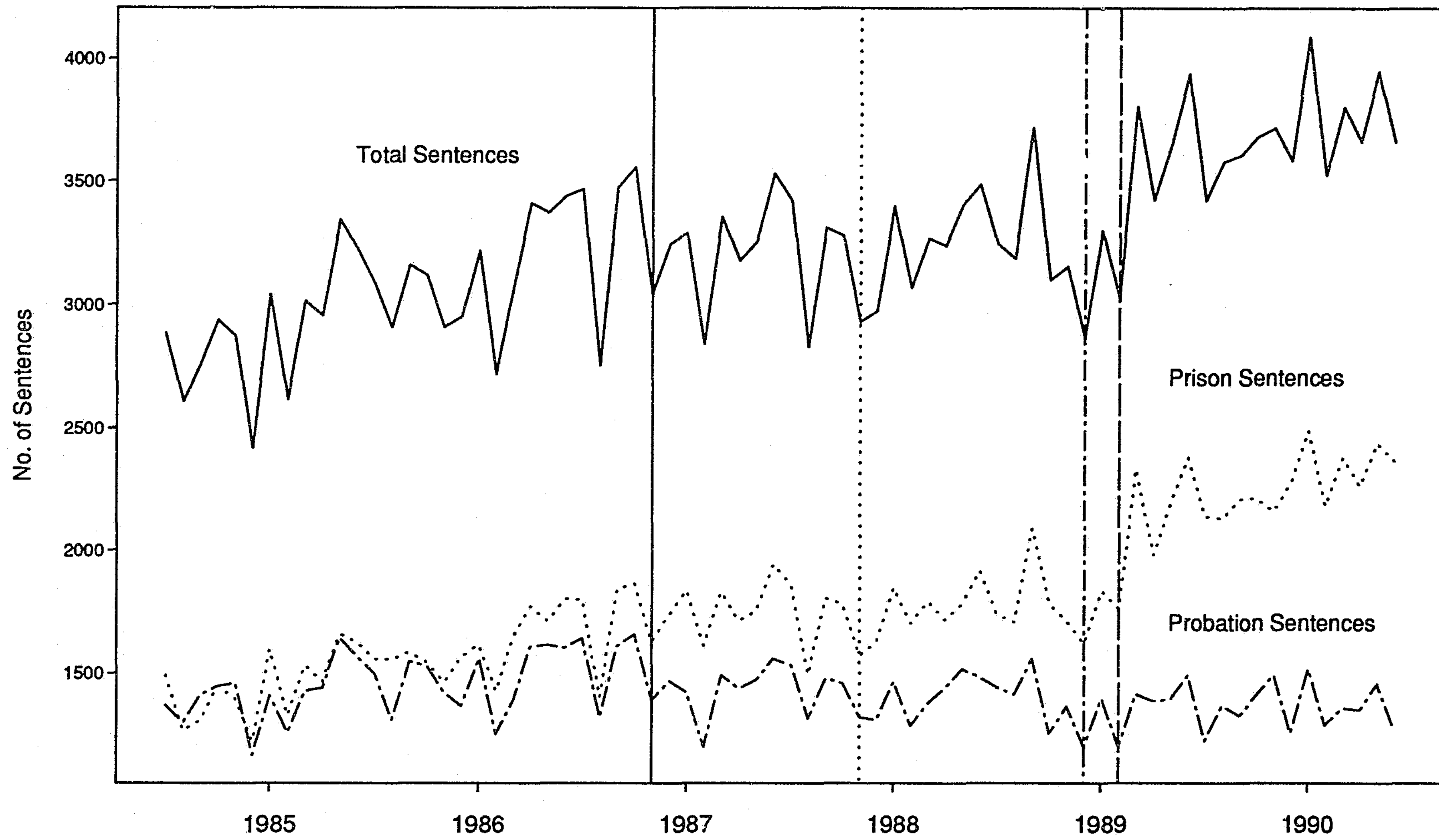
Finally, a slight decline in the numbers of federal offenders sentenced to probation since the Anti-Drug Abuse Act of 1986 is indicated by Figure 12. No interventions, however, show a statistically significant impact on the number of probation cases (*see* Table 136).

B. The In/Out Decision

While the previous section clearly shows that numbers of offenders and offenders sentenced to prison increased during the study period, Figures 14 and 15 provide more important information concerning the rate of imprisonment (and probation) during this same timeframe. Figure 14 shows

Figure 12

Prison and Probation Sentences: July 1984 to June 1990

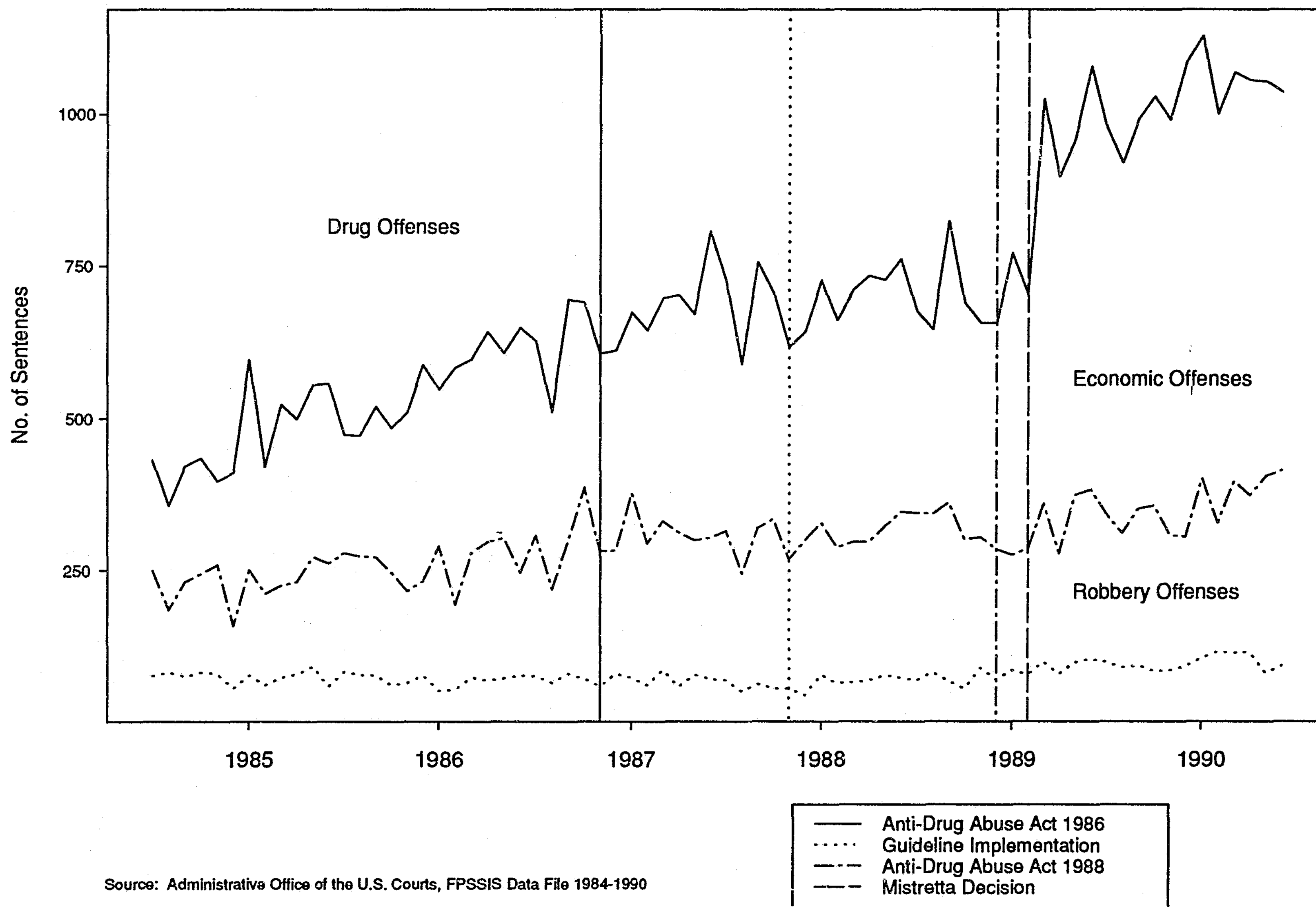


Anti-Drug Abuse Act 1986
Guideline Implementation
Anti-Drug Abuse Act 1988
Mistretta Decision

Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

Figure 13

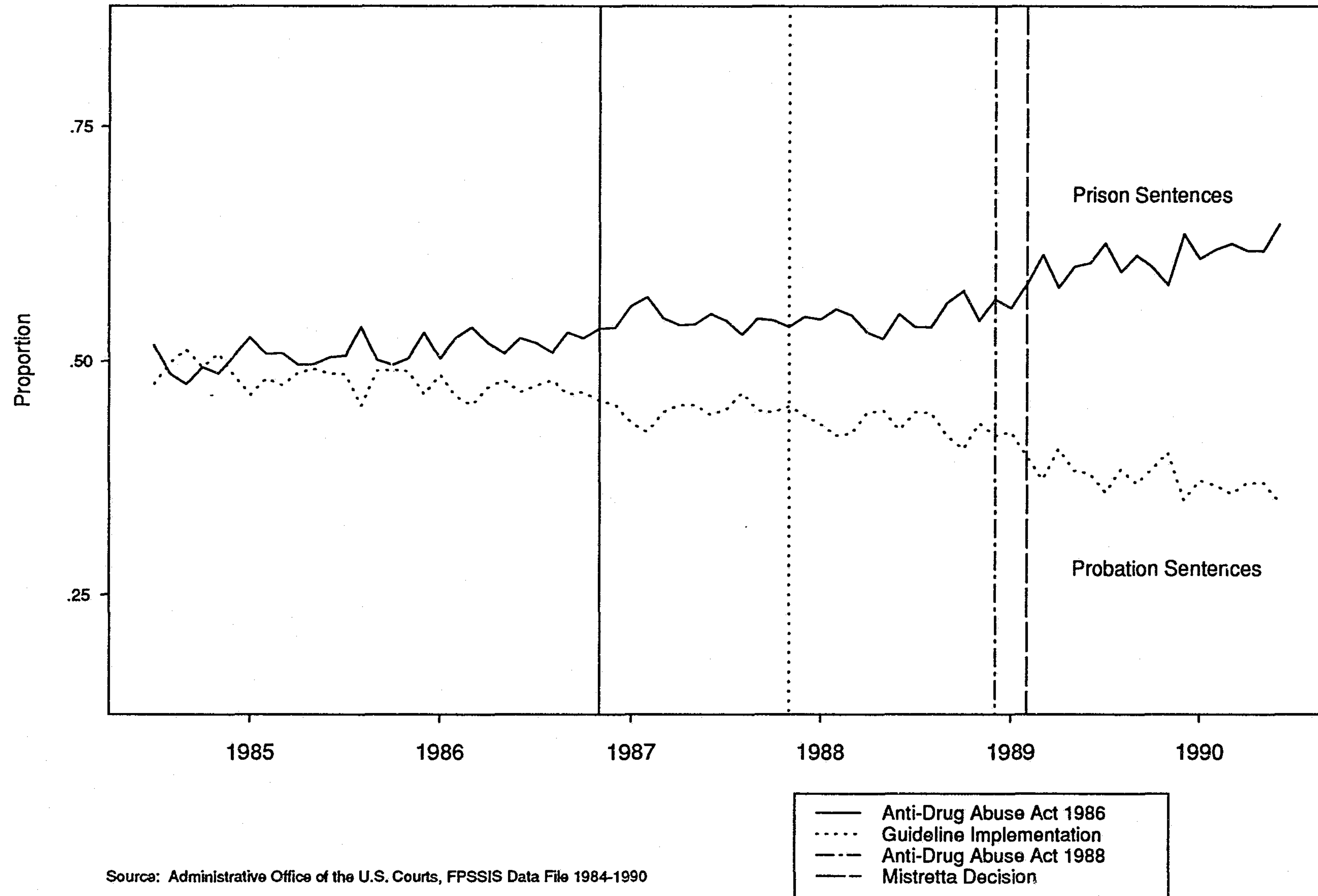
Prison Sentences by Type of Offense: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

Figure 14

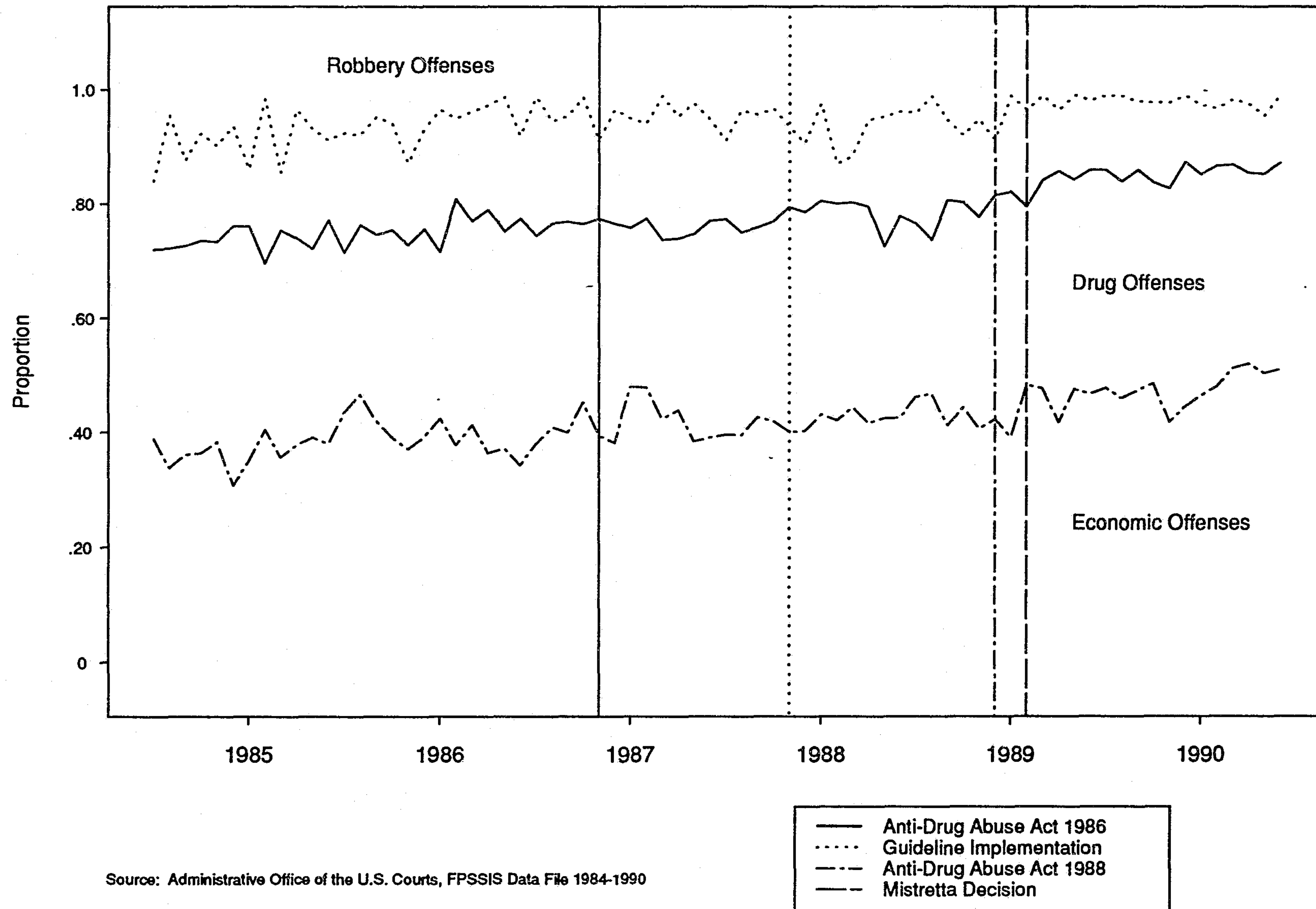
Prison and Probation Sentences as Proportions of All Sentences: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

Figure 15

Proportions of Sentences that Include Prison for Specific Offense Types: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, FPSSIS Data File 1984-1990

that the proportion of cases sentenced to prison has increased over time, from 52 percent during the first month of the study (July 1984) to 65 percent during the last month (June 1990). By definition, the proportion of cases sentenced to probation varies inversely with the rate of imprisonment.

While the increase in the rate of imprisonment appears to begin prior to the first intervention, statistically significant positive impacts are found for the Anti-Drug Abuse Act of 1986, as well as the Mistretta decision (*see* Table 136). As noted before, because of anomalies in the system caused by pre-Mistretta delays, the time period and impact of the Anti-Drug Abuse Act of 1988 and Mistretta decision are not clearly delineated. The Mistretta intervention may be acting as a proxy for a delayed guideline impact generated by courts who had ruled the guidelines unconstitutional. Alternatively, the Mistretta intervention may act as a proxy for the Drug Abuse Act of 1988 that took effect during an unusual slow-down period prior to the Supreme Court decision and would be expected to have a gradual impact over time.

Figure 15 illustrates changes in imprisonment rates for the three offense types studied. The rate of imprisonment for robbery offenses increased over time from 84 percent during the first month of study to 99 percent during the last month. Similarly, the rates increased from 72 percent to 87 percent for drug offenses and from 39 percent to 51 percent for economic offenses.[446]

As shown by Table 136, the time series analysis indicates that initial implementation of the guidelines and the Anti-Drug Abuse Act of 1988 result in significant changes in the rates of incarceration for drug offenders, while the Mistretta decision produced a similar effect on robbery and economic offenses.

C. Sentence Length

This section reviews the average lengths of imprisonment imposed during the study period. Two separate analyses are conducted for each time series of sentence length, the first excluding probation (zero prison terms) and the second including zero prison terms. The first series indicates the average term of imprisonment only for those that received some prison term. The second analysis mitigates any downward influences on mean sentence length caused by movement from probation to shorter prison terms. While such movement actually increases sentence severity, it reduces average lengths in models that omit probation.

As shown in Figure 16, mean sentence lengths across all offenses during this time period nearly doubled, increasing from 24 months in July 1984 to 46 months in June 1990 (excluding zeros). The mean sentence length increased from 13 to 30 months when zeros are included (*see* Figure 17). These increases in the average terms of imprisonment reflect statistically significant impacts by three major interventions — the Anti-Drug Abuse Act of 1986, the initial implementation of the guidelines, and the Mistretta decision.

As can be seen from Figure 16 and Table 137, drug sentences increased significantly at each intervention point except the 1988 Drug Act. Overall, mean prison terms for drug offenders increased throughout the study period from 27 months in July 1984 to 67 months in June 1990, an increase of 248 percent.

