

The U.S. Sentencing Guidelines

Results of the Federal Judicial Center's 1996 Survey

*Report to the Committee on Criminal Law of the
Judicial Conference of the United States*

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1. Introduction

The federal judiciary has now had nine years of experience with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission under the Sentencing Reform Act of 1984. During this time only a few attempts have been made to assess systematically the views and experiences of those who work with the guidelines on a daily basis. To fill this gap in available data, and to obtain information that will be useful to the Sentencing Commission as it conducts a comprehensive review and assessment of the Sentencing Guidelines, the Federal Judicial Center, at the request of the Committee on Criminal Law of the Judicial Conference of the United States, undertook a survey of all Article III judges and chief probation officers regarding their experiences with and views of the federal Sentencing Guidelines. This report presents the results of that survey.

Overall, responses did not reflect a groundswell of support for major overhaul of the guidelines. This might have been in part because, as some respondents noted, the questionnaire asked about many specific issues but did not focus on questions about the philosophical approach underlying the guidelines. On the other hand, where we provided opportunities for open-ended comment about the guidelines, more respondents commented positively about the guidelines than expressed opposition. In general, chief probation officers were less supportive of change to the current guideline sentencing system than were judges.

Questionnaire design and administration

After seeking substantive input from individual committee members, Sentencing Commissioners and staff, the Administrative Office of the U.S. Courts, the U.S. Department of Justice, a representative of federal public defenders, and others, Center staff designed two versions of a written questionnaire: one for district judges and chief probation officers (eighteen pages) and another for circuit judges (ten pages). The questionnaires asked a number of questions about specific proposals under consideration by the committee or commission as well as more general questions regarding respondents' experiences with and opinions about the guidelines. Many questions were identical for both versions of the questionnaire, but the version for circuit judges omitted several questions about issues primarily of relevance to district judges and added questions more specific to circuit judges' experience with the guidelines.

Table 1 shows the number and type of responses for circuit and district judges and chief probation officers. The overall response rate was 75%, although some of those who responded did not complete the questionnaire, most frequently because they did not have sufficient experience with guideline sentencing. The overall rate of completed questionnaires was 68%.

Table 1
Response to the survey

Respondent Group	Questionnaires Mailed	Response to Survey			
		Completed Questionnaire	"Insufficient Experience"	Other Response	Total Response
Chief Probation Officer	93	89 (96%)	0	0	89 (96%)
Active District Judge	595	450 (76%)	2 (< 1%)	11 (2%)	463 (78%)
Senior District Judge	287	141 (49%)	41 (14%)	18 (6%)	200 (70%)
Active Circuit Judge	156	100 (64%)	3 (2%)	1 (< 1%)	104 (67%)
Senior Circuit Judge	73	40 (55%)	3 (4%)	8 (11%)	51 (70%)
Total	1,204	820 (68%)	49 (4%)	38 (3%)	907 (75%)

Note: The "Other Response" category includes judges who were in trial, ill, or on travel, and therefore unable to respond; judges who had strong objections to the guidelines system in general and therefore did not want to complete a questionnaire about the system; and a handful of other reasons for not completing the questionnaire.

Organization of this report

In Part 2 we discuss the broad areas of concern identified by respondents. Part 3 describes specific areas of the guidelines in which respondents report changes are needed. In Part 4 we describe areas about which respondents expressed less concern. Finally, in Part 5 we set forth respondents' evaluations of several participants in the guideline sentencing process, including judges, chief probation officers, federal public defenders, assistant U.S. attorneys, private defense attorneys, the U.S. Sentencing Commission, and the Judicial Conference. Appendix 1 contains copies of the questionnaires. Appendix 2 describes the methods used in designing, administering, and analyzing data from the questionnaires. Appendix 3 contains tables of the responses to all multiple-choice questions in the order they appeared in the questionnaires.

2. Major areas of interest and concern

We asked respondents to rank the guidelines areas requiring substantive change (see Table 2), to describe changes they would like to see made to the guidelines, and to indicate the areas they thought did not require change. Based on the patterns of their responses, we identified several general areas in which respondents think changes are needed: judicial discretion and departures; prosecutorial discretion and control of sentences; plea bargaining practices; and mandatory minimum and quantity-based sentences. These areas interrelate in many ways and will be considered together in this section. In addition to reporting the general results that led to identification of these areas as important, we will also describe responses to specific questions we asked on each of these topics.