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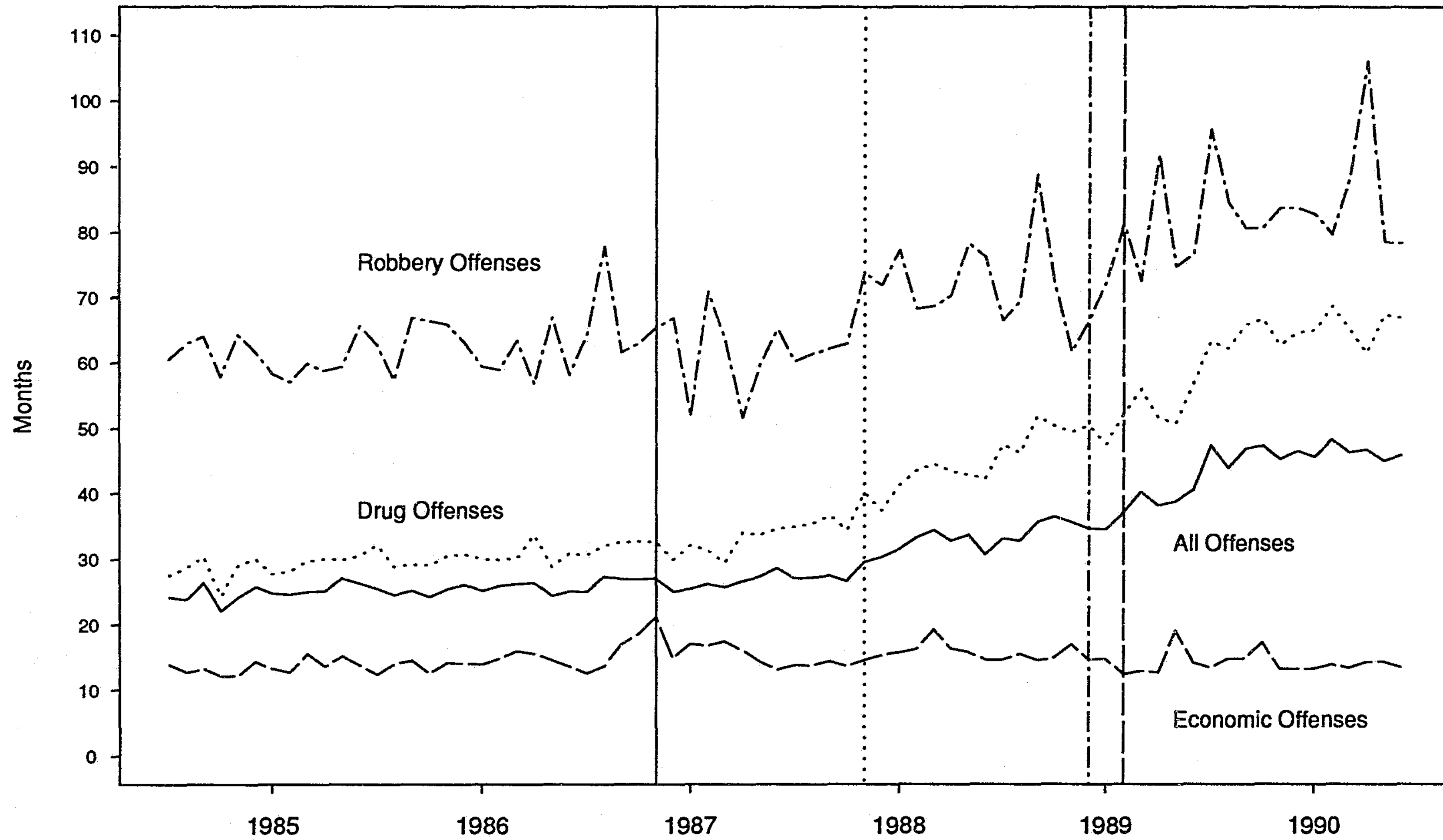
[446]Even though a major increase in the use of alternative sentences for economic crimes would be anticipated with the implementation of the guidelines, the analysis summarized in Figure 15 does not test for this effect. Alternative sentences for economic offenses, however, are incorporated into the later analyses on the length of incarceration.

Figure 16

Mean Prison Sentence by Type of Offense: July 1984 to June 1990

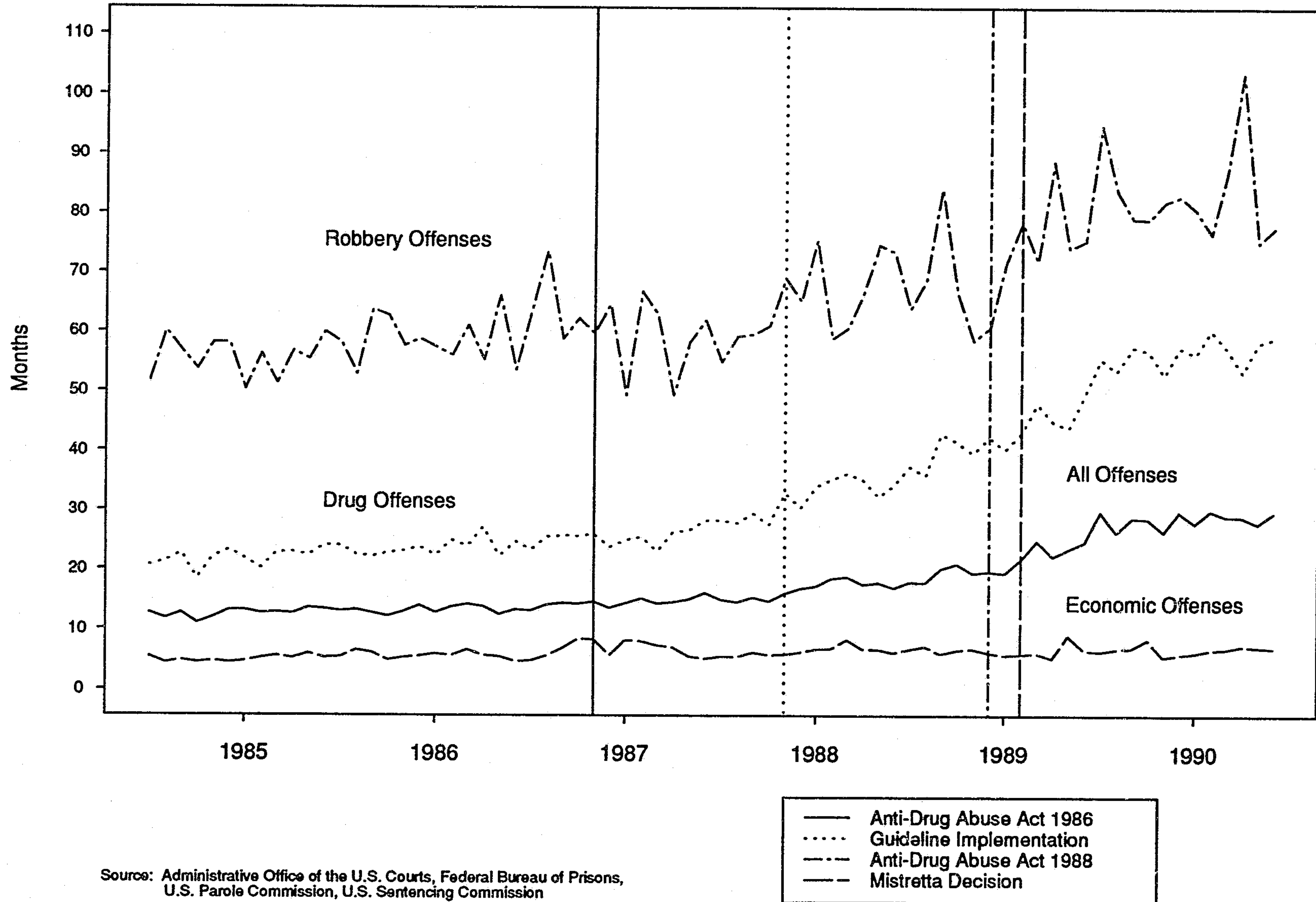


- Anti-Drug Abuse Act 1986
- Guideline Implementation
- Anti-Drug Abuse Act 1988
- Mistretta Decision

Source: Administrative Office of the U.S. Courts, Federal Bureau of Prisons, U.S. Parole Commission, U.S. Sentencing Commission

Figure 17

Mean Total Sentence by Type of Offense: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, Federal Bureau of Prisons, U.S. Parole Commission, U.S. Sentencing Commission

Figure 18 further specifies the major increases occurring under the guidelines by showing trends separately for cases involving (and not involving) mandatory consecutive firearms charges coupled with drug distribution convictions. Mean terms for cases involving such charges increased from 100 months in August 1984 to 146 months in June 1990, while terms for cases not involving the mandatory minimum firearms charges more than doubled, increasing from 27 to 64 months during the same period.

Figure 16 shows that average prison terms for robbery offenders also increased over the study period. Increases primarily occurred after initial guideline implementation and the Mistretta decision; both interventions produced significant positive changes (*see* Table 137). Mean sentences for robbery offenses were 60 months in July 1984 and rose to 78 months in June 1990.

Interestingly, the majority of the increase occurred among cases involving mandatory minimum firearms charges. As shown in Figure 19, mean prison terms for cases not involving such mandatory minimum charges only varied from 60 to 66 months at the extreme ends of the period. It is likely that, while the typical robbery case without a mandatory minimum firearms enhancement has only been affected slightly, the guidelines system has more dramatically increased sentences for cases with such mandatory gun charges by not allowing reductions in sentences for the underlying bank robbery count, thus ensuring that the mandatory minimum consecutive term actually serves as an enhancement to the substantive count. Because the pre- and post-guidelines means differed by less than 60 months, it appears that the consecutive terms increased sentences, but not by as much as the full 60 months intended by Congress.

Little difference is found between average robbery sentences with and without zeros due to the fact that probation was used so rarely for these offenses throughout the entire study period (*see* Figures 16 and 17).

Finally, Figure 16 indicates that average prison terms are reduced slightly for economic offenses when zeros (no prison terms) are not included, but have remained relatively stable if zeros are included (*see* Figure 17).[447] As indicated earlier, the intervention for the Mistretta decision showed significant increases in prison rates for economic offenders. However, it is likely that offenders previously receiving probation now receive short prison terms and drive averages down in the first model. Leaving probation cases in the second model shows that mean sentences actually have remained relatively stable overtime (*see* Table 137).

IV. Summary

Over the last several years a number of major legislative, policy, and systemic changes have affected the federal criminal justice system. While this study attempts to unravel the impacts of these interventions, a number of major trends in the system clearly began before the interventions currently under study. Both the numbers of cases being processed and the numbers of cases going to prison in the federal system began to increase before late 1986. These increases, most prominent among drug cases, appear to have been fueled by later interventions, primarily the Anti-Drug Abuse Act of 1986, initial implementation of the guidelines, and the Mistretta decision.

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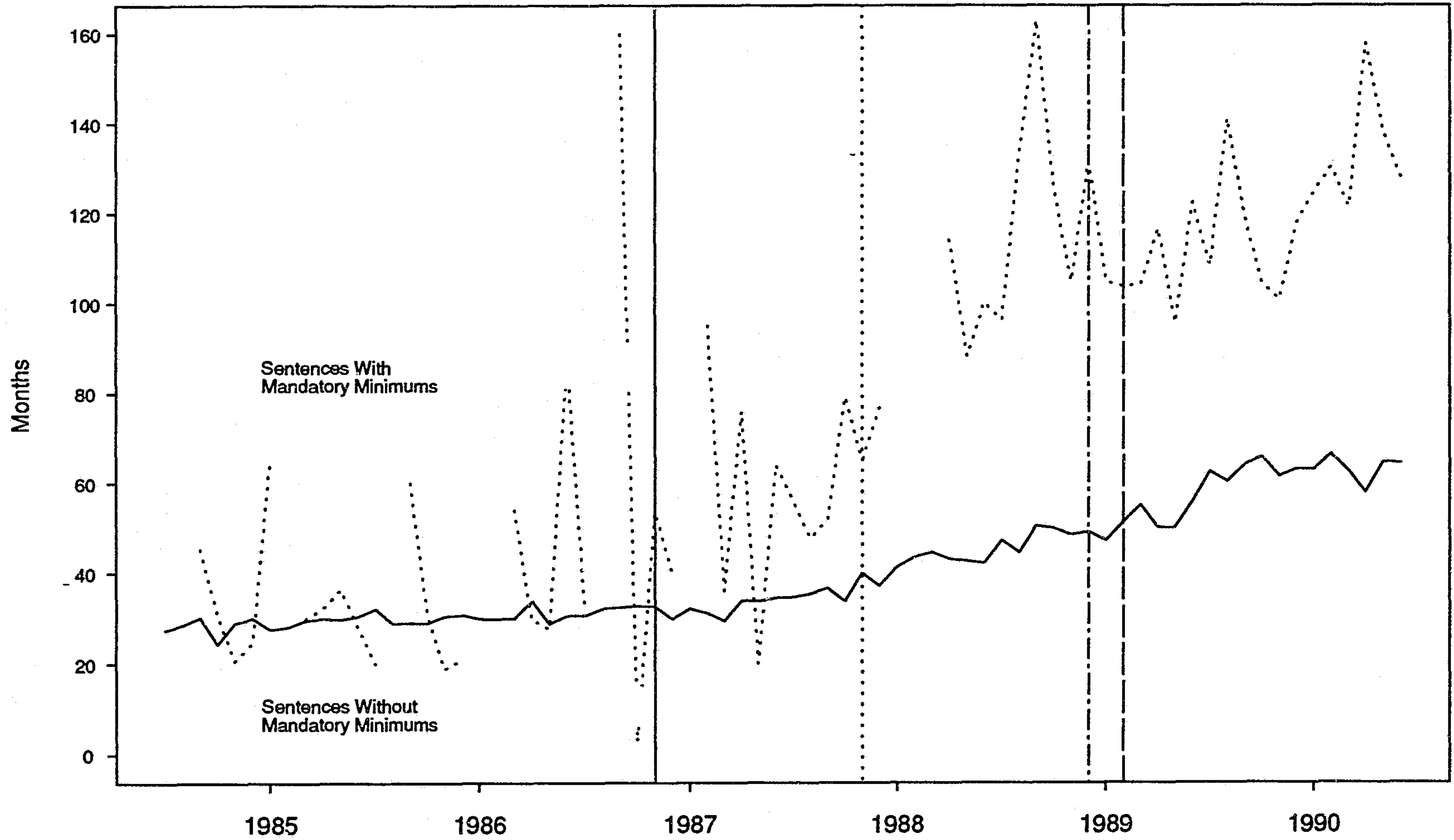
[447]Because alternatives to imprisonment (community confinement, intermittent confinement, and home detention) are frequently available within the guideline ranges applied for economic crimes, sentences to these alternatives have been included as prison equivalents in the mean terms generated for Figures 16 and 17.

Figure 18

Mean Prison Sentences for Drug Offenses: July 1984 to June 1990

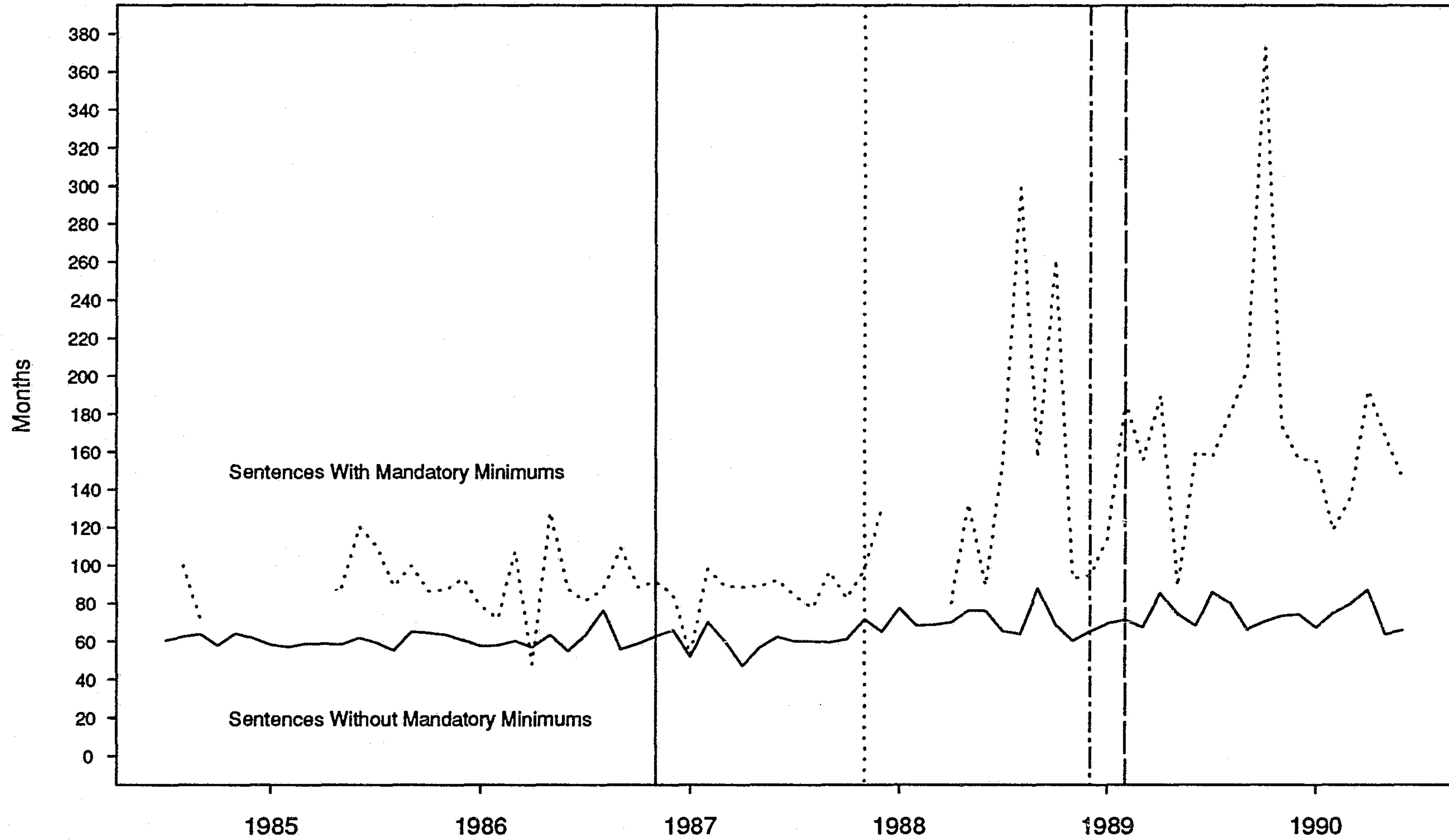


———	Anti-Drug Abuse Act 1986
· · · ·	Guideline Implementation
—·—	Anti-Drug Abuse Act 1988
— —	Mistretta Decision

Source: Administrative Office of the U.S. Courts, Federal Bureau of Prisons, U.S. Parole Commission, U.S. Sentencing Commission

Figure 19

Mean Prison Sentences for Robbery Offenses: July 1984 to June 1990



Source: Administrative Office of the U.S. Courts, Federal Bureau of Prisons, U.S. Parole Commission, U.S. Sentencing Commission

Possible trends created by the Anti-Drug Abuse Act of 1988 are confounded in the study by its close proximity in time to the Mistretta decision. It appears that many of the cases that were postponed pending the outcome of the Supreme Court ruling on the guidelines were sentenced shortly after the decision. As a result, trends between the time of these two intervention points are unreliable and immediate impacts of the Mistretta decision are confounded by both interventions.

A. In/out Decision

By promulgating the 1986 and 1988 drug acts and the Sentencing Reform Act that established the guidelines system, Congress sent a strong message that sentences for certain types of offenses and offenders would be increased. Imprisonment rates in the federal system, already increasing prior to these interventions, were further fueled by them. The overall rate of imprisonment in the federal system increased from 52 to 65 percent from mid-1984 through mid-1990 (*see* Figure 14 and Table 136). All three offense types reviewed in this study showed increases in imprisonment rates during this timeframe, with drug offenses significantly increasing after the 1988 Act as well as initial guideline implementation, and robbery and economic crimes significantly affected by the Mistretta decision (*see* Figure 15 and Table 136).

B. Sentence Lengths

In addition to increases in the general rates of imprisonment, the average lengths of sentences (expected time to be served) have increased during the study period. The analysis shows that the mean sentence lengths have risen following three major interventions — the Anti-Drug Abuse Act of 1986, initial guideline implementation, and the Mistretta decision. Average sentence lengths have increased for drug offenses after all interventions, except the Anti-Drug Abuse Act of 1988.

While average sentences for robbery cases have increased as a result of implementation of the guidelines and the Mistretta decision, the types of robbery cases principally affected involve mandatory consecutive firearms charges. It appears that the guideline structure may be instituting actual 60-month enhancements that were previously mitigated by lower sentences for the underlying counts prior to the guidelines.

Finally, the average sentence lengths for economic crimes have remained stable over the study period. While the guidelines system has resulted in higher rates of imprisonment and use of alternative confinements (*e.g.*, community confinement) for these offenders, the average sentence lengths have not changed.

This analysis illustrates major system changes after significant interventions during the last several years. However, the exact causal links or chains creating the changes are not clearly delineated by this type of analysis. For example, the Anti-Drug Abuse Act of 1986 created an increased penalty structure that targeted major drug offenders for particularly long prison sentences. The Act also increased the number of investigative and prosecutorial staff to fight this type of crime. It is clear that a result of these changes is increasing numbers of drug offenders being sentenced to prison. If the nature of these drug offenses is similar to those previously processed in the federal system, a stronger conclusion could be drawn that the new penalty structures are impacting rates of imprisonment and sentence lengths. However, if the new laws are resulting in the conviction of higher-level offenders or individuals involved in more serious drug offenses, subsequent changes in imprisonment rates and sentence lengths may be a result of the changing nature of the offenders processed.

The study reported in this chapter indicates a system that, between 1984 and 1990, experienced significant increases both in the use of incarcerative sentences and in the average length of prison sentences. Due to considerable changes that occurred not only in legislation and sentencing policy but also in the volume, seriousness, and composition of the criminal behavior they seek to regulate, any causal influences are too confounded and close in proximity to be separately assessed and evaluated. Further research should be undertaken to disentangle these causal relationships between the interventions and the systemic changes.

Appendix C:

Statistical Methodology

Statistical Methodology

The overtime analysis utilizes time series models popularized by Box and Jenkins[1] and Box and Tiao.[2] These models describe a time series as the outcome of a process that includes both deterministic (*i.e.*, a mean level and changes in that level due to changes in legislation) and stochastic components (*i.e.*, an error process). In general, these models take this form:

$$y_t = \mu + \omega_{ik} I_{it} + \ldots + \frac{\Theta}{\Phi} u_t \quad (1)$$

where $i = 1, \ldots, I$ interventions

$k = 0, \ldots, K$ lags

y_t represents the time series, μ is the conditional mean of that series, ω_{ik} is a parameter representing the change in mean level of the time series after the intervention represented by I_t, u_t is an error term, and Φ and Θ model the overtime behavior of the observations and the error term, respectively. Interventions are constructed as dummy variables coded 0 before the event of interest and 1 thereafter.

Impact Assessments

The intervention component may be of four distinct types.[3] They differ according to whether the response to the intervention is abrupt or gradual and according to whether the effect is temporary or permanent. When a legal intervention has a clear and definite time of inception, the abrupt component, known as a zero-order transfer function, is specified. The gradual (first-order transfer function) is specified when a phase-in period is suspected. The zero-order and the first-order transfer functions were tested for all interventions in all models.

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[1]Box & Jenkins, Time Series Analysis: Forecasting and Control (2d ed. 1976).

[2]Box & Tiao, Intervention Analysis with Applications to Economic and Environmental Problems, 70 J. of Amer. Stat. Assoc. 70 (1975).

[3]McCleary & Hay, Applied Time Series for the Social Sciences (1980).

Appendix D:

Time Series Parameter Estimates

Table D-1

Total Sentences

$$y_t = \mu + \omega_{01}ADAA86_t + \omega_{02}GL_t + \omega_{03}ADAA88_t + \omega_{04}MISTRETTA_t + (1-\theta_2 B^2)(1-\theta_3 B^3)(1-\theta_{12} B^{12})u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	3005.915	72.941	41.21
θ_2	-.200	.119	-1.68
θ_3	-.283	.116	-2.44
θ_{12}	-.495	.119	-4.16
$\omega_{01}ADAA86_t$	118.058	96.420	1.22
$\omega_{02}GL_t$	178.174	93.665	1.90
$\omega_{03}ADAA88_t$	-215.107	138.703	-1.55
$\omega_{04}MISTRETTA_t$	541.407	137.359	3.94

Table D-2

Total Prison Sentences

$$y_t=\mu+\frac{\omega_{01}}{(1-\delta_{01}B)}ADAA86_t+\frac{\omega_{02}}{(1-\delta_{02}B)}GL_t+\frac{\omega_{03}}{(1-\delta_{03}B)}ADAA88_t+\frac{\omega_{04}}{(1-\delta_{04}B)}MISTRETTA_t+(1-\theta_3B^3)(1-\theta_{12}B^{12})u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	1537.341	34.816	44.16
θ_3	-.466	.111	-4.21
θ_{12}	-.407	.124	-3.29
$\omega_{01}ADAA86_t$	215.726	68.301	3.16
δ_{01}	-.842	.092	-9.12
$\omega_{02}GL_t$	17.687	8.176	2.16
δ_{02}	.988	.030	33.10
$\omega_{03}ADAA88_t$	-379.923	98.601	-3.85
δ_{03}	-.751	.097	-7.78
$\omega_{04}MISTRETTA_t$	264.065	84.399	3.13
δ_{04}	.405	.207	1.95

Table D-3

Total Probation Sentences

$$y_t = \mu + \omega_{01} ADAA86_t + \omega_{02} GL_t + \omega_{03} ADAA88_t + \omega_{04} MISTRETTA_t + (1 - \theta_{12} B^{12}) u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	1451.213	23.320	62.23
θ_{12}	-.482	.123	-3.93
$\omega_{01} ADAA86_t$	-43.668	32.811	-1.33
$\omega_{02} GL_t$	-1.404	31.583	-.04
$\omega_{03} ADAA88_t$	-108.263	65.064	-1.66
$\omega_{04} MISTRETTA_t$	69.204	64.535	1.07

Table D-4

Proportion of Prison Sentences to Total

$$y_t = \mu + \omega_{01} ADAA86_t + \omega_{02} GL_t + \omega_{03} ADAA88_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	.375	.053	7.03
ϕ_1	.273	.103	2.64
$\omega_{01} ADAA86_t$	.025	.006	4.26
$\omega_{02} GL_t$	.006	.006	1.02
$\omega_{03} ADAA88_t$	.011	.011	1.07
$\omega_{04} MISTRETTA_t$	.035	.012	3.02

Table D-5

Proportion of Probation Sentences to Total

$$y_t = \mu + \omega_{01} ADAA86_t + \omega_{02} GL_t + \omega_{03} ADAA88_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	.352	.050	7.01
ϕ_1	.273	.104	2.64
$\omega_{01} ADAA86_t$	-.025	.006	-4.26
$\omega_{02} GL_t$	-.006	.006	-1.02
$\omega_{03} ADAA88_t$	-.011	.011	-1.07
$\omega_{04} MISTRETTA_t$	-.035	.012	-3.02

Table D-6

Total Prison Sentences for Drugs

$$y_t = \mu + \omega_{01} ADAA86_t + \omega_{02} GL_t + \frac{\omega_{03}}{(1-\delta_{03}B)} ADAA88_t + \frac{\omega_{04}}{(1-\delta_{04}B)} MISTRETTA_t + \frac{(1-\theta_1 B)(1-\theta_{12}B^{12})}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	112.941	33.865	3.33
θ_1	.643	.123	5.25
θ_{12}	-.267	.135	-1.98
ϕ_1	.801	.063	12.74
$\omega_{01} ADAA86_t$	23.452	11.786	1.99
$\omega_{02} GL_t$	3.423	10.162	.34
$\omega_{03} ADAA88_t$	-155.853	51.048	-3.05
δ_{03}	-.794	.096	-8.31
$\omega_{04} MISTRETTA_t$	135.757	32.828	4.14
δ_{04}	.610	.131	4.67

Table D-7

Proportion of Prison Sentences to Total Sentences for Drug Offenses

$$y_t = \mu + \omega_{01} ADAA86_t + \omega_{02} GL_t + \frac{\omega_{03}}{(1-\delta_{03}B)} ADAA88_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B^6)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	.750	.005	146.33
ϕ_1	.260	.126	2.07
$\omega_{01} ADAA86_t$	.007	.008	0.83
$\omega_{02} GL_t$	.027	.009	3.18
$\omega_{03} ADAA88_t$	.026	.011	2.29
δ_{03}	.721	.081	8.88
$\omega_{04} MISTRETTA_t$	-.017	.027	-.65

Table D-8

Total Robbery Sentences to Prison

$$y_t = \mu + \omega_{02} GL_t + \omega_{04} MISTRETTA_t + \frac{(1-\theta_5 B^5)}{(1-\phi_2 B^2)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	56.045	8.731	6.42
θ_5	.259	.129	2.01
ϕ_2	.233	.116	2.00
$\omega_{02} GL_t$	-.313	2.796	-.11
$\omega_{04} MISTRETTA_t$	21.057	4.539	4.64

Table D-9

Proportion of Prison Sentences to Total Sentences for Robbery Offenses

$$y_t = \mu + \omega_{02} GL_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B^2)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	.939	.008	123.96
ϕ_1	.372	.113	3.29
$\omega_{02} GL_t$	-.003	.013	-.19
$\omega_{04} MISTRETTA_t$	.040	.015	2.64

Table D-10

Total Economic Crime Sentences to Prison

$$y_t = \mu + \omega_{02} GL_t + \omega_{04} MISTRETTA_t + (1-\theta_2 B^2)(1-\theta_3 B^3)(1-\theta_4 B^4) u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	268.597	11.467	23.42
θ_2	-.273	.121	-2.26
θ_3	-.376	.111	-3.37
θ_4	-.257	.123	-2.10
$\omega_{02} GL_t$	34.601	18.808	1.84
$\omega_{04} MISTRETTA_t$	51.711	21.172	2.44

Table D-11

Proportion of Prison Sentences to Total Sentences for Economic Offenses

$$y_t = \mu + \omega_{02} GL_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	.396	.008	49.66
ϕ_1	.414	.113	3.67
$\omega_{02} GL_t$	.022	.015	1.54
$\omega_{04} MISTRETTA_t$	.060	.017	3.53

Table D-12

Mean Prison Sentence

$$y_t = \mu + \omega_{01} ADAA86_t + \frac{\omega_{02}}{(1-\delta_{02}B)} GL_t + \omega_{03} ADAA88_t + \frac{\omega_{04}}{(1-\delta_{04}B)} MISTRETTA_t + u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	25.351	.269	94.09
$\omega_{01} ADAA86_t$	1.434	.463	3.09
$\omega_{02} GL_t$	2.120	.499	4.25
δ_{02}	.732	.079	9.29
$\omega_{03} ADAA88_t$	-.192	1.110	-.17
$\omega_{04} MISTRETTA_t$	2.417	.475	5.09
δ_{04}	.812	.038	21.35

Table D-13

Mean Sentence

$$y_t = \mu + \omega_{01} ADAA86_t + \frac{\omega_{02}}{(1-\delta_{02}B)} GL_t + \omega_{03} ADAA88_t + \frac{\omega_{04}}{(1-\delta_{04}B)} MISTRETTA + u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	13.026	.198	65.64
$\omega_{01} ADAA86_t$	1.753	.340	5.16
$\omega_{02} GL_t$	.889	.284	3.13
δ_{02}	.813	.089	9.12
$\omega_{03} ADAA88_t$	.294	.892	.33
$\omega_{04} MISTRETTA_t$	1.749	.346	5.06
δ_{04}	.819	.037	22.15

Table D-14

Mean Prison Sentence for Drugs

$$y_t = \mu + \omega_{01} ADAA86_t + \frac{\omega_{02}}{(1-\delta_{02}B)} GL_t +$$
$$\omega_{03} ADAA88_t + \frac{\omega_{04}}{(1-\delta_{04}B)} MISTRETTA_t +$$
$$(1-\theta_1 B) u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	29.937	.553	54.10
θ_1	-.253	.123	-2.07
$\omega_{01} ADAA86_t$	3.464	.938	3.69
$\omega_{02} GL_t$	2.729	.698	3.91
δ_{02}	.845	.066	12.84
$\omega_{03} ADAA88_t$	-.786	2.331	-.34
$\omega_{04} MISTRETTA_t$	2.383	.778	3.06
δ_{04}	.874	.050	17.36

Table D-15

Mean Sentence for Drugs

$$y_t = \mu + \omega_{01} ADAA86_t + \frac{\omega_{02}}{(1-\delta_{02}B)} GL_t + \omega_{03} ADAA88_t + \frac{\omega_{04}}{(1-\delta_{04}B)} MISTRETTA_t + u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	23.035	.437	52.68
$\omega_{01} ADAA86_t$	3.589	.747	4.80
$\omega_{02} GL_t$	2.210	.556	3.98
δ_{02}	.849	.065	13.07
$\omega_{03} ADAA88_t$	.769	2.035	.38
$\omega_{04} MISTRETTA_t$	2.403	.647	3.72
δ_{04}	.867	.043	20.32

Table D-16

Mean Prison Sentence for Robbery

$$y_t = \mu + \omega_{02} GL_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	62.128	.687	90.45
ϕ_1	-.332	.115	-2.88
$\omega_{02} GL_t$	9.914	1.339	7.40
$\omega_{04} MISTRETTA_t$	11.763	1.582	7.44

Table D-17

Mean Sentence for Robbery

$$y_t = \mu + \frac{\omega_{02}}{(1-\delta_{02}B)} GL_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	58.569	.754	77.66
ϕ_1	-.296	.119	-2.49
$\omega_{02} GL_t$	15.237	2.464	6.18
δ_{02}	-.715	.156	-4.58
$\omega_{04} MISTRETTA_t$	14.548	1.691	8.60

Table D-18

Mean Prison Sentence for Economic Crime

$$y_t = \mu + \omega_{02} GL_t + \frac{\omega_{04}}{(1-\delta_{04}B)} MISTRETTA_t + \frac{1}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	14.524	.423	34.30
ϕ_1	.420	.111	3.77
$\omega_{02} GL_t$	1.130	.725	-1.56
$\omega_{04} MISTRETTA_t$	-2.648	1.153	-2.30
δ_{04}	-.749	.203	-3.70

Table D-19

Mean Sentence for Economic Crimes

$$y_t = \mu + \omega_{02} GL_t + \omega_{04} MISTRETTA_t + \frac{1}{(1-\phi_1 B)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	5.794	.245	23.68
ϕ_1	.444	.109	4.10
$\omega_{02} GL_t$	.720	.439	1.64
$\omega_{04} MISTRETTA_t$	.160	.504	.32

Chapter Six

Prosecutorial Discretion and Plea Bargaining

Introduction[448]

Congress was mindful of the fact that prosecutorial discretion in charging decisions and plea negotiations could potentially undercut the full impact of the guideline sentencing system. In particular, Congress was concerned that prosecutors could use one or more of the traditionally available charging and plea negotiation vehicles to circumvent and therefore undermine the goals of the Sentencing Reform Act, and consequently reintroduce unwarranted sentencing disparity into the system. Without some check on plea bargaining, "prosecutorial decisions — particularly decisions to reduce charges in exchange for guilty pleas — could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system."[449]

In the Sentencing Reform Act, Congress directed the Commission to promulgate policy statements to assist federal courts in deciding whether or not to accept plea agreements.[450] Such policy guidance was intended to provide "an opportunity for meaningful judicial review of proposed charge-reduction plea agreements, as well as other forms of plea agreements, ... while at the same time [guarding] against improper judicial intrusion upon the responsibilities of the Executive Branch."[451] Further, Congress required that the Sentencing Commission's evaluation report include "an evaluation of the impact of the sentencing guidelines on prosecutorial discretion [and] plea bargaining."[452] This portion of the evaluation report is intended to address that specific congressional mandate.

The Commission adopted a multi-pronged strategy to help ensure that prosecutorial discretion and the sentencing guidelines would not work at cross purposes. This strategy (described more fully in Chapter Three, Part F of this report) was designed to minimize the likelihood that charging and plea practices would circumvent the guidelines and impede the objectives of the Act. First, the Commission developed a guidelines structure that begins with the offense of conviction. Based on

[448]The title of this chapter reflects how Congress framed the issue in directing the Commission to evaluate the implementation of the guidelines. Nevertheless, it is clear from the context of the Sentencing Reform Act and its legislative history that the matter of greater interest to Congress was the way in which prosecutorial decisions, including plea bargaining, would impact on the operations of the guidelines system, rather than vice versa. Consequently, the Commission has focused its evaluative studies in this chapter principally (though not entirely) on this latter issue.

[449]S. Rep. No. 225, 98th Cong., 1st Sess. 167 (1983).

[450]28 U.S.C. § 994(a)(2)(E) directs the Commission to issue policy statements to guide courts in exercising "the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1)."

[451]S. Rep. No. 225, *supra* note 449, at 167.