Table 2
Rankings of guidelines areas requiring substantive change

Guideline Area	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
Departures	1	4	2
Use of Quantity in Drug Cases*	2	1	8
Relevant Conduct	3	3	5
Alternatives to Incarceration	4	8	4
Plea Bargaining	5	6	1
Role in the Offense	6	7	2
Use of Quantity in Fraud Cases	7	—	9
Multiple Counts	8	5	12
Standards of Appellate Review	9	12	14
Use of Quantity in Theft Cases	10	—	10
Retroactivity of Amendments	11	9	15
Lack of Clarity in Relevant Circuit Law	12	—	7
Acceptance of Responsibility	13	11	10
Supervised Release and Probation	14	13	13
Criminal History	15	10	6
Standard of Proof at Sentencing	—	1	—

*Circuit judges were asked to rank “Use of Quantity as a Sentencing Factor,” rather than giving separate rankings for use of quantity in each specific area.

Note: Responses are listed in descending order according to district judge rankings. The circuit judge survey presented a list of issues for ranking slightly different from the district judge and chief probation officer survey; issues not presented to a particular respondent group are identified with lines through the corresponding cell in the table. For a description of how we calculated these weighted rankings, see Appendix 2.

Judicial discretion and departures

The general pattern of judge responses suggests that, while most are willing to work within a guidelines system in some form, they strongly prefer a system in which judges are accorded more discretion than they are under the current guidelines. Judges would prefer that the guidelines be advisory or that, if they continue to be mandatory, sentencing judges be given more opportunity to exercise discretion, particularly in the form of departures from prescribed guideline ranges.

Advisory guidelines

When asked whether they thought mandatory guidelines were necessary to direct the sentencing process, a majority of district and circuit judges (73% and 69%, respectively) said no, while a majority (64%) of chief probation officers said yes. In addition, we asked those who reported that mandatory guidelines were not necessary what sentencing system they would prefer. Table 3 shows the response options and the number selecting each. About two-thirds of district judges and chief probation officers responding to this question, and more than half of the circuit judges responding, expressed a preference for advisory guidelines, while less than one-third of each group preferred the former system of discretion-based sentencing with parole. If we combine the number of district judges reporting a preference for advisory

guidelines (265) with the number who said mandatory guidelines were necessary (159), more than 70% of district judges responding to this set of questions showed a preference for either mandatory or advisory guidelines.

Table 3
Preferred sentencing system of those who do not think mandatory guidelines are necessary

Preferred System	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
Mandatory penalties	1 (0.2%)	0	0
Advisory guidelines	265 (66.8%)	52 (58.4%)	21 (67.7%)
Discretion-based sentencing (with parole)	66 (16.6%)	24 (27.0%)	6 (19.4%)
Discretion-based sentencing (without parole)	58 (14.6%)	11 (12.4%)	2 (6.4%)
Other	7 (1.8%)	2 (2.2%)	2 (6.4%)
Total	397	89	31

Note: This question appeared as a follow-up to Question 39 in the district judge and chief probation officer questionnaire and to Question 19 in the circuit judge questionnaire. It was asked only of those who said they did not think mandatory guidelines were necessary to direct the sentencing process.

Sample responses to open-ended questions provide some insight into the perceived benefits of advisory guidelines.

I believe there should be advisory guidelines, with discretion to depart, appeal only if judge goes outside guidelines. The present system works injustices in individual cases. Kids who take \$500 to act as courier and sentenced to six to eight years on basis of weight of drugs. We never see an entrepreneur.

I think guidelines which were not mandatory would be helpful for all federal and state judges. It is the mandatory nature which creates the unfairness and the unfairness is outrageously unjust. All of us who sit on the trial bench can recite many, many stories about defendants who are unfairly treated.

I appreciate that many people have worked long and hard to make the guidelines work. It has put judges time after time in the position of having to fudge in order to do justice. It would be much more honest if they (the guidelines) were made advisory, as I suspect that society doesn't benefit in the long run if judicial officers from the bench (as well as the lawyers) have to struggle with and strain at gnats to do right by the public and the defendant. I have often wondered why much simpler methods could not have been used to assure against extreme sentences. It would have been so easy to do so.

These responses reflect a view that advisory guidelines would allow judges to avoid unjust results in individual cases while still providing guidance about appropriate sentencing ranges.