[452]Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, ch. II, § 236, 98 Stat. 1837, 2033 (1984).

this count of conviction, the applicable guideline range is determined according to the defendant's actual offense conduct and criminal history. This is intended to limit the degree to which the prosecutor's choice of charge will ultimately dictate the guideline sentence. Chapter Two of this report more fully describes the guidelines model promulgated by the Commission. The guideline components most important to limiting the impact of the charge or the offense of conviction are: (1) the use of "generic" guidelines organized by offense type (*e.g.*, fraud) that typically apply to any offense of that general type, regardless of the particular statute charged by the prosecutor; (2) a central "relevant conduct" guideline (U.S.S.G. §1B1.3) that defines the parameters of the real offense conduct and other information the court is to consider in determining the guideline range;[453] and (3) the use of cross references from the guideline most applicable to the offense of conviction to another guideline that more appropriately sanctions the actual offense conduct.[454]

Second, the Commission promulgated policy statements governing the court's consideration and acceptance of plea agreements, as directed by 28 U.S.C. § 994(a)(2)(E). The Commission viewed its initial four policy statements (set forth in Chapter Six, Part B of the Guidelines Manual) as a substantial "first step" toward implementing the congressional goal of ensuring that plea practices function appropriately within, but do not undermine, the guidelines system. As suggested by the legislative history, the policy statements are intended to reinforce judicial authority and responsibility to examine and reject, if necessary, proposed plea agreements.

Third, the Commission has actively pursued cooperation with the Attorney General (through his *ex officio* representative on the Commission) regarding the implementation of Department of Justice policies on charge selection and plea bargaining practices. Consequently, the Department has imposed, since the inception of guidelines sentencing, national plea bargaining standards. On November 1, 1987, when the guidelines went into effect, the Department of Justice issued the Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984. This was followed two days later by a memorandum from Associate Attorney General Stephen S. Trott titled "Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines." Attorney General Thornburgh later issued the "Memorandum to Federal Prosecutors" on March 13, 1989, and "Plea Bargaining in Cases Involving Firearms" on June 16, 1989.

The Justice Department's national plea bargaining policies require prosecutors to follow the letter and spirit of the Commission's policy statements on plea agreements by fully disclosing all relevant information to the court, and by negotiating plea bargains that do not undermine the guidelines. According to Attorney General Thornburgh's memorandum, "Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve."[455] In fact, the

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[453]For a discussion of the purposes and operation of this important guideline, *see* Wilkins & Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495 (1990).

[454]The Commission has used cross references to other guidelines for multiple reasons. This reference is only intended to illustrate that one effect, and sometimes one of the underlying rationales, is to limit the impact of charge bargaining.

[455]Dick Thornburgh, Attorney General, Memorandum to Federal Prosecutors (March 13, 1989) [hereinafter "Thornburgh Memorandum"].

memorandum requires prosecutors to obtain supervisory approval before deviating from the Department's plea bargaining policies.

The Attorney General's memorandum sets out the Department's basic charge selection policy as follows:

> *... a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct.... The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability to prove a charge for legal or evidentiary reasons.*[456]

The policy also states that plea bargaining departures from the guideline range must be revealed to the court:

> *It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.*[457]

A fourth component of the Commission's strategy to ensure consistency between the guidelines and plea practices has been the Commission's comprehensive, ongoing sentencing guideline education programs for judges, prosecutors, defense attorneys, probation officers, and others. A fifth element involves the use of the Commission's broad authority to conduct research and gather information about sentencing and related matters, specifically for use in assessing the effects of plea bargaining and prosecutorial discretion under the guidelines.

I. Historical Background

The implementation of the guidelines sentencing system has brought about important changes in plea bargaining. Before the guidelines, the prosecutor's objective was to obtain a plea to charge(s) that resulted in sufficient sentencing exposure, defined solely in terms of the maximum penalty for those counts to which the defendant would plead guilty. Defendants attempted to minimize that exposure through the dismissal of one or more charges, often coupled with the government's agreement not to seek additional charges for related criminal conduct. The nature of the charge(s) to which the defendant pleaded guilty was not as significant in terms of its effect on sentencing as was the maximum penalty attached to the charge(s), as long as that penalty afforded the court appropriate latitude.

Prior to the guidelines, district court judges had virtually unlimited discretion to impose sentences up to the statutory maximum penalty of the charge for which the defendant was convicted. Accordingly, the end result of the plea agreement process under the pre-guidelines sentencing system was often a matter of considerable speculation for those negotiating the plea. Try as they might to limit their exposure, defendants often entered into guilty pleas that left them subject to penalties ranging from probation to ten, 20, or 50 years or more of imprisonment. Moreover, because the sentence ultimately imposed was often well below the maximum available and was

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[456] *Id.*

[457] *Id.*

typically not accompanied by any explanation of the basis for the sentence (as none was required under prior law), neither defendants, defense counsel, or prosecutors had reliable, quantifiable means of conducting after-the-fact assessments of the effects of the plea agreement (and possible defendant cooperation) on the sentence imposed. In effect, the pre-guidelines plea agreement and sentencing process was a gamble for defendants, an open field for prosecutors willing and able to deal charges, an opportunity for judges to exercise unfettered discretion, and a difficult if not impossible task for anyone seeking a means of assessing whether similarly situated offenders received similar treatment.

In contrast, the system of guideline sentencing provides far greater direction when negotiating pleas, while at the same time placing restrictions upon the exercise and consequence of prosecutorial and judicial discretion. Under the guidelines, the uncertainty of a sentence can be quantified in terms of months rather than years in most cases. Stipulations to facts material to guideline determinations, the applicability of a guideline factor, or a particular guideline range can further reduce that uncertainty.

Through the use of specified sentencing ranges, the guidelines provide the parties a much clearer idea of the relatively narrow sentencing options available to the court should there be a plea or a conviction after trial. Prior to the guidelines, a plea agreement would frequently include a plea to one or two of the most serious charges in exchange for the dismissal of the remaining charges. The presumed "benefit" to the defendant was that the maximum exposure would be reduced, for example, from 100 years to ten years. The parties expected that the defendant was unlikely to be sentenced to more than ten years in the first place and, in fact, probably would receive much less imprisonment. The defendant's advantage in entering a plea under the pre-guidelines system was largely the hope that the sentence would be lower than if the defendant had been convicted at trial. In contrast, the guidelines system is much more honest and accessible to the defendant and participants in the criminal justice system. Depending on the charges to which a defendant pleads guilty and the specific guideline adjustments as determined by the court, a defendant can know in advance the range of sentence exposure associated with his/her negotiated plea.

The advent of sentencing guidelines brought about a number of ancillary changes. First, when the guidelines went into effect in November 1987, the Justice Department instituted the first strict national policy on plea bargaining and prosecutors' disposition of cases.[458] This policy, along with the guidelines themselves, provides a basis of comparison by which a prosecutor's colleagues and supervisors, defense counsel, the Sentencing Commission, Congress, and the public can objectively judge the appropriateness of a particular plea negotiation. A review of the degree of compliance with these policies can limit significantly the ability of prosecutors to exercise unfettered discretion.

Second, as described above, the guidelines take into account certain real offense conduct regardless of whether or not the conduct is described in a count chosen by the prosecutor and pursued to conviction. That is, for certain commonly prosecuted offenses in which dollar loss or quantity of drugs is important, the applicable guideline range is calculated using the entire quantity or amount that is part of the same course of conduct or common scheme or plan, regardless of the

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[458]*See* Chapter Three, Part F for a more complete discussion of the Prosecutor's Handbook, the Trott Memorandum, and the Thornburgh Memorandum.

number of counts of conviction.[459] In addition, specific offense characteristics pertaining to the various guideline sections, cross references between guidelines, and adjustments for such factors as role in the offense, acceptance of responsibility, or obstruction of justice are determined according to actual conduct relevant to the offense(s) of conviction. In general, these adjustments modify the base offense level, determined by the count(s) of conviction, to generate a guideline range more closely associated with the defendant's real offense conduct and criminal history.

Third, the probation officer, as the independent arm of the court, is charged with providing the court with all relevant information about the offense and the offender. The probation officer is required to provide the court with a neutral assessment of that information and an explanation of how the guidelines apply to the case. This function can provide a valuable check on the prosecutor's and defense attorney's ability to control the case facts and guideline application.

Finally, and perhaps most importantly, judges remain the ultimate arbiters of the propriety of plea agreements through their traditional authority under Rule 11(e) of the Federal Rules of Criminal Procedure to accept or reject pleas. That authority is highlighted in the Guidelines Manual. Specifically, policy statement §6B1.2 advises courts that plea agreements calling for the dismissal of charges or an agreement not to pursue potential charges should not be accepted if "the remaining charges do not adequately reflect the seriousness of the actual offense behavior." By providing this critical opportunity to exercise judicial discretion, the guidelines present the court with an important benchmark against which to evaluate the appropriateness of the plea agreement in a particular case as it relates to the goals of sentencing as mandated by Congress.

As a result of the guidelines system, prosecutors and defendants negotiating pleas have a quantifiable measure of the effects of their negotiations as well as a much clearer view of the probable end result. Courts benefit from the guidance of a system that provides a distinct means for evaluating the propriety of proposed plea agreements in light of the nature and severity of the offense conduct. The public benefits from a process designed to treat similar offenders similarly, in turn resulting in greater confidence in the criminal justice system.

II. Case Processing and Prosecutorial Decisions

In general, "matters" originate in U.S. attorneys' offices upon receipt of referrals of new investigations from investigative agencies. The opening of a new matter typically results in the assignment of the referral to a prosecutor for evaluation. The prosecutor's assessment of the matter's provability, along with Department of Justice prosecution and office declination policies, lead to a decision to either decline prosecution outright or to proceed with the investigation.

Subsequent investigation frequently necessitates periodic review of the matter under investigation to determine whether the evidence gathered meets initial expectations or minimal requirements for proceeding with the case to indictment. For example, additional investigation may reveal a lower loss figure than originally anticipated, a lesser quantity of controlled substances, or a lack of criminal intent. The passage of time or other factors may affect a witness' willingness to cooperate, or may result in the exposure of other weaknesses in the case such as the credibility or reliability of a witness or the availability of physical evidence (possibly due to questions regarding its

[459]For example, the guidelines treat a three-count indictment, each count of which charges the sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging the sale of 300 grams of heroin or theft of $30,000.

admissibility). These developments may affect not only the prosecutor's assessment of the provability of the case, but may run afoul of the office declination policies based on the seriousness of the criminal conduct (such as minimum dollar loss or drug quantities for federal prosecution) or the willingness of the victim or other witnesses to cooperate with authorities. Any of these developments, alone or in combination, may result in the declination of prosecution at some point during the investigation or, alternatively, could influence substantively the plea bargaining process.

Evidence discovered during an investigation may launch plea agreement discussions that were either not pursued or not pursued successfully prior to indictment. Defendants may seek to curtail further government action by pleading to charges incorporating facts already discovered. Consequently, a defendant may benefit by reaching an agreement with the government before a potentially long and costly investigation is complete, even if the defendant is not in a position to provide incriminating information about other persons who may have engaged in criminal activity. Additional investigation may disclose proof problems that, while not necessitating the termination of prosecution, would require the prosecutor to re-evaluate the probability of obtaining a conviction on the present charges. If the probability of conviction at trial is diminished, the prosecutor may agree to a plea to less serious charges or to a plea incorporating favorable recommendations in order to ensure that "all is not lost" by proceeding to trial with a risky case.

At or near the completion of the investigation, decisions must be made regarding charges to be incorporated into an indictment or to be included in a pre-indictment plea proposal to defense counsel. It is at this point that the process under the guidelines departs significantly from pre-guideline practice. Prosecutors drafting charges (or pre-indictment plea agreements) governed by the guidelines must consider what effect certain charges, or combinations of charges, will have on the eventual sentencing range. Rather than looking only to statutory maximums and minimums, prosecutors must take into account the base offense levels and specific offense characteristics implicated by certain potential charges, as well as the effect of the guideline grouping rules in the event of multiple-count convictions. While doing so, prosecutors must bear in mind Department of Justice policy requiring that charges reflect the most serious, provable offense conduct and that statutory sentencing enhancements such as 18 U.S.C. § 924(c) and (e) be pursued when possible. While the overriding charging concerns, provability, and relationship of charges to trial strategy are consistent with pre-guideline practice, indictments in the guidelines era cannot be drafted intelligently without considering the effects of the guidelines.

III. The Impact Studies

A. Introduction

Several obstacles inhibit the design of a straightforward quantitative study of the impact of sentencing guidelines on prosecutorial discretion and plea bargaining. Primarily, much of the plea negotiation process involves "behind the scenes" discussions between prosecutors and defense attorneys that generally are not memorialized. Evidentiary problems and defendant cooperation may affect the outcome of a plea negotiation (*i.e.*, the sentence), but often there is little record of how this outcome evolved. Without data on specific decision points in this plea process, quantitative analysis cannot be performed.

In addition, quantitative data reflecting prosecutorial practices historically have numerous shortcomings. Standardization of data collection efforts has not been a priority for individual U.S. attorneys' offices until recently. For example, one U.S. attorney's office may use a defendant-based system, while another may use a case-based system and consequently the data fall short of providing

specific details of charging practices in any systematic fashion. Furthermore, as is true of the other impact studies included in this report, a number of substantive changes in the federal criminal justice system over the past decade have made disentangling the effects of a single reform very difficult. Therefore, what may appear to be the consequence of one such change, (*e.g.*, guideline implementation) may in fact be the result of another (*e.g.*, enactment of mandatory minimum penalties).[460]

In recognition of these obstacles to quantitative analysis, the Commission focused a significant portion of the interviews with judges and court practitioners in the implementation study on plea bargaining and prosecutorial discretion (*see* Chapter Three, Part F, Charging and Plea Practices). Through examples and open-ended questions, the Commission attempted to examine the plea negotiation processes at work within the federal court system. In addition, the Commission authorized Commissioner Ilene H. Nagel and Professor Stephen J. Schulhofer to conduct an in-depth study of plea practices under the sentencing guidelines to further examine these important issues.[461]

In addition to the qualitative research in Chapter Three of the evaluation report, this chapter examines the issue of whether and how the guidelines might impact on the use of prosecutorial discretion. Two different methodologies are used in analyzing the available quantitative data. The first study presents an over-time analysis that deals most directly with the issue outlined by Congress, *i.e.*, the impact of the guidelines on prosecutorial behavior. The study provides an aggregate portrait of changes and trends in prosecutorial outcomes (*e.g.*, the number of cases settled by guilty plea) occurring before and after the implementation of the guidelines, while controlling for other possible competing influences on prosecutors' behavior such as changes in legislation. Ideally, findings from this study will help place the results of other impact studies in the larger context of changes in the federal system.

The second impact study describes a variety of plea negotiation strategies possible under the guidelines, and examines a 25-percent sample of all guideline cases sentenced between July 1, 1990, and September 30, 1990, as a measure of the impact of negotiated pleas on guideline sentences.

B. Summary of Chapter Three Findings[462]

Generally, prosecutors report that the factors that affected their decisions regarding what to charge before guideline implementation are the same factors that affect their decisions under the guidelines. That is, offense seriousness, whether or not the defendant cooperated, and evidentiary factors principally drive their charging decisions under the guidelines. In addition, a number of

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[460]For an initial look at prosecutorial practices in relation to mandatory minimum penalties, *see* U.S. Sentencing Commission's Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991).

[461]The Process of Plea Negotiation Under Federal Sentencing Guidelines: The Early Post-Mistretta Experience (available at the Commission; expected public distribution, spring 1992). *See also* Schulhofer & Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Amer. Crim. L. Rev. 231 (1989).

[462]For a complete discussion and report of findings, *see* Chapter Three, Part F, Charging and Plea Practices.

prosecutors point to Department of Justice policies on plea negotiations (embodied in the "Thornburgh Memorandum") as an important yardstick in determining final charging patterns.

There appear to be no patterns by judges to accept or reject particular types of pleas; rather, it appears to be more a function of individual preference. Pre-indictment pleas are accepted under the guidelines, principally for cooperating defendants and those convicted of fraud and other white-collar offenses. Recommending a guideline adjustment for acceptance of responsibility and moving for substantial assistance are viewed by prosecutors as the strongest incentives to plead guilty under the guidelines.

Prosecutors report that pleas under the guidelines generally reflect the full offense conduct. In cases in which a plea agreement reflects less than the full offense conduct, prosecutors cite cooperation as the primary reason for omitting some criminal behavior. Plea agreements that consistently do not reflect the total or most serious offense conduct appear to be a problem at only one of the sites visited in the implementation study.

The implementation study of charging and plea practices portrays a system in transition. In many ways, the data suggest that judges and attorneys attempt to make charging and plea practices under the guidelines mirror similar practices under the pre-guidelines system. Judges, prosecutors, and defense attorneys are experimenting with means of operating within the structure of sentencing guidelines and that experimentation period is ongoing.

IV. Over-time Analysis of Prosecution Stages and Outcomes

A. Research Questions

To address more broadly the way in which prosecutorial behavior may have been affected by the implementation of the sentencing guidelines, monthly time series data were constructed and analyzed for a number of prosecutorial outcomes. These outcomes represent either discrete decision steps in the processing of criminal cases or the characteristics of cases that pass through the system. Rather than addressing issues that affect the processing of individual cases, this analysis examines the court system as a whole and the processing of cases through that system. The benefit of this type of time series analysis is the ability to separate the effects of various legislative, policy, and internal changes in the court system from one another as potentially competing explanations for observed changes in the system over time. For example, this mode of analysis makes it possible to get a sense of the relative impact certain interventions (*e.g.*, the sentencing guidelines) have had on the processing of criminal cases. In addition, the analysis addresses such questions as:

- What changes have occurred over time in the number of matters initiated, cases filed, and cases resolved by guilty plea or at trial?

- Is the proportion of cases resolved by guilty pleas and trials related to guideline implementation?

- What is the relationship between other sources of intervention (*e.g.*, legislative and policy changes) and the proportion of cases resolved through guilty plea or trial?

In brief, the findings of this study suggest that the legislative and policy changes examined have either no effect on prosecutorial behavior (as measured by certain aggregate time series) or do not have consistent effects. Changes in the system appear to be affected more by the number of cases

processed and possibly by increased case severity (at least for controlled substance and firearms violations) than by any specific efforts to affect the prosecution of criminal cases.

B. Data Sources and Outcome Measures

Monthly time series measurements for these analyses have been constructed from two datasets maintained by the Executive Office of the U.S. Attorneys: 1) Docket and Reporting System for Fiscal Years 1984-1986, and 2) Criminal Master File with Auxiliary Events and Charge Files (referred to as the new data system) for Fiscal Years 1987-1990. These datasets contain processing information about matters initiated, cases filed, and cases resolved in the U.S. attorneys' offices in each federal district.

The two data archives used are not identical. The later Criminal Master File contains more information about matter and case processing than does the older system. However, a number of discrete processing stages were available consistently throughout the time period of the study. Based on the availability of these data, the following monthly time series were constructed:[463]

- the number of matters initiated;
- the number of cases filed;
- the number of cases disposed of by guilty plea, trial, and both combined;
- the proportion of matters initiated to matters filed as cases;
- the proportion of cases resolved either by guilty plea or trial to cases filed;
- the proportion of cases settled by guilty plea to cases filed; and
- the proportion of cases going to trial to cases filed.