Greater discretion within mandatory guidelines

Short of making the guidelines advisory, respondents would like to see more discretion afforded to sentencing judges within the current system of mandatory guidelines. For example, in response to an open-ended question about the one thing they would change about the guidelines, assuming the continued existence of a mandatory guidelines system, eighty-three respondents (11%) said they would increase judicial discretion in sentencing, particularly in cases of youthful offenders, first-time offenders, or offenders who played a minor role in the charged criminal activity.

Departures

More specifically, respondents repeatedly expressed support for providing judges greater opportunity to depart from prescribed guideline sentencing ranges. District judges ranked departures as the guideline area most in need of substantive change, and circuit judges and chief probation officers joined in ranking departures relatively high. In response to the question about what one thing they would change about the guidelines, 152 of 728 respondents (21%) cited providing district judges more opportunities to depart. The following comments are illustrative:

Increase chances for downward departures. Penalties in areas like drugs and firearms are draconian.

Increase the opportunities for departing outside the guidelines.

Allow more opportunity for reasonable downward departures in unusual or exceptional circumstances and for youthful first offenders.

I would permit more discretion with respect to downward departures; i.e., consideration of some factors which cannot now be considered.

I would make it easier to depart downward, and in that regard, would limit appellate review of downward departures.

These narrative comments, as well as responses to other questions, reveal that judges' primary concern is with downward, rather than upward, departures. When asked to rate, on a 1 to 7 scale, the importance of sixteen specific potential changes to the guidelines (with 1 denoting low importance and 7 denoting high importance), both district and circuit judges gave their highest average rating to increasing the availability of downward departures: the average rating for district judges on this item was 5.4, while the average rating for circuit judges was 5.2.

In addition, when we asked respondents for their views of whether certain specific offender characteristics should be considered relevant to within-range sentence determinations or departures, a number of characteristics—including youth, advanced age, mental and emotional conditions, physical disability or vulnerability, and the fact that an offender's criminal act was personally aberrant behavior—were cited by more than 40% of respondents as factors they thought should be relevant to downward departures, although all but one of these factors are considered not ordinarily relevant to departures under Section 5H of the guidelines.

As we will discuss below, respondents also believe that judges should have greater authority to depart downward based on a defendant's substantial assistance.

NB: The questionnaires were distributed before the Supreme Court's decision in *Koon v. United States*, Nos. 94-1664, 94-8842, 1996 WL 315800 (June 13, 1996), which held that appellate courts should use an "abuse of discretion" standard in reviewing a sentencing court's decision to depart from the applicable guideline sen-

tencing range. It remains to be seen what impact this decision will have on judges' use of departures under the guidelines.

Broader sentencing ranges

Another way in which respondents expressed their support for increased judicial discretion was their endorsement of broadening the sentencing ranges. Table 4 shows the number and percentage of respondents agreeing or disagreeing that Congress should, by statutory amendment, allow broader ranges in the final Sentencing Table.

Table 4
Extent of respondents' agreement that Congress should allow broader ranges in the final Sentencing Table

Proposition: Congress should amend 28 U.S.C. § 994(b)(2) to allow broader ranges in the final Sentencing Table

Response	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
Strongly Agree	266 (46.1%)	65 (48.9%)	25 (28.4%)
Somewhat Agree	204 (35.4%)	41 (30.8%)	22 (25.0%)
Somewhat Disagree	83 (14.4%)	12 (9.0%)	25 (28.4%)
Strongly Disagree	24 (4.2%)	15 (11.3%)	16 (18.2%)
Total	577	133	88

Note: This question appeared as Question 1c in the district judge and chief probation officer questionnaire and as Question 1b in the circuit judge questionnaire.

As these responses show, a great majority of judges agree—many of them strongly—that Congress should amend 28 U.S.C. § 994(b)(2) to allow broader ranges in the final Sentencing Table. Chief probation officers were more divided in their responses, but the majority supported broadening the ranges. Consistent with these results, forty-eight respondents (7%) answering the question about the one thing they would change about the guidelines cited making the sentencing ranges wider and/or reducing the number of offense levels. As with expanding departures, broadening the mandatory sentencing ranges would provide judges with greater discretion in selecting an appropriate sentence.

Prosecutorial discretion and control

A number of findings show that respondents believe much of the discretion that resided with judges before the guidelines has been shifted to prosecutors and that prosecutors now have an inappropriate degree of influence in the sentencing process. We asked district judges and chief probation officers to report the extent to which they agreed (somewhat or strongly) or disagreed (somewhat or strongly) with the statement, “The Sentencing Guidelines give too much discretion to prosecutors.” Just over 86% of respondents either somewhat or strongly agreed with this statement, with 57% saying that they strongly agreed.

In another question, we asked district judges and chief probation officers which of four participants—judge, defense attorney, probation officer, or prosecutor—has

the greatest influence on the final sentence under the Sentencing Guidelines. As shown in Table 5, about three-quarters of district judges, and over half of chief probation officers, reported that the prosecutor has the greatest influence on the sentence.

Table 5
District judge and chief probation officer views of who has the greatest influence on the final guideline sentence

Question: Under the Sentencing Guidelines, which of the following participants has the greatest influence on the final guideline sentence?

Most Influential Participant	Respondent Group	
	District Judges	Chief Probation Officers
Judge	94 (16.5%)	27 (31.0%)
Defense attorney	5 (.1%)	0
Probation Officer	44 (7.7%)	9 (10.3%)
Prosecutor	427 (74.9%)	51 (58.6%)
Total	570	87

Note: This question appeared as Question 8 in the district judge and chief probation officer questionnaire; it was not asked of circuit judges.

Narrative responses to open-ended questions also reflected frustration with the power and discretion held by prosecutors under the guidelines, and thirty-nine respondents (5%) said the one change they would make to the guidelines would be to reduce prosecutors' discretion. The following comments are illustrative:

The excessive power granted prosecutors by the guidelines scheme has resulted in a situation where the Court is viewed as a rubber stamp of the prosecutors' determinations. Unwarranted recommendations are made in pleas under Fed. R. Crim. P. 11(e)(1)(B) and 11(e)(1)(C). Refusal to follow the recommendations or rejection of the specific sentence agreements have no effect since the prosecution can bypass and defeat the goal of sentencing uniformity by filing custom-made informations. The waivers of indictments and simultaneous filings of informations have increased, therefore ensuring that the prosecutors' sentencing criteria become the ultimate authority and the final decision.

As a practical matter, prosecutors, by charging or not charging, by bargaining or not bargaining, and by making facts known—or failing to make facts known, control the ultimate sentence. Any system that permits such a result is wrong.

Reduce the power of the U.S. attorney in determining the sentence via their plea agreements. They have too much control of the guidelines by which the court will be bound.

One source of prosecutors' power under the Sentencing Guidelines is the § 5K1.1 (policy statement) motion, pursuant to which the government can move for a downward departure based on a defendant's "substantial assistance." The majority of district judge (59%) and chief probation officer (55%) respondents said they had had cases in which they believed a defendant substantially assisted, but the government did not make a § 5K1.1 motion. They generally agreed, however, that this occurred only infrequently. As Table 6 shows, most respondents think there are some

situations in which the judge should be permitted to depart downward for substantial assistance even in the absence of a government motion.

Table 6
Judge and chief probation officer views of circumstances under which a judge should be able to depart based on “substantial assistance” without a government motion

Question: If the law were to be changed, under what circumstances do you think a judge should be allowed to depart based on substantial assistance without a government motion?

Response	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
Under no circumstances	106 (18.2%)	27 (19.7%)	31 (35.2%)
Upon motion of the defendant	288 (49.4%)	72 (52.6%)	19 (21.6%)
On the court’s own motion	324 (55.6%)	92 (67.2%)	48 (54.5%)
Other	36 (6.2%)	5 (3.6%)	6 (6.8%)

Note: This appeared as Question 17 in the district judge and chief probation officer questionnaire, and as Question 13 in the circuit judge questionnaire. Percentages are calculated based on 88 chief probation officers, 583 district judges, and 137 circuit judges who provided at least one response to the question. Because respondents were asked to check all circumstances under which they thought a judge should be able to depart, the percentages do not add to 100%.

Forty-seven respondents described other circumstances under which substantial assistance departures should be permitted in the absence of a government motion. The most commonly mentioned circumstance, noted by nine respondents, was a situation in which a judge believes the government’s failure to make a substantial assistance motion is based on bad faith or vindictiveness. Eight respondents said they thought a judge should be permitted to make such a departure upon a recommendation of the probation officer. Five respondents would permit substantial assistance departures in situations where the government admits the defendant fully cooperated but says the cooperation did not rise to the level of “substantial assistance.” No other circumstances were mentioned by more than three respondents.

In response to a separate question, about two-thirds of district and circuit judges (69% and 65%, respectively), but fewer than half of chief probation officers (44%), agreed that Congress should amend 18 U.S.C. § 3553(e) to allow judges to sentence below a mandatory minimum for “substantial assistance” without a government motion.