C. Sources of Change in Prosecutorial Outcomes

The following events are examined for their impact on prosecutorial outcomes over time:[464]

- the Anti-Drug Abuse Act of 1986 (November 1986);
- the implementation of the sentencing guidelines (November 1987);[465]
- the Anti-Drug Abuse Act of 1988 (November 1988);
- the United States Supreme Court's decision in Mistretta affirming the constitutionality of the guidelines (January 1989); and
- the issuance of a memorandum by Attorney General Thornburgh announcing Department of Justice plea negotiation and charging policy (March 1989).

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[463]Other potential outcome series were examined but judged to be either unreliable or not available consistently for the entire time period. These series include the number of matters declined, the number of superseding indictments filed, and the number of superseding informations filed.

[464]Effective dates of these interventions are not specified precisely. For example, in the case of the Anti-Drug Abuse Act of 1988 (effective on November 18, 1988), an approximate intervention point of November 1988 is used.

[465]Due to numerous constitutional challenges, the guidelines were not implemented nationwide until the Supreme Court issued its decision in Mistretta on January 18, 1989.

A priori, one might expect these various legislative changes and policy directives to have an effect on case processing. However, the form and timing of these effects may differ. The decision in Mistretta, for example, might have had an immediate impact by ending the period of constitutional uncertainty and releasing into the system a backlog of cases that awaited the Supreme Court's resolution. In contrast, the Anti-Drug Abuse Acts and initial implementation of the guidelines would have more gradual effects, as the proportion of eligible matters and cases increased in the system over time. Both types of effects are tested in this section, and, when appropriate, their varying results are reported.

D. Methods

The over-time analysis uses time series models made popular by Box and Jenkins[466] and Box and Tiao.[467] These models describe a time series as the outcome of a process that includes both deterministic (*i.e.*, an average and changes in that level due to changes in legislation) and stochastic components (*i.e.*, an error process).[468] These methods are described in more detail in Chapter Five, Use of Incarceration.

E. Results

Table 138 presents prosecutorial outcomes, by year, from 1984 to 1989. Note that in 1986 some of the numbers might be reflective of data problems due to the transition from the old to the new data system. Overall, the criminal justice system in these years experienced an upward trend in the number of investigative matters initiated, cases filed, and cases resolved. For example, of all matters initiated between 1984 and 1989, the rate of cases filed increased from 45.8 to 50.3 percent, and, of all cases filed, the rate of pleas increased from 63.6 to 71.1 percent.

Figures 20 through 23 present results of the various time series. The series of proportions are not included in these figures, but each figure contains the two series numbers that are used to calculate each of the proportions. In other words, for each monthly observation point the proportion of a given outcome would be the number of cases with that outcome (*e.g.*, "guilty pleas") over the total number of relevant cases (*e.g.*, "cases filed").

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[466]Box & Jenkins, Time Series Analysis (2d ed. 1976).

[467]Box & Tiao, Intervention Analysis with Applications to Economic and Environmental Problems, 70 J. Amer. Stat. Assoc. 70 (1975).

[468]In addition, a dummy variable is included to represent the fact that these series were constructed from two different data systems. Data from the Docket and Reporting System were used to construct the time series through July 1986; the remainder of each series was constructed using data from the Criminal Master File. Thus, the dummy variable is coded 1 beginning in August 1986 and 0 for all prior months. A check of the two data systems indicated that this was a reasonable junction point, even though it predates the first month of the Criminal Master File for fiscal year 1987. Regardless of the month at which the series are joined, there is a noticeable dip in each of the series. This is most likely caused by the switch from one system to another and the possibility that not all cases were transferred from the old to the new system.

Table 138

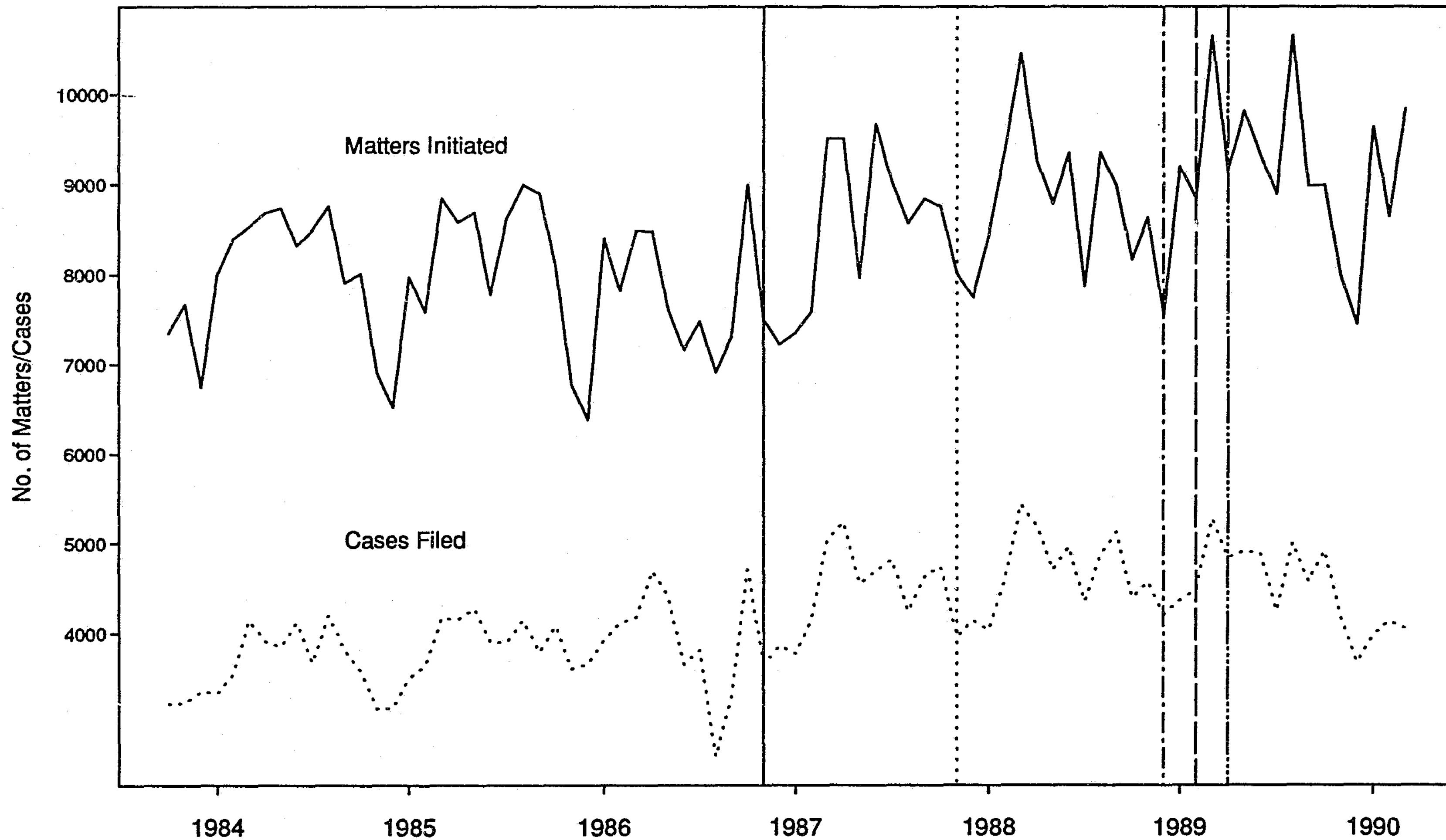
Prosecutorial Outcomes, by Year

Outcome	1984	1985	1986	1987	1988	1989
Matters Initiated	97256	97207	93384	102545	106225	109967
Cases Filed	44537	46854	46960	53974	56422	55361
Cases Resolved	32093	33872	37420	44245	45822	45068
Guilty Pleas	28309	29882	32009	38158	39101	39360
Trials Initiated	3784	3990	5411	6087	6721	5708

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1989.

Figure 20

Matters Initiated and Cases Filed: October 1983 to March 1990

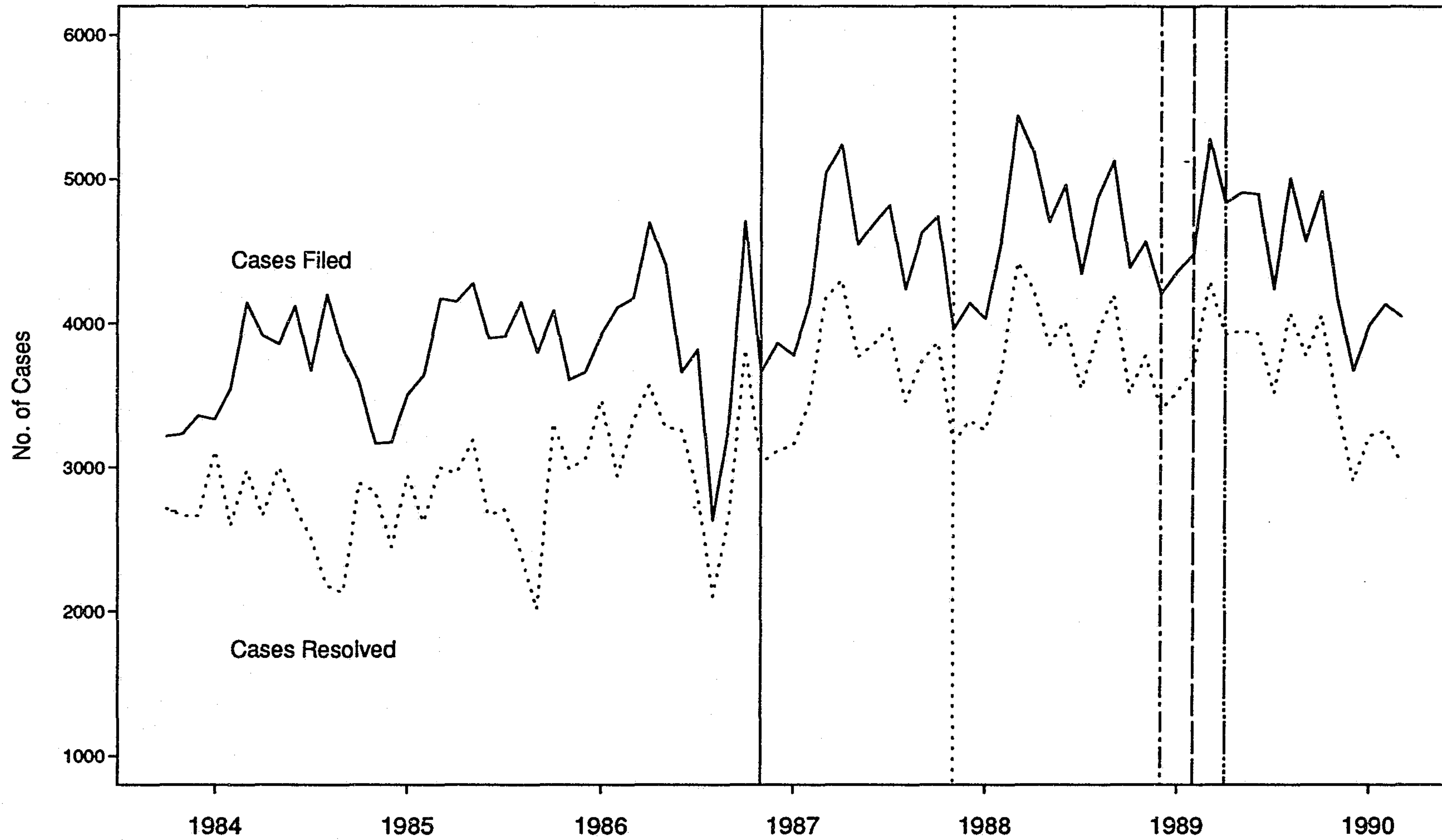


Anti-Drug Abuse Act 1986
Guideline Implementation
Anti-Drug Abuse Act 1988
Mistretta Decision
Thornburgh Memo

Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 21

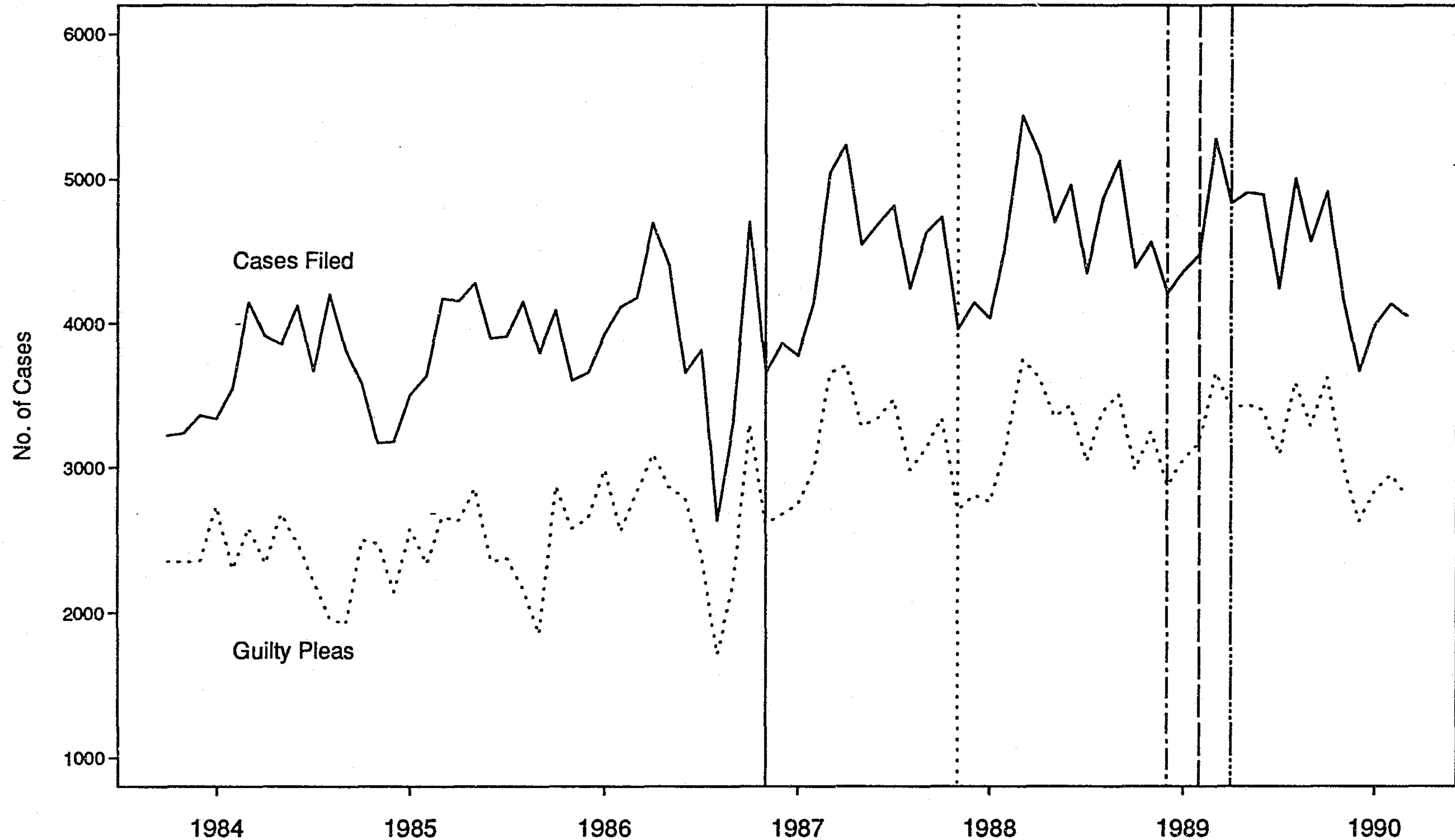
Cases Filed and Cases Resolved: October 1983 to March 1990



Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 22

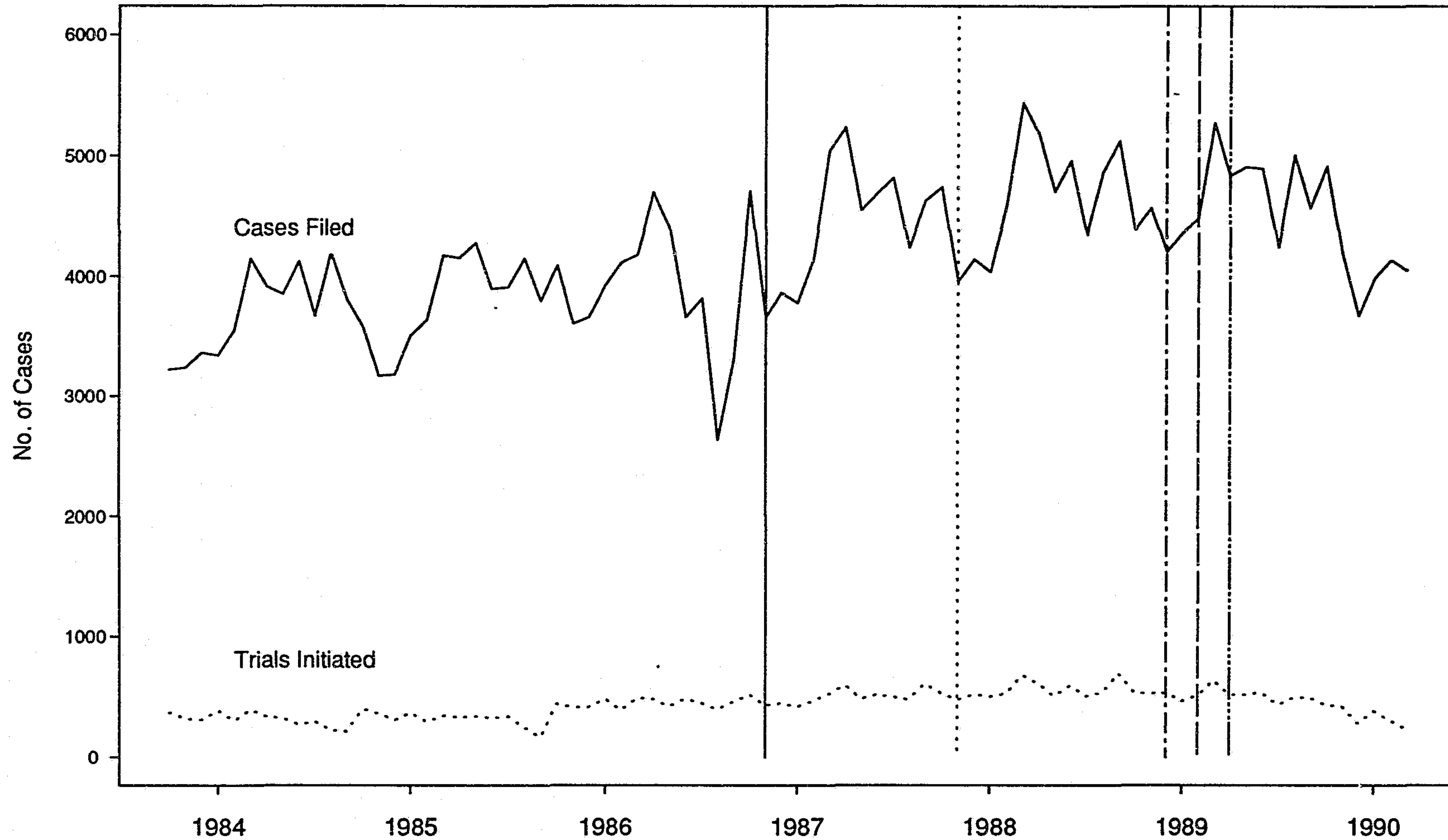
Cases Filed and Guilty Pleas: October 1983 to March 1990



Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Figure 23

Cases Filed and Trials Initiated: October 1983 to March 1990



Anti-Drug Abuse Act 1986
Guideline Implementation
Anti-Drug Abuse Act 1988
Mistretta Decision
Thornburgh Memo

Source: Executive Office of the U.S. Attorneys: Docket and Reporting System 1983-1987; Criminal Master File 1987-1990

Tables 139 through 141 contain summaries of results for various models for these series.[469] Table 139 summarizes models for matters initiated, cases filed, cases resolved, convictions, and guilty pleas, with only the earlier-described interventions specified. Table 140 summarizes models for cases filed, cases resolved, convictions, and guilty pleas, with another series specified in the model. The model for cases filed includes the number of matters initiated that month; the other models include the number of cases filed. Inclusion of these series helps control for the magnitude of the system overall so that changes in outcomes apparently due to legislative or policy changes potentially can be separated from changes due to greater or lesser numbers of matters and cases being processed through the system. Finally, Table 141 summarizes results for the series of proportions. The proportions, by their construction, control for the magnitude of the system, albeit in a form different from the models summarized in Table 140.