Plea bargaining

According to respondents, one arena in which prosecutors exert undue influence in the sentencing process is through plea agreements. Chief probation officers identified plea bargaining as the guideline area most in need of substantive change, and ten of eighty-six chief probation officers (12%) responding to the question about the one thing they would change about the guidelines cited the plea bargaining process. Judges expressed somewhat less concern about plea bargaining, with district judges ranking it fifth as a guidelines area requiring substantive change and circuit

judges ranking it sixth. Despite the lower degree of concern, judges agreed with chief probation officers generally on many questions related to plea bargaining.

As Table 7 shows, large majorities of both district judges and chief probation officers—including 93% of the latter group—somewhat or strongly agreed with the statement that “Plea bargains are a source of hidden unwarranted disparity in the guidelines system.”

Table 7
Extent of respondents’ agreement that plea bargains are a source of disparity under the guidelines

Proposition: Plea bargains are a source of hidden unwarranted disparity in the guidelines system

Response	Respondent Group	
	District Judges	Chief Probation Officers
Strongly agree	223 (38.4%)	52 (58.4%)
Somewhat agree	202 (34.8%)	31 (34.8%)
Somewhat disagree	102 (17.6%)	4 (4.5%)
Strongly disagree	54 (9.3%)	2 (2.2%)
Total	581	89

Note: This question appeared as Question 11c in the district judge and chief probation officer questionnaire; it was not asked of circuit judges.

Narrative comments, mostly from chief probation officers, also expressed the view that the guidelines are manipulated through plea agreements and that this creates disparities:

The players manipulate the guidelines in plea agreements and judges rubber-stamp the deals.

Build in some stop gates to the wide range of plea bargaining. The current plea bargaining in its liberal state is creating significant disparity in sentencing. Perhaps in some manner the judges could be more restricted by the guidelines as to the type of plea agreement they could accept.

Limit or more closely regulate plea agreements and stipulations on offense conduct which defeat the intent of the guidelines.

In response to specific questions about plea agreement practices in their districts, nearly all (97%) chief probation officers reported that plea agreements in their districts contain stipulated facts (e.g., as to amount of drugs or whether a weapon was used), compared to 84% of district judges. Chief probation officers were also more likely than judges to say that stipulated facts in plea agreements frequently *understate* offense conduct, as Table 8 shows.

Table 8
District judge and chief probation officer estimates of how frequently offense conduct is understated in plea agreements with factual stipulations

Question: How frequently in cases with factual stipulations do the stipulations understate offense conduct?

Response	Respondent Group	
	District Judges	Chief Probation Officers
Very infrequently	139 (30.0%)	12 (14.6%)
Somewhat infrequently	142 (30.7%)	22 (26.8%)
About half the time	54 (11.7%)	17 (20.7%)
Somewhat frequently	92 (19.9%)	17 (20.7%)
Very frequently	36 (7.8%)	14 (17.1%)
Total	463	82

Note: This question appeared as a follow-up to Question 9 in the district judge and chief probation officer questionnaire, and was answered only by those who reported that plea agreements in their districts contain stipulated facts.

To get information about the extent to which judges review plea agreements, we asked district judges whether they ever “go behind” a plea agreement and rule against a prosecutor’s recommendation that tends to lower a sentence by either stipulating facts or recommending the application, or nonapplication, of specific offense characteristics. About 75% of district judges said that they have done this, while 25% said that they have not. Judges who do go behind plea agreements in this way generally report that they do so infrequently, with only about 8% saying they do it somewhat or very frequently.

Overall, then, these results suggest that respondents believe that parties often manipulate the guidelines through plea agreements—in part by stipulating facts—and that judges rarely scrutinize or reject such agreements. With respect to solutions, we asked respondents for the extent of their agreement with two possible changes to the guidelines’ treatment of plea bargaining: (1) providing guidelines, rather than policy statements, and (2) clarifying the court’s discretion to reject a plea when it believes the facts or guidelines have been manipulated. As shown in Table 9, a majority of district judges and chief probation officers endorsed providing guidelines rather than policy statements for plea bargains, and a much larger majority of each group supported clarifying the court’s discretion to reject a plea.