As reported in Tables 139 and 140, in terms of legislative and policy interventions only the Anti-Drug Abuse Act of 1986 is statistically significant in the models for matters initiated, cases filed, guilty pleas, and cases filed (with matters initiated in the model). The positive sign in each of these models indicates that the corresponding time series experienced an upward shift in mean level after the effective date of the legislation. Put differently, the number of matters initiated, cases filed, cases resolved, and guilty pleas increased immediately after the effective date of the Anti-Drug Abuse Act of 1986; however, other results in these models cast doubt upon the strength of this finding. The introduction of the new data system indicates an impact that is both positive and statistically significant (at the .05 level for a two-tailed test) as shown in Table 139. Ordinarily, this could be interpreted as a sign that the new data system may have resulted in more complete reporting of some prosecutorial outcomes. Nevertheless, some pattern emerges. Whenever there is an indication of the impact of one of these factors (*i.e.*, the coefficient is positive and statistically significant), the other factor seems to have no impact (*i.e.*, the coefficient is negative and insignificant). These two factors — the 1986 Anti-Drug Abuse Act and the new data system — are specified five months apart. Although there is no statistical evidence indicating their confounded influence, there may be overlapping effects such that their independent contributions are difficult to disentangle.[470] Consequently, these results must be viewed with caution.

The other three interventions attempt to capture the effect of the Mistretta decision, the Anti-Drug Abuse Act of 1988, and the Thornburgh memorandum; they are all specified within six months of one another and show virtually no effect on these different time series. However, there is the possibility that high correlations among the interactions mask their impact. To test for the possibility of collinearity masking the effects of these interventions, the variables for the Anti-Drug Abuse Act of 1988 and the Thornburgh memorandum were dropped. The impact of Mistretta was statistically significant in only one of the nine models, the model for guilty pleas (reported in Table E-9). This is not a compelling result since the same model, alternatively specified with one of the other two variables, also produces a statistically significant result in the same direction. Apparently, some change occurred around that point in time but the effect cannot be attributed individually to any one of the three interventions.

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[469]For the full set of tables, *see* Appendix E. T-statistics were used to test each model coefficient at the .05 level for a two-tailed test. Statistically significant positive and negative coefficients are indicated in the summary tables by a plus (+) or a minus (-).

[470]The diagnostics do not show a high degree of collinearity between their coefficients.

Table 139

Summary of Time Series Analysis Results

Parameter/Intervention	Outcome Variable[a] Matters Initiated	Cases Filed	Cases Resolved	Convictions	Guilty Pleas
Mean	+	+	+	+	+
New Data			+	+	
Anti-Drug Abuse Act of 1986	+	+			+
Guideline Implementation					
Anti-Drug Abuse Act of 1988					
Mistretta Decision					
Thornburgh Memo					

[a] Statistically significant positive coefficients are denoted by "+"; statistically significant negative coefficients are denoted by "-"; statistically insignificant coefficients are blank; and interventions not specified in the model are denoted by "NA."

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table 140

Summary of Time Series Analysis Results

Parameter/Intervention	Outcome Variable[a]			
	Cases Filed	Cases Resolved	Convictions	Guilty Pleas
Mean				
Matters Initiated	+	NA	NA	NA
Cases Filed	NA	+	+	+
New Data		+	+	+
Anti-Drug Abuse Act of 1986	+			
Guideline Implementation				
Anti-Drug Abuse Act of 1988				
Mistretta Decision				
Thornburgh Memo				

[a] Statistically significant positive coefficients are denoted by "+"; statistically significant negative coefficients are denoted by "-"; statistically insignificant coefficients are blank; and interventions not specified in the model are denoted by "NA."

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table 141

Summary of Time Series Analysis Results

	Outcome Variable[a]			
Parameter/Intervention	Ratio of Filed Cases to Matters Initiated	Ratio of Resolved Cases to Filed Cases	Ratio of Guilty Pleas to Filed Cases	Ratio of Trials Initiated to Filed Cases
Mean	+	+	+	+
New Data		+	+	+
Anti-Drug Abuse Act of 1986	+			
Guideline Implementation				
Anti-Drug Abuse Act of 1988				
Mistretta Decision				
Thornburgh Memo				

[a] Statistically significant positive coefficients are denoted by "+"; statistically significant negative coefficients are denoted by "-"; statistically insignificant coefficients are blank; and interventions not specified in the model are denoted by "NA."

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

The results for the models of proportions, summarized in Table 141 and reported in Tables E-10 through E-13, show a similar lack of statistically significant results for the interventions.[471] The only pattern that emerges among the interventions is the familiar one for the Anti-Drug Abuse Act of 1986 and the new data system reported above. The other interventions are consistently not significant. Only the intervention variable for guideline implementation (in the table for the proportion of guilty pleas to cases filed) is close to being statistically significant.[472]

While the models discussed up to this point test mean levels for all federal cases, those trends might be appreciably different for specific offense types within the same timeframe. As one test of this hypothesis, two of the possible offenses — drugs and bank robbery — were examined separately. Drug cases, constituting the largest portion of all cases in the system, probably drive the direction of the general trends. Controlled substance violations are the obvious targets of the two Anti-Drug Abuse interventions, and they also represent offenses that are aggregable under the guidelines, two facts with definite implications for plea agreements. Bank robberies, on the other hand, constitute a smaller portion of all federal cases, do not involve aggregable offense behavior under the guidelines, and present a different scenario for plea considerations.[473] Fluctuations in the plea rates of cases involving these offenses compared to all cases are presented in Figures 24, 25, and 26, respectively.

Figure 24 shows that the ratio of guilty pleas to all drug cases resolved each month during the period October 1986 to March 1990 remains fairly constant.[474] This general pattern is repeated for bank robberies (*see* Figure 25) and all cases (*see* Figure 26), although in robberies the series is based on a smaller number of cases and the fluctuations over time are sharper.

F. Summary

It appears that none of the legislative or policy interventions tested produced consistent changes in the mean levels of various time series describing prosecutorial outcomes. While these interventions appear to have the potential for initiating changes in the processing of cases, no such changes are discernible at this point in time.

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[471]After a process of diagnosing and testing, the reported models for the error process adequately model patterns of serial correlation in the data.

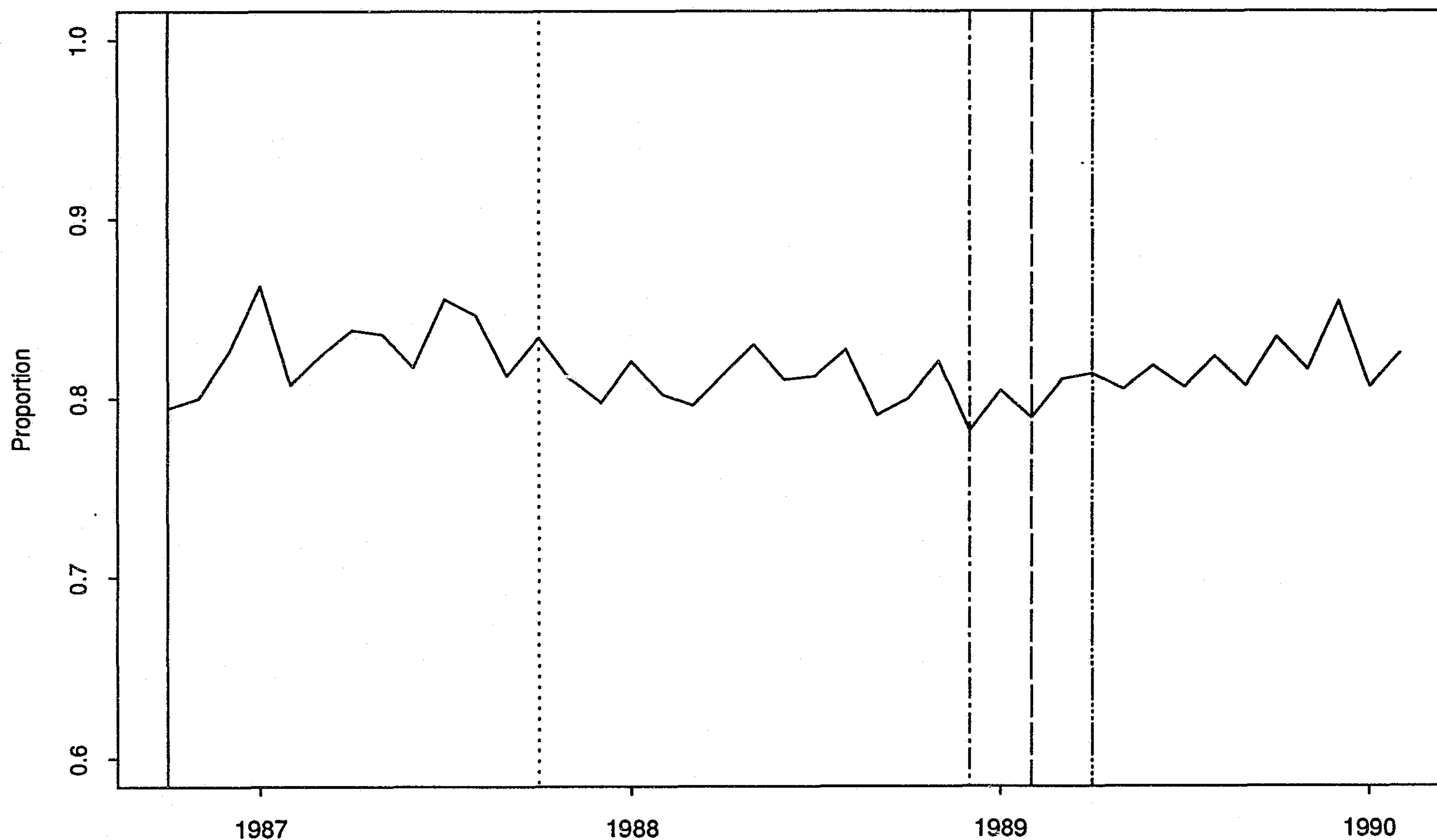
[472]This model has an additional autoregressive parameter at lag 7. The model was purposely overfit in order to bring out the effect for guideline implementation. Without the term at lag 7, the t-value for this dummy variable would be less than 1.0 in absolute value. A similar test was conducted for this model, dropping the dummy variables for the Anti-Drug Abuse Act of 1988 and the Thornburgh memorandum. However, in contrast to the earlier findings, the dummy variable for the Mistretta decision did not become statistically significant.

[473]As explained more fully in other sections of this report, this means that the number of drug trafficking counts generally does not affect the guideline range, while the number of robbery counts does.

[474]The earlier Docket and Reporting System contains less complete information about charges than does the later Criminal Master File. Comparable series could not be constructed for substantive offense categories without using the broadest possible definitions. Consequently, only data from the Criminal Master File is presented for the drug and bank robbery offense categories.

Figure 24

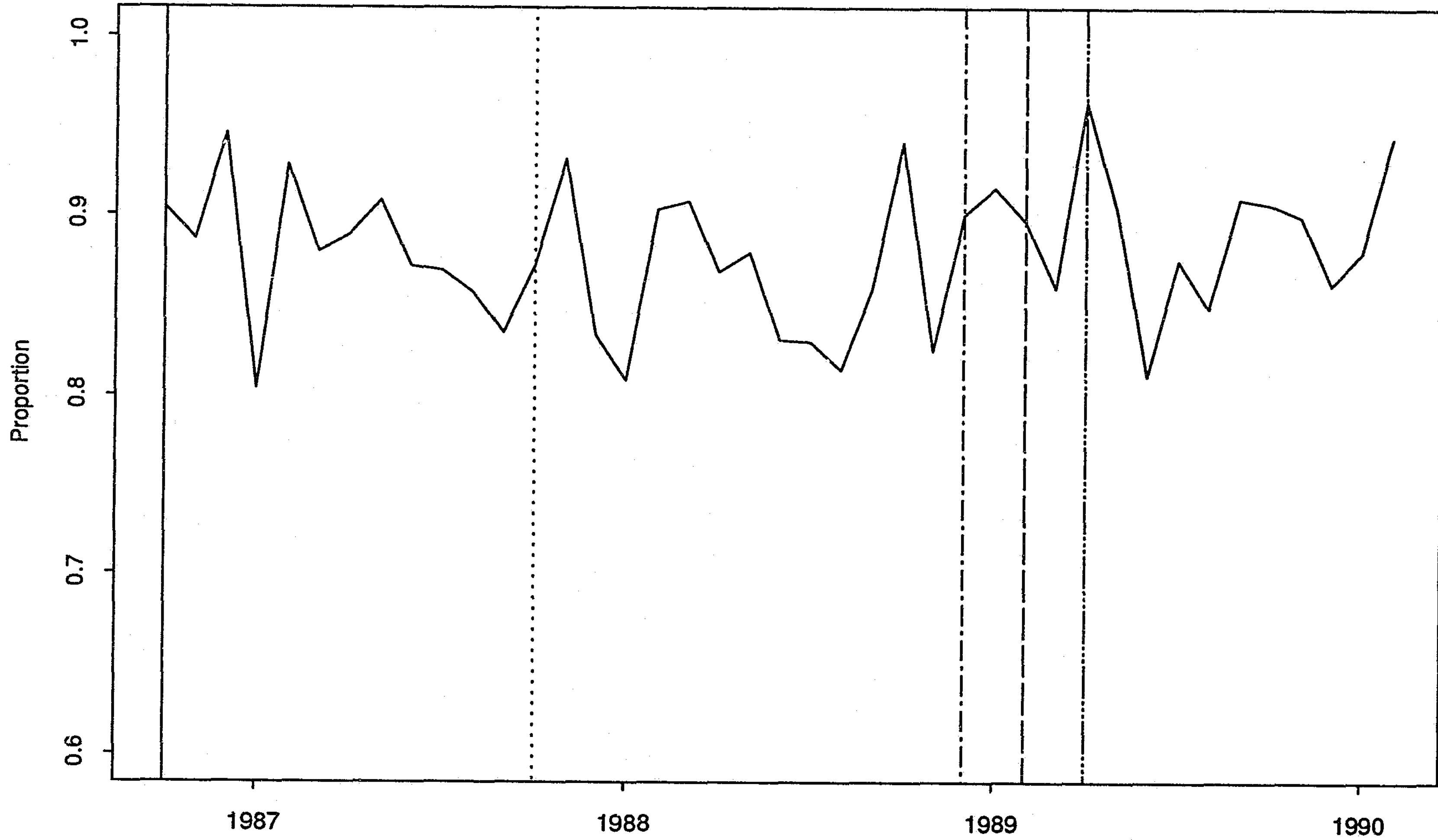
Proportion of Convictions by Guilty Plea: October 1986 to March 1990
Drug Cases



Source: Executive Office of the U.S. Attorneys: Criminal Master File 1987-1990

Figure 25

Proportion of Convictions by Guilty Plea: October 1986 to March 1990
Robbery Cases

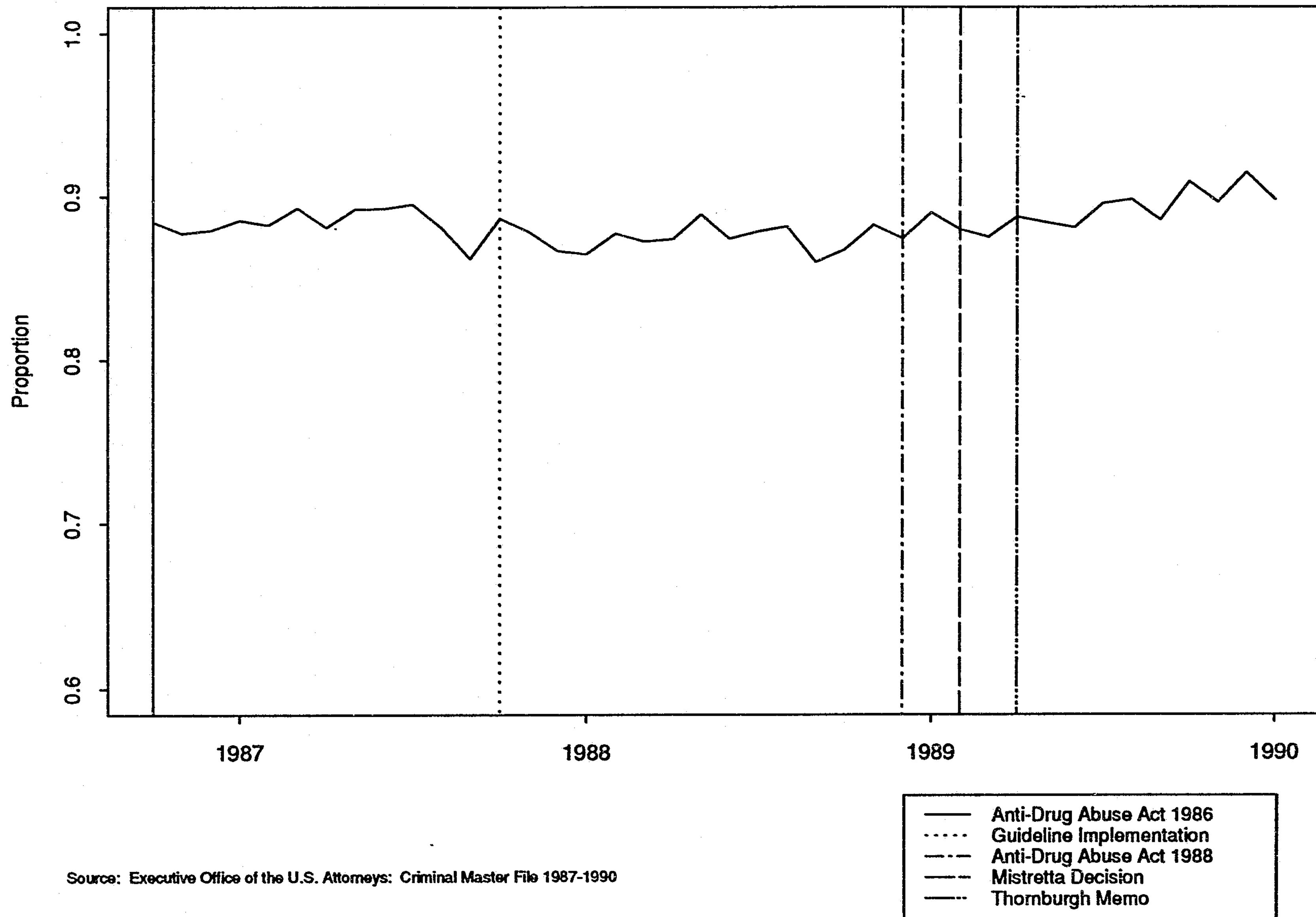


———	Anti-Drug Abuse Act 1986
· · · ·	Guideline Implementation
—·—	Anti-Drug Abuse Act 1988
— —	Mistretta Decision
—···	Thornburgh Memo

Source: Executive Office of the U.S. Attorneys: Criminal Master File 1987-1990

Figure 26

Proportion of Convictions by Guilty Plea: October 1986 to December 1989



Source: Executive Office of the U.S. Attorneys: Criminal Master File 1987-1990

Of particular interest is the lack of an effect associated with the guidelines on the number and proportion of guilty pleas among filed cases.[475] This finding stands in stark contrast to the prediction by some that the guidelines would cause (or have caused) an increase in the rate of defendants going to trial. To the contrary, the data analyses support the conclusion that this has not happened. If the number of trials has increased, it is due to the fact that more cases are being filed; the rate of defendants' choosing to enter guilty pleas or stand trial has not changed appreciably as a result of guideline implementation.