Table 9
Extent of district judge and chief probation officer agreement with potential changes to guidelines' treatment of plea bargains

Potential Change	Respondent Group			
	District Judges		Chief Probation Officers	
	Agree	Disagree	Agree	Disagree
The Sentencing Commission should provide guidelines, rather than policy statements, concerning plea agreements.	318 (55.8%)	252 (44.2%)	59 (66.3%)	30 (33.7%)
The guidelines should be amended to clarify the court's discretion to reject a plea when it believes the facts or guidelines have been manipulated.	468 (80.4%)	114 (19.6%)	83 (94.3%)	5 (5.7%)

Note: Response categories (strongly agree, somewhat agree, somewhat disagree, strongly disagree) were collapsed to form one Agree and one Disagree category. These statements appeared in Question 11 in the district judge and chief probation officer questionnaire; they were not presented to circuit judges.

Mandatory minimums and quantity-based sentences

Responses to a number of questions suggest that respondents believe that many problems with the guidelines result from their interaction with congressionally imposed mandatory minimum sentences. In response to the open-ended question about the one thing they would change about the guidelines, sixty-three respondents (9%)—nearly all of them judges—said they would eliminate mandatory minimum sentences. This is a high proportion given that a number of respondents apparently thought that comments about mandatory minimums were outside the scope of the question.¹ Examples of comments on mandatory minimums include:

Remove minimum mandatory statutes that trump discretion.

Do away with mandatory minimums. The guidelines generally work well and would work much better without mandatory minimums.

Congress's continued efforts to impose mandatory sentences (e.g. 924 (c)) is clearly frustrating the commission's efforts to create equitable sentencing guidelines.

The guidelines are OK but mandatory minimum sentences are not.

I would change the drug guidelines to reflect what is fair, thereby putting pressure on Congress to eliminate the mandatory minimums—which are the most serious problem in sentencing.

Repeal of mandatory minimum sentences which are in conflict with Sentencing Guidelines. Mandatory minimum sentences are counterproductive to a guideline system.

1. Some respondents specifically noted that they assumed the question was not inviting comments about mandatory minimums. As one judge said, "I realize statutory mandatory minimums are not within this survey, and nothing can be fixed until that is."

Do away with mandatory minimum sentences which skew the mandate of the U.S.S.C.

Guidelines are fine, but are driven in too many cases by mandatory minimums, which should be—but won't—be gotten rid of.

These comments reflect a view that the Sentencing Guidelines would work better and produce fairer results without mandatory minimum sentences.

In a separate question, we asked respondents whether the Sentencing Guidelines should be “de-linked” from the statutory mandatory minimums, so that base offense levels and guideline ranges would be set independently of the mandatory minimums. As shown in Table 10, more than two-thirds of each respondent group, including 79% of district judges, somewhat or strongly agreed with this idea.

Table 10
Extent of judge and chief probation officer agreement with “de-linking” guidelines from mandatory minimums

Proposition: The Sentencing Guidelines should be “de-linked” from the statutory mandatory minimum sentences (i.e., the floors for base offense levels and guideline ranges should be set independently of the mandatory minimums)

Response	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
Strongly agree	292 (50.4%)	57 (43.5%)	39 (43.8%)
Somewhat agree	164 (28.3%)	31 (23.7%)	20 (22.5%)
Somewhat disagree	79 (13.6%)	24 (18.3%)	17 (19.1%)
Strongly disagree	44 (7.6%)	19 (14.5%)	13 (14.6%)
Total	579	131	89

Note: This appeared as Question 1d in the district judge and chief probation officer questionnaire, and as Question 1c in the circuit judge questionnaire.

It appears that one of respondents’ main concerns with mandatory minimum sentences for drug trafficking, and with guidelines based upon them, is that they are tied to the quantity of drugs involved in a criminal transaction. Circuit and district judges ranked the use of quantity as a sentencing factor first and second, respectively, as an area requiring substantive change. In addition, more than three-quarters of district and circuit judges, and more than 60% of chief probation officers, supported basing mandatory minimum sentences on factors other than drug quantity.²

In response to a specific question about the role of quantity in drug sentences, almost half of district judges (48%) and more than one-third of chief probation officers (38%) said that drug quantity should have a smaller effect on sentences than it currently does, while most of the remaining respondents said it should have the same effect.

2. As one respondent pointed out, the phrasing of this question—which asked whether mandatory minimum penalties should be based on “factors other than the quantity of drugs involved”—was ambiguous regarding whether other factors should be considered *in addition to* or *instead of* drug quantity. At the very least, however, we can infer that those who answered affirmatively believe that mandatory minimum sentences should not be based solely on drug quantity.

We also asked district judges and chief probation officers what effect drug quantity should have on sentences relative to other culpability factors, such as role in the offense. The great majority of district judges thought that drug quantity should have the same (44%) or a smaller (39%) effect on sentences than should other culpability factors, while chief probation officers were more evenly divided as to whether quantity should have a greater (28%), the same (35%), or a smaller (37%) effect than other culpability factors.

3. Other areas in which changes are supported

In addition to the broad areas of concern described in Part 2, respondents identified changes they thought were needed in several more specific guideline areas: relevant conduct; standards of proof at sentencing; alternatives to incarceration; role in the offense; multiple counts; and stabilizing the guidelines system. In this section we discuss questionnaire responses relevant to each of these areas.

Relevant conduct

In response to the question asking for ranking of issues requiring substantive change, both district and circuit judges ranked relevant conduct among the top three, and chief probation officers ranked it fifth. When asked what one thing they would change about the guidelines, twenty-six respondents (4%)—most of them circuit judges—cited relevant conduct.

Although the majority of respondents think the current relevant conduct guideline is sufficiently clear about what conduct should be used to determine the appropriate offense level, 60% of responding district judges, and 44% of chief probation officers, said that the current scope of relevant conduct is not appropriate.³ We asked respondents what conduct of an offender they thought *should* be considered relevant conduct for purposes of sentencing; the results are shown in Table 11. As shown in Table 11, about one-quarter to one-third of respondents expressed a preference for a pure “charge offense” system, in which only conduct that was part of the offense of conviction is considered at sentencing. At the other extreme, fewer than 20% of district judges and chief probation officers thought acquitted conduct should be considered, although more than 70% of circuit judges thought it should. In addition to the types of conduct listed in Table 11, a small proportion of respondents who answered this question (4%) specified other types of conduct they thought should be considered for sentencing, with the highest number (five respondents) suggesting that conduct admitted by the defendant (e.g., in a plea agreement) should be relevant to sentencing even if not required for conviction.

3. Some aspects of the relevant conduct guideline have been interpreted differently in different circuits. Thus, respondents to our survey would likely have had different frames of reference when evaluating the scope of relevant conduct, depending on the circuit in which they were located. In addition, the questionnaire was administered before the Supreme Court’s decision in *United States v. Watts*, No. 95-1906, 1997 WL 2443 (U.S.), January 6, 1997, which held that a sentencing court may consider acquitted conduct that is proven by a preponderance of the evidence.

Table 11
Judge and chief probation officer views on conduct that should be considered relevant for purposes of sentencing

Question: In your view, what conduct of an offender should be considered “relevant conduct” for purposes of sentencing?

Response	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
Only conduct that was part of the offense of conviction	136 (38.5%)	40 (29.4%)	9 (25.0%)
Charged but dismissed conduct, proven at sentencing	65 (18.4%)	0	9 (25.0%)
Uncharged conduct proven at sentencing	106 (30.0%)	0	11 (30.5%)
Acquitted conduct proven at sentencing	46 (13.0%)	96 (70.6%)	7 (19.4%)
Total	353	136	36

Note: This question appeared as Question 4 in the district judge and chief probation officer questionnaire and as Question 9 in the circuit judge questionnaire. Responses from district judges and chief probation officers came only from those who indicated that the current scope of relevant conduct is not appropriate. In analyzing the data, we treated the response categories as hierarchical—that is, if a response category further down on the table was marked, we assumed the respondent also meant to mark categories above it (and, in fact, most multiple responses did follow this hierarchy). Thus, the numbers reported for each category listed after “only conduct that was part of the offense of conviction” reflect the additional respondents who marked that category as well as each preceding category. For example, the 106 district judges noted under the category “uncharged conduct proven at sentencing” also marked, or were assumed to mark, “charged but dismissed conduct” and “conduct that was part of the offense of conviction,” but these respondents did not mark “acquitted conduct.”

A majority of district and circuit judges, but not chief probation officers, agreed with three statements about relevant conduct: (1) that the current relevant conduct guideline increases offenders’ sentences too much for the behavior of their accomplices or coconspirators; (2) that conduct beyond the offense of conviction should be given less weight than conduct that is part of the offense of conviction; and (3) that there should be a limit on the offense level increase for unconvicted conduct.