This study provides an initial look at the over-time impact of the guidelines on prosecutorial case processing. Due to a number of important and interrelated interventions occurring so temporally close to each other (with each individually affecting the system at a different pace and with varying lag times), a more accurate assessment of the various possible impacts might be gained only with the passage of time.

V. Impact of the Plea on Sentences

A. Introduction

In determining a final sentencing range, the guidelines consider much of the defendant's "real offense" conduct. Consequently, charging practices, guilty pleas, and plea agreements under the guidelines may reflect an accommodation to the realities of such a system. Thus, a number of avenues may exist through which prosecutorial behavior can impact the offender's sentence. This section focuses on the impact of the plea agreement on guideline sentences, examines some of the most frequent plea bargaining scenarios, and reports the relative frequency with which they occur.

Three points should be noted at the outset. First, this analysis deals only with the impact of negotiated pleas on the guideline range and/or sentence. A non-negotiated guilty plea may have an impact by increasing the likelihood that an offender will receive a downward adjustment for acceptance of responsibility. Also, entry of a guilty plea might influence the court's decision to impose a sentence at the bottom portion of the guideline range. However, these impacts are difficult to document without a written plea or some record of an oral plea.

Second, this study examines only the final set of charges filed against an offender. Because negotiations may occur early in the process and take the form of pre-indictment pleas or superseding indictments or informations, their impact may not be documented sufficiently. As a result, the impact of the negotiated plea likely will be underestimated.

Finally, it is important to keep in mind the frequency with which defendants who plead guilty receive a two-level downward adjustment for acceptance of responsibility. A review of fiscal year 1990 guideline cases with a statement of reasons available indicates that 88 percent of defendants who pleaded guilty received the two-level adjustment for acceptance, compared to 20 percent of defendants convicted at trial.

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[475]This finding has been replicated elsewhere, using a different dataset and a different definition of the plea rate as the ratio of guilty pleas to all convictions (*see* the Monitoring chapter of the Commission's 1990 Annual Report).

Overall, the findings indicate that plea agreements impact the sentencing process in about 17 percent of all of the guilty plea cases. Some of these plea agreements affect guideline factors, some affect sentences, and some impact on both.

B. Plea Agreement Scenarios

Plea agreements can address any or all of the following items: stipulated facts about the offense, guideline applications, the offender's criminal history, charges to be dismissed (or not filed), sentence recommendations (binding or non-binding on the court), and motions to depart due to cooperation or substantial assistance to the government. These items, depending upon the type of offense, may have an impact on the guideline range, the guideline sentence, or both.

A variety of common plea agreement scenarios, and their possible impact, can be outlined as follows:

Stipulations to guideline-relevant facts:

1) If the stipulated facts agree with the real offense characteristics that are relevant under the guidelines, there will be no impact on the guideline range or the sentence;

2) If the stipulation is to facts that describe less serious offense behavior (*e.g.*, lower drug amount, lesser role in the offense, no weapon), the stipulation will impact the guideline range and/or the sentence if the judge accepts the stipulation in the plea agreement and if the offense seriousness is reduced sufficiently to lower the offense level.

Dismissed counts:

1) If the dismissed counts reflect quantity-based (aggregable) offense behavior, their dismissal generally will have no impact on the guideline range or sentence;

2) If the dismissed counts reflect non quantity-based (non-aggregable) offense behavior, their dismissal generally will impact the guideline range and/or the sentence;

3) If the dismissed counts carry mandatory minimum penalties, their dismissal will impact the guideline range and sentence most if that minimum is above the guideline range maximum, will truncate the lower end of the range if the minimum is captured within the guideline range, and will have no impact if the minimum is lower than the minimum of the range;

4) If the dismissed counts carry a mandatory consecutive penalty, their dismissal will impact the sentence.

Reduction to less serious counts:

1) If the new (*i.e.*, reduced) count of conviction carries a lower statutory maximum, the reduction will impact the guideline range and sentence if that statutory maximum is lower than the guideline range minimum, will truncate the higher end of the range if the maximum falls within the guideline range, and will have no impact if the maximum is higher than the maximum of the range.

Motions to depart:

1) If accepted by the court, motions to depart downward due to the offender's cooperation or substantial assistance will impact the sentence, possibly resulting in a sentence below the guideline range and mandatory minimum provisions.

C. Findings

To examine the incidence of various plea agreement types and their impact on the guideline range and/or the guideline sentence, a 25-percent random sample of all cases convicted after a guilty plea and sentenced between July 1, 1990, and September 30, 1990, was selected from the Commission's monitoring system. The final analysis includes 1,212 plea cases classified by primary offense of conviction.[476]

Files for the sample cases were reviewed and available information concerning the type of plea, plea agreement, guideline calculations, motions, and sentence were analyzed. The major findings from this nationally representative sample are presented below.

The results in Table 142 show that 17 percent (n=202) of all guilty plea cases indicate some form of plea impact. This percentage seems to vary considerably by offense type, with pleas generally having less impact on immigration, larceny, embezzlement, and fraud sentences, and more impact on drug violation sentences.

Among all plea cases, a written or oral plea agreement resulted in a lower guideline range in 10.5 percent (n=127) of the cases, in a reduced sentence (defined as a sentence below the minimum of the original guideline range) in 14 percent (n=170) of the cases, and in a combined impact on both guideline range and sentence in 7.8 percent (n=95) of the cases.

For cases affected by a plea agreement, the average or mean reduction in the bottom of the guideline range was 39 months (the median reduction was 21 months). A high percentage (42%) of the reductions resulted in less than 12 months off the original minimum guideline range (*see* Table 143). However, in some cases the new and old ranges overlap and provide the court with the option to sentence within this overlap and thereby eliminate the impact of the plea on the sentence. Of the 30 such cases in the sample, judges opted to sentence 12 offenders within the overlap and gave a sentence reduction (in addition to the range reduction) to the remaining 18 offenders.

An examination of the 127 cases with a reduced guideline range reveals that the reasons for reducing the range included: dismissal of non-aggregable charges in 22 percent of these cases, a plea to a lesser charge in 26 percent, and stipulations to less serious facts in 33 percent.

Among the cases affected by a written or oral plea agreement, the mean sentence reduction was 40 months and the median reduction was 21 months. One-third (32.5%) of these reductions were less than one year below the original guideline range minimum (*see* Table 144). Among the affected cases, the reasons for the sentence reduction included: dismissal of mandatory minimum penalty charges that otherwise trump the guideline range (11% of the cases), dismissal

[476]A 25-percent random sample of 784 non-drug trafficking cases and a 12.5-percent random sample of 214 drug trafficking cases were reviewed for guideline cases convicted by guilty plea and sentenced between July 1, 1990, and September 30, 1990. Weighting the drug trafficking cases to constitute a 25-percent sample, the analysis is based on a final weighted size of 1,212 cases.

Table 142

Plea Impact by Primary Offense Type

		Plea Impact			
		"No"		"Yes"	
Offense Type	Total Cases[a]	Number	Percent[b]	Number	Percent[b]
Total	1212	1012	(83.3)	202	(16.7)
Homicide	3	1	(33.3)	2	(66.7)
Kidnapping	4	2	(50.0)	2	(50.0)
Robbery	56	46	(82.1)	10	(17.9)
Assault	14	12	(85.7)	2	(14.3)
Burglary/B&E	7	5	(71.4)	2	(28.6)
Larceny	91	87	(95.6)	4	(4.4)
Embezzlement	59	56	(94.9)	3	(5.1)
Tax offenses	12	10	(83.3)	2	(16.7)
Fraud	142	130	(91.6)	12	(8.5)
Drug trafficking	428	318	(74.3)	110	(25.7)
Drug possession	38	27	(71.1)	11	(29.9)
Drug communication facility	15	7	(46.7)	8	(53.3)
Auto theft	11	10	(90.9)	1	(9.1)
Forgery/Counterfeiting	44	41	(93.2)	3	(6.8)
Bribery	9	8	(88.9)	1	(11.1)
Escape	16	16	(100.0)	0	(0.0)
Firearms	94	79	(84.0)	15	(16.0)
Immigration	97	95	(97.9)	2	(2.1)
Extortion	9	5	(55.6)	4	(44.4)
Gambling/Lottery	6	5	(83.3)	1	(16.7)
Other	52	46	(88.5)	6	(11.5)
Money laundering	5	4	(80.0)	1	(20.0)

[a] Missing cases = 49.

[b] Row percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

Table 143

Reduction in Guideline Range Minimum for Cases with Plea Impact on the Guideline Range

Guideline Range Minimum Reduction (in Months)	Frequency[a]	
	Number	Percent[b]
Total	108	(100.0)
1-5	15	(13.9)
6-11	30	(27.8)
12-23	14	(13.0)
24-35	12	(11.1)
36-59	16	(14.8)
60-119	14	(13.0)
120 and above	7	(6.5)

[a] Missing cases = 19.

[b] Column percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

Table 144

Reduction in Sentence for Cases with Plea Impact on the Sentence

Sentence Reduction (in months)	Including Departures for Substantial Assistance		Excluding Departures for Substantial Assistance	
	Number[a]	Percent[b]	Number[a]	Percent[b]
Total	163	(100.0)	112	(100.0)
1-5	23	(14.1)	21	(18.8)
6-11	30	(18.4)	24	(21.4)
12-23	28	(17.2)	17	(15.2)
24-35	22	(13.5)	12	(10.7)
36-59	28	(17.2)	11	(9.8)
60-119	19	(11.7)	16	(14.3)
120 and above	13	(8.0)	11	(9.8)

[a] Missing cases = 9

[b] Column percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

of mandatory consecutive penalty charges such as 18 U.S.C. § 924(c) (6.5%), reduction to charges with a lower statutory maximum that trump the otherwise applicable guideline range (8%), binding sentencing recommendations (9%), and government recommendation for a downward departure (40.5%). Excluding from the analysis cases in which the reduction was due to substantial assistance, the mean and median reductions become 44 and 21 months, respectively, implying that the few extreme reductions are not accounted for by substantial assistance.

Thirty percent of the 202 cases affected in some way by a plea agreement were sentenced under guidelines for which multiple counts are non-aggregable.[477] The remaining 70 percent of the cases were sentenced under guidelines that involve grouping or aggregation. As indicated in Table 145 (for all cases and cases excluding substantial assistance), in non-aggregable cases reductions most often occur in both the sentence and guideline range, while in aggregable cases the reductions are most often directly in the sentence.

A breakdown of reduction patterns by reasons is presented in Table 146 for all distinct offense categories with ten or more cases. Patterns appear to vary by the type of offense. In eight of the ten robbery cases affected the reduction resulted from dismissed non-aggregable charges, while in the 110 drug trafficking cases most reductions can be attributed to government motions for substantial assistance and stipulations to lesser drug amounts.

D. Summary

The results of this study suggest that prosecutorial charge reductions and other bargaining appear to have an impact on the sentencing process in approximately 17 percent of cases resolved through a guilty plea. In 14 percent of all cases, the impact is directly on the sentence imposed. When the guilty plea leads to a reduced sentence, approximately half of these reductions are less than 21 months. Whether or not an impact of this frequency and magnitude is cause for concern must be separated, as an issue, from the question of the source of these reductions. As noted earlier in this chapter and in Chapter Three, the Commission promulgated policy statements for judicial review of plea agreements. On the basis of these data, it is difficult to determine to what extent reductions occur due to plea agreements that, for example, involve dismissal of charges, or occur due to a combination of prosecutorial behavior circumventing the guidelines and judicial acquiescence in the face of such agreements.

[477]*See* U.S.S.G. §3D1.2.

Table 145

Type of Reduction by Aggregability of Charges Under the Guidelines

	Charges (including cases involving substantial assistance departures)				
		Percent Non-Aggregable		Percent Aggregable	
Reduction Type	Total[a]	Number	Percent[b]	Number	Percent[b]
Total	200	59	(100.0)	141	(100.0)
Guideline range reduction only	30	10	(17.0)	20	(14.2)
Sentence reduction only	75	8	(13.6)	67	(47.5)
Both guideline range and sentence reduction	95	41	(69.5)	54	(38.3)

Type of Reduction by Aggregability of Charges Under the Guidelines

	Charges (excluding cases involving substantial assistance departures)				
		Percent Non-Aggregable		Percent Aggregable	
Reduction Type	Total[a]	Number	Percent[b]	Number	Percent[b]
Total	146	50	(100.0)	96	(100.0)
Guideline range reduction only	30	10	(20.0)	20	(20.8)
Sentence reduction only	30	1	(2.0)	29	(30.2)
Both guideline range and sentence reduction	86	39	(78.0)	47	(49.0)

[a] Missing cases = 2

[b] Column percents appear in parentheses. Percents may add up to more than 100 because of rounding.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

Table 146

Reduction Patterns by Reasons for Select Offense Types[a]

Offense Type	Total Number of Cases[b]	Reasons for Plea Impact: Dismiss Non-Aggregatable Counts	Plea to Lesser Count	Stipulate to Lesser Facts	Dismiss Higher Mandatory Minimum Trump Count	Dismiss Mandatory Consecutive Count [924(c)]	Plea to Lower Statutory Maximum Trump Count	Binding Sentence Recommended	Government Recommended Downward Departure
Robbery	10	8	1	1	0	0	0	0	1
Fraud	12	4	1	1	0	0	0	2	4
Drug trafficking	110	0	10	32	14	6	2	10	50
Drug possession	11	1	8	C	1	1	3	0	0
Firearms	15	7	2	0	0	2	1	0	3

[a] Includes only offense types with 10 or more cases in them.

[b] A case can have one or more reason for reduction.

SOURCE: U.S. Sentencing Commission Monitoring Files, FY 1990.

Appendix E:

Time Series Parameter Estimates

Table E-1

Maximum Likelihood Results for the Number of Matters Initiated

$$y_t = \mu + \omega_{01} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	7998.800	221.449	36.12
ϕ_1	0.177	0.126	1.41
ϕ_2	0.542	0.111	4.89
$\omega_{01} NEWDATA_t$	-485.446	424.674	-1.14
$\omega_{02} ADAA86_t$	1028.900	433.152	2.38
$\omega_{03} GL_t$	314.215	255.824	1.23
$\omega_{04} ADAA88_t$	59.340	469.753	0.13
$\omega_{05} MISTRETTA_t$	326.223	613.238	0.53
$\omega_{06} MEMO_t$	-116.704	472.975	-0.25

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-2

Maximum Likelihood Results for the Number of Cases Filed

$$y_t = \mu + \omega_{01}NEWDATA_t + \frac{\omega_{02}}{(1-\delta_1 B^1)}ADAA86_t + \omega_{03}GL_t + \omega_{04}ADAA88_t + \omega_{05}MISTRETTA_t + \omega_{06}MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})}u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	3853.000	124.740	30.89
ϕ_1	0.267	0.123	2.18
ϕ_2	0.462	0.121	3.83
$\omega_{01}NEWDATA_t$	-297.623	213.354	-1.39
$\omega_{02}ADAA86_t$	184.178	83.196	2.21
δ_1	0.878	0.090	9.80
$\omega_{03}GL_t$	-342.469	364.388	-0.94
$\omega_{04}ADAA88_t$	-2.560	314.623	-0.01
$\omega_{05}MISTRETTA_t$	108.784	344.873	0.32
$\omega_{06}MEMO_t$	-395.384	278.425	-1.42

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-3

Maximum Likelihood Results for the Number of Cases Resolved

$$y_t = \mu + \frac{\omega_{01}}{(1-\delta_1 B^1)} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t +$$
$$\omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	2823.600	125.591	22.48
ϕ_1	0.330	0.121	2.73
ϕ_2	0.550	0.110	4.98
$\omega_{01} NEWDATA_t$	215.820	81.768	2.64
δ_1	0.906	0.040	22.81
$\omega_{02} ADAA86_t$	-631.559	374.030	-1.69
$\omega_{03} GL_t$	-547.241	300.363	-1.82
$\omega_{04} ADAA88_t$	-45.965	254.073	-0.18
$\omega_{05} MISTRETTA_t$	140.618	278.817	0.50
$\omega_{06} MEMO_t$	-445.757	233.348	-1.91

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-4

Maximum Likelihood Results for the Number of Convictions

$$y_t = \mu + \frac{\omega_{01}}{(1-\delta_1 B^1)} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	2754.000	124.235	22.17
ϕ_1	0.340	0.120	2.83
ϕ_2	0.541	0.111	4.86
$\omega_{01} NEWDATA_t$	206.441	80.393	2.57
δ_1	0.908	0.040	22.62
$\omega_{02} ADAA86_t$	-596.401	369.534	-1.61
$\omega_{03} GL_t$	-541.062	296.897	-1.82
$\omega_{04} ADAA88_t$	-75.386	252.299	-0.30
$\omega_{05} MISTRETTA_t$	159.951	275.393	0.58
$\omega_{06} MEMO_t$	-415.873	232.053	-1.79

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-5

Maximum Likelihood Results for the Number of Guilty Pleas

$$y_t = \mu + \omega_{01} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	2510.000	99.269	25.29
ϕ_1	0.239	0.125	1.91
ϕ_2	0.519	0.111	4.68
$\omega_{01} NEWDATA_t$	-1.323	183.498	-0.01
$\omega_{02} ADAA86_t$	541.516	185.947	2.91
$\omega_{03} GL_t$	83.300	115.893	0.72
$\omega_{04} ADAA88_t$	102.335	206.335	0.50
$\omega_{05} MISTRETTA_t$	123.488	260.848	0.47
$\omega_{06} MEMO_t$	-243.802	205.613	-1.19

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-6

Maximum Likelihood Results for the Number of Cases Filed

$$y_t = \mu + \omega_{01} MATTERS_t + \omega_{02} NEWDATA_t + \omega_{03} ADAA86_t + \omega_{04} GL_t + \omega_{05} ADAA88_t + \omega_{06} MISTRETTA_t + \omega_{07} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	771.780	394.913	1.95
ϕ_1	0.231	0.124	1.86
ϕ_2	0.515	0.124	4.16
$\omega_{01} MATTERS_t$	0.385	0.048	7.99
$\omega_{02} NEWDATA_t$	-207.278	172.651	-1.20
$\omega_{03} ADAA86_t$	478.373	182.369	2.62
$\omega_{04} GL_t$	107.331	111.847	0.96
$\omega_{05} ADAA88_t$	114.818	196.910	0.58
$\omega_{06} MISTRETTA_t$	-35.115	249.214	-0.14
$\omega_{07} MEMO_t$	-344.659	196.927	-1.75

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-7

Maximum Likelihood Results for the Number of Cases Resolved

$$y_t = \mu + \omega_{01}FILED + \omega_{02}NEWDATA_t + \omega_{03}ADAA86_t + \omega_{04}GL_t + \omega_{05}ADAA88_t + \omega_{06}MISTRETTA_t + \omega_{07}MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	214.462	256.623	0.84
ϕ_1	0.307	0.121	2.53
ϕ_2	0.629	0.087	7.25
$\omega_{01}FILED$	0.690	0.062	11.09
$\omega_{02}NEWDATA_t$	350.171	127.201	2.75
$\omega_{03}ADAA86_t$	-47.137	135.885	-0.35
$\omega_{04}GL_t$	-20.257	86.223	-0.23
$\omega_{05}ADAA88_t$	28.354	141.289	0.20
$\omega_{06}MISTRETTA_t$	116.930	172.625	0.68
$\omega_{07}MEMO_t$	-161.676	143.456	-1.13

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-8

Maximum Likelihood Results for the Number of Convictions

$$y_t = \mu + \omega_{01} FILED + \omega_{02} NEWDATA_t + \omega_{03} ADAA86_t + \omega_{04} GL_t + \omega_{05} ADAA88_t + \omega_{06} MISTRETTA_t + \omega_{07} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	205.008	253.875	0.81
ϕ_1	0.311	0.120	2.59
ϕ_2	0.611	0.089	6.83
$\omega_{01} FILED$	0.674	0.062	10.93
$\omega_{02} NEWDATA_t$	329.332	127.083	2.59
$\omega_{03} ADAA86_t$	-29.414	135.604	-0.22
$\omega_{04} GL_t$	-21.559	86.183	-0.25
$\omega_{05} ADAA88_t$	3.101	141.270	0.02
$\omega_{06} MISTRETTA_t$	138.441	172.234	0.80
$\omega_{07} MEMO_t$	-137.502	143.391	-0.96

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-9

Maximum Likelihood Results for the Number of Guilty Pleas

$$y_t = \mu + \omega_{01} FILED + \frac{\omega_{02}}{(1-\delta_1 B^1)} NEWDATA_t + \omega_{03} ADAA86_t + \omega_{04} GL_t + \omega_{05} ADAA8$$
$$\omega_{06} MISTRETTA_t + \omega_{07} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	299.122	213.248	1.40
ϕ_1	0.214	0.122	1.75
ϕ_2	0.654	0.086	7.64
$\omega_{01} FILED$	0.572	0.053	10.77
$\omega_{02} NEWDATA_t$	117.281	50.599	2.32
δ_1	0.818	0.086	9.55
$\omega_{03} ADAA86_t$	-255.649	186.825	-1.37
$\omega_{04} GL_t$	-161.808	119.695	-1.35
$\omega_{05} ADAA88_t$	27.825	109.342	0.25
$\omega_{06} MISTRETTA_t$	62.564	136.725	0.46
$\omega_{07} MEMO_t$	-21.268	109.721	-0.19

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-10

Maximum Likelihood Results for the Ratio of Filed Cases to Matters Initiated

$$y_t = \mu + \omega_{01} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	0.480	0.008	60.08
ϕ_1	0.177	0.123	1.44
$\omega_{01} NEWDATA_t$	-0.028	0.026	-1.06
$\omega_{02} ADAA86_t$	0.072	0.028	2.57
$\omega_{03} GL_t$	0.001	0.018	0.03
$\omega_{04} ADAA88_t$	-0.011	0.032	-0.33
$\omega_{05} MISTRETTA_t$	-0.014	0.040	-0.34
$\omega_{06} MEMO_t$	-0.012	0.032	-0.38

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-11

Maximum Likelihood Results for the Ratio of Resolved Cases to Filed Cases

$$y_t = \mu + \omega_{01} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	0.749	0.022	34.27
ϕ_1	0.263	0.122	2.15
ϕ_2	0.630	0.084	7.47
$\omega_{01} NEWDATA_t$	0.097	0.032	3.00
$\omega_{02} ADAA86_t$	-0.038	0.033	-1.15
$\omega_{03} GL_t$	-0.010	0.021	-0.47
$\omega_{04} ADAA88_t$	0.004	0.036	0.11
$\omega_{05} MISTRETTA_t$	0.025	0.045	0.55
$\omega_{06} MEMO_t$	-0.028	0.036	-0.76

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-12

Maximum Likelihood Results for the Ratio of Guilty Pleas to Filed Cases

$$y_t = \mu + \omega_{01} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)(1-\phi_2 B^7)(1-\phi_3 B^{12})} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	0.652	0.013	51.62
ϕ_1	0.212	0.123	1.73
ϕ_2	-0.350	0.109	-3.19
ϕ_3	0.689	0.074	9.27
$\omega_{01} NEWDATA_t$	0.067	0.021	3.25
$\omega_{02} ADAA86_t$	-0.016	0.021	-0.75
$\omega_{03} GL_t$	-0.018	0.013	-1.43
$\omega_{04} ADAA88_t$	0.010	0.024	0.40
$\omega_{05} MISTRETTA_t$	0.011	0.031	0.36
$\omega_{06} MEMO_t$	0.001	0.024	0.05

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Table E-13

Maximum Likelihood Results for the Ratio of Trials Initiated to Filed Cases

$$y_t = \mu + \omega_{01} NEWDATA_t + \omega_{02} ADAA86_t + \omega_{03} GL_t + \omega_{04} ADAA88_t + \omega_{05} MISTRETTA_t + \omega_{06} MEMO_t + \frac{1}{(1-\phi_1 B^1)} u_t$$

Parameter	Estimate	Standard Error	t-Value
μ	0.093	0.005	20.40
ϕ_1	0.428	0.117	3.66
$\omega_{01} NEWDATA_t$	0.032	0.013	2.57
$\omega_{02} ADAA86_t$	-0.012	0.013	-0.88
$\omega_{03} GL_t$	0.055	0.010	0.48
$\omega_{04} ADAA88_t$	-0.001	0.014	-0.07
$\omega_{05} MISTRETTA_t$	-0.001	0.016	-0.07
$\omega_{06} MEMO_t$	-0.024	0.014	-1.68

SOURCE: Executive Office of the U.S. Attorneys: Docket and Reporting System, 1984-1987; Criminal Master File, 1987-1990.

Observations and Recommendations

I. Observations

In addition to assessing the implementation and impact of the guidelines, the Commission is required by applicable statutory directive to discuss "... any problems with the system or reforms needed" in its evaluation report.

While the preliminary data from the evaluation of the early phase of guideline implementation show significant reductions in disparity, and the desired increases in uniformity, the Commission feels nonetheless compelled to acknowledge that despite these early successes there remain three areas of concern relevant to the impact and process evaluation research.

First, there continues to be considerable resistance on the part of some federal judges to the need for, and wisdom of, the statutory scheme for sentencing reform enacted by Congress in the 1984 Sentencing Reform Act. In addition to their criticism of the statute, these judges resist implementation of the sentencing guidelines as promulgated by the Commission and reviewed and accepted by Congress.

While the Commission's implementation study as well as its other experiences suggest that overall judicial resistance to the Sentencing Reform Act and the guidelines has greatly abated, the comments of the more vocal critics receive disproportionate attention; in contrast, the comments of those who report a more general acceptance of guidelines, an acceptance that has steadily grown over time, seem to pass without notice. The relevance of this cannot be minimized in the context of an impact evaluation. To the extent that those who continue to express doubt about the need for guidelines and the way in which the guidelines work are more vocal than their colleagues, one can erroneously draw the inference that their speeches, publications, testimony, and case opinions reflect the views of the judiciary as a whole. Our data and experience suggest that this is not the case.

It is important to note that given the opposition of many judges to the idea of sentencing guidelines when the statute was being considered, it is encouraging that less than three years after the Supreme Court issued its opinion in Mistretta holding Congress' plan for sentencing reform constitutional, so much of the resistance has dissipated; nonetheless, it is not gone. So long as some number of judges resist this new guidelines system, the reduction of unwarranted disparity, the increased certainty and uniformity, and the end to the pockets of undue leniency identified by Congress will be less than would otherwise be achieved. This must be kept in mind when measuring the early effects of the sentencing guidelines.

Second, and not unrelated to the above, the Commission's research has found that judicial resistance to the Sentencing Reform Act, as well as to the sentencing guidelines, is far stronger among judges who deem the guideline sentences as too high than among judges who deem the guideline sentences too low. This problem is greatly exacerbated by the proliferation of mandatory minimum sentences during the same years as early guideline implementation. Many of the most oft quoted critics of the Sentencing Reform Act and the sentencing guidelines fail to distinguish between the sentences Congress requires in mandatory minimums and the offense levels the sentencing guidelines set forth. Again, the relevance of this for the evaluation study is that this rejection of the sentences as unduly harsh by some members of the judiciary, in particular their judgment about the lengths required by mandatory minimum sentences, has created an atmosphere of discontent in which distinctions between guideline levels and mandatory minimum levels are merged. One consequence of this atmosphere is the presumption on the part of some judges that circumvention of the guidelines or the mandatory minimums is justified, so long as the result is a

sentence lower than that required by Congress or promulgated by the Commission. This minority of judges, by their actions, re-create unwarranted disparity.

Third, but to a lesser extent, a similar pattern is found among some federal prosecutors. The Commission's research suggests that in a minority of cases, federal prosecutors compromise the full potential of the guidelines to accomplish the statutorily prescribed goals by negotiating plea agreements that are not consistent with Commission policy statements. Because these bargains are given only to some defendants, the unwarranted disparity eliminated by the uniformity of sentencing guidelines is compromised for this minority of cases.

The guideline structure, consistent with the enabling legislation, calls upon the judiciary to monitor plea agreements to ensure that they are consistent with the purposes of the Sentencing Reform Act. If, however, judges choose not to exercise this supervisory responsibility as the Commission's research suggests is occurring in some number of cases, there is no obvious remedy. While the Commission's research suggests that this problem exists only in a minority of cases, it must be kept in mind in any appraisal of the early effects of guideline implementation.

II. Recommendations

With respect to the matter of "reforms needed," the evaluation study identified for the Commission a number of areas meriting further attention. The overriding conclusion the Commission draws from this short-term evaluation, however, is that at this early juncture there is every reason for Congress to reaffirm the sentencing reforms it set in motion through passage of the Sentencing Reform Act of 1984 and no compelling justification for any significant alteration of those well-considered policies.

With that central point underscored, the Commission has identified from its evaluation the following areas in which improvements should be made to improve the functioning and effectiveness of the guidelines system.

A. Improving the Guidelines Through an Iterative, Selective Amendment Process

1. **Guideline amendments.** During the first four years of guideline operation, the Commission promulgated a series of amendments to the initial guidelines, policy statements, and commentary. These amendments made discrete technical, clarifying, and substantive changes in guideline provisions in response to congressional directives, for policy reasons, and to correct areas identified as problematic. In the course of the evaluation, a number of additional guideline issues were identified by judges, probation officers, and prosecuting and defense attorneys. The Commission feels a responsibility, as it has in the past when potentially problematic guideline matters have been brought to its attention, to carefully review these issues and determine whether amendments are warranted.

2. **Comprehensive review of departure sentences.** The Commission should conduct a comprehensive review of departure sentences because of the importance of such sentences to the guidelines improvement process and the congressional goals of balancing sentencing fairness in individual cases with the need to avoid unwarranted disparity. This review is underway.

3. **Inter-circuit conflicts in guideline application.** The Commission should establish procedures to ensure that significant conflicts among the courts of appeals in the interpretation and application of the guidelines are identified timely for amendment consideration. *See* Braxton v. United States, 111 S. Ct. 1854 (1991). The Commission has directed its legal staff to institute these procedures as part of its ongoing review of appellate court guideline decisions.

4. **Selectivity in the amendment process.** Balanced against the aforementioned needs is an overarching concern identified by a variety of persons involved in the sentencing process that the pace of guideline amendments should be slowed and the Commission's amendment focus made more selective. These concerns stem from the difficulty system participants have experienced in keeping current with numerous guideline changes introduced each year, compounded by the increased complexity of applying the guidelines consistent with court rulings that the *ex post facto* clause generally forbids retrospective application of amendments that increase the guideline level of punishment. The Commission is sensitive to these concerns and expects that the pace of guideline changes will slow appreciably.

B. Cooperative Efforts with Other Judicial Branch Agencies and Groups to Improve Guideline Knowledge and Effectiveness

1. **Expand training opportunities and materials.** Although the overall level of guideline application expertise has continued to grow among all participants in the sentencing process, the evaluation suggests that many private defense attorneys and some judges need additional training in the use of guidelines and related sentencing procedures. The Commission has an ambitious education plan to address many of these concerns and has instituted ongoing cooperative efforts with the Federal Judicial Center and the Administrative Office of the U.S. Courts to deliver needed training on sentencing guidelines in the most efficient manner. In addition, the Commission supplies training faculty and educational materials to private bar groups to the extent its resources allow.

2. **Expand use and utility of ASSYST computer software.** The evaluation identified the need for the Commission to promote the increased use of the ASSYST computer program developed by the Commission to aid probation officers in guideline application and preparation of presentence reports. The Commission has devoted substantial resources to updating and improving the ASSYST program and has taken steps to encourage its broader use. At the same time, the Commission has initiated efforts to test the feasibility of collecting sentencing data electronically through ASSYST. This project should be more fully developed.

3. **Court submission of statements of sentencing reasons.** The evaluation showed that, despite considerable progress in improving the rate of submission to the Commission of statements of reasons and other statutorily required information, a number of districts continue to have inordinately low compliance rates. Because these documents are key to accurate reporting of sentencing data and to the process of guideline improvement, the Commission and the Judicial Conference Committee on Criminal Law and Probation Administration should continue to monitor this area and take action as appropriate to remedy deficiencies.

C. Cooperative Efforts with the Department of Justice to Improve the Effectiveness of the Guidelines

1. **Responsible exercise of prosecutorial discretion.** Despite well-designed policies developed by the Department of Justice, the evaluation found qualitative and quantitative evidence suggesting that a relatively small number of prosecutors in a minority of cases exercise their discretion in charge selection and/or plea bargaining to undermine the guidelines and Sentencing Reform Act goals. The Commission recommends that the Department of Justice vigorously monitor compliance with Department policies and enforce adherence to them.

2. **Substantial assistance departures.** The evaluation suggested some unevenness and unwarranted use among U.S. attorney offices and individual prosecutors of prosecutorial motions to depart below the guideline range based on a defendant's substantial assistance in the investigation or prosecution of other persons. Quantitative and qualitative evidence from the evaluation points to a need for the Commission and the Department of Justice to carefully monitor this issue to ensure that substantial assistance departures are not inappropriately used to undermine the guidelines, and to ensure that warranted substantial assistance departures do not result in unwarranted disparity.

3. **Resolution of *ex post facto* issue.** A number of practitioners interviewed during the site visits described how possible *ex post facto* implications of amended guideline sections complicates the guideline application process. The Commission recommends that the Department of Justice examine the legal decisions that have held the *ex post facto* clause of the U.S. Constitution to be applicable to the guidelines, with the prospect of seeking Supreme Court review of the issue.

D. Cooperation with Congress in Shaping Sentencing Policy to Reaffirm Sentencing Reform Act Goals and Serve the Public Good

1. **Adherence to Sentencing Reform Act principles.** As previously stated, this short-term evaluation of the sentencing guidelines suggests that Congress should continue to embrace and staunchly resist efforts to significantly modify the core principles of the Sentencing Reform Act of 1984.

2. **Legislating sentencing policy consistent with the guidelines' structure and purposes.** The Commission recommends that Congress exercise its powers to determine sentencing policy through the established sentencing guidelines system, rather than legislating statutory minimum sentencing provisions. The required study of mandatory minimums recently submitted to Congress by the Commission found that mandatory minimums set by Congress suffer from substantial unevenness of application, fail to distinguish among substantially different offenders, and produce sharp differences in sentences for offenders who are substantially similar. In contrast, the guidelines system that Congress devised reduces disparity, allows for more proportional sentences, and better meets the crime control objectives Congress seeks. Consistent with the guidelines, Congress can accomplish its sentencing policy goals through statutory directives to the Commission that it implement specific objectives by making appropriate amendments to the guidelines. (A detailed discussion of the problems of mandatory minimums and how Congress could direct the Commission's guideline drafting efforts is set forth in the Commission's report to Congress on mandatory

minimums. *See* Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Chapter Seven (August 1991).)

3. **Maximizing Use of Available Sentencing Data in the Determination of Sentencing Policy.** Congress directed the Commission to collect, analyze, summarize, and disseminate data on federal sentencing practices. Having established an extensive sentence monitoring, data retrieval, and analysis system, the Commission stands ready to cooperate with members and committees of Congress in providing sentencing data relevant to policy issues under consideration. Furthermore, the Commission recommends that Congress more systematically consider data on sentences imposed under the guidelines as part of any policy deliberations that affect sentencing.

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