On the whole, then, most respondents think some conduct beyond that required for conviction should be relevant to sentencing, but most would not go so far as to include acquitted conduct. In addition, most would not permit conduct that was not part of the offense of conviction to affect sentences to the same extent that convicted conduct does.

Finally, majorities of all three respondent groups, including 80% of circuit judges, agreed that offenders should be given notice before pleading guilty of what criminal conduct beyond the offense of conviction the government will ask the court to apply at sentencing.

Standards of proof at sentencing

Circuit judges ranked standards of proof at sentencing highly as an area requiring substantive change, although few cited it in response to the open-ended question about the one thing they would change about the guidelines. The current standard of proof for most factual matters at sentencing is “preponderance of the evidence.” We asked respondents whether this standard or another was most appropriate for

various types of information sought to be established: facts supporting the base offense level; facts supporting adjustments to the base offense level; facts supporting departures; facts of conduct outside the offense of conviction; and facts of conduct within the offense of conviction.

Overall, respondents expressed strong support for the “preponderance of the evidence” standard for all types of information. Consistent with previous responses about relevant conduct, however, almost a third of each group of respondents said that facts of conduct outside the offense of conviction should be subject to the more stringent “clear and convincing evidence” standard. A substantial minority of each group (18%–28%) also thought the “clear and convincing” standard should be applied to facts supporting departures.

Alternatives to incarceration

Both district judges and chief probation officers ranked alternatives to incarceration fourth in importance as an area requiring substantive change; circuit judges ranked it eighth. When asked whether the guidelines appropriately identify offenders who should be eligible for alternatives to incarceration, about a third of district judges and chief probation officers said they do, while almost two-thirds of each group said that more offenders should be eligible for alternatives (only a small proportion thought fewer offenders should be eligible).

Table 12 shows the types of offenders respondents think should be generally eligible for alternatives to incarceration.

Table 12
District judge and chief probation officer views of which offenders should be eligible for alternatives to incarceration

Question: To what classes of offenders do you think alternatives to incarceration should be made available?

Response	Respondent Group	
	District Judges	Chief Probation Officers
First-time offenders generally	358 (63.5%)	46 (56.1%)
Nonviolent offenders generally	266 (47.2%)	43 (52.4%)
Nonviolent first-time offenders, except drug offenders	240 (42.6%)	37 (45.1%)
Nonviolent first-time drug offenders	167 (29.6%)	23 (28.0%)
All nonviolent first-time offenders	225 (39.9%)	30 (36.6%)
Offenders with extenuating circumstances (e.g., illness, handicap, dependents)	376 (66.7%)	45 (54.9%)

Note: This appeared as Question 26 in the district judge and chief probation officer questionnaire, and was not asked of circuit judges. Percentages are calculated based on 82 chief probation officers and 564 district judges who provided at least one response to the question. Because respondents were asked to check all categories they thought should be eligible for alternatives, the percentages do not add to 100%.

Majorities of each group think alternatives to incarceration should be made available to first-time offenders generally or to offenders with extenuating circumstances, such as illness, handicap, or dependents. In addition to the offender types shown in the table, sixty-three respondents specified other classes of offenders for whom al-

ternatives to incarceration should be made available, including youthful offenders and first-time nonviolent offenders with certain extenuating circumstances. Six respondents noted that determinations of whether alternatives would be appropriate should be made on a case-by-case basis.

These responses focus on using offender characteristics to expand the availability of alternatives. Another approach, mentioned by several respondents in narrative comments, would be to expand the areas on the sentencing table for which alternatives would be an option. The following comments are illustrative:

[I would change] the almost total unavailability of probation. It should be available in *most* cases, and this would have NOTHING to do with discretion or the other reasons we have the guidelines.

Give the court discretion to impose probation in zones A, B & C and discretion to impose probation on first-time offenders not convicted of a class A or B felony in zone C.

Make alternatives to incarceration available for ranges up to twenty-four months—providing the defendant was a first offender, no arrests/convictions.

To what extent should alternatives to incarceration serve as true substitutes for prison terms? We asked district judges and chief probation officers whether they thought the currently available alternatives—including intermittent confinement, community service, shock incarceration (“boot camp”), fines, residential drug treatment, and intensive supervision probation—should be allowed to substitute for none, all, or part of a prison term for eligible offenders. Most of the respondents said that fines should *not* be used as a substitute for prison, while most said that community confinement, shock incarceration, and home detention could be used as substitutes for some or all of a prison term. Among remaining alternatives, respondents’ views were more mixed as to whether a given alternative could be substituted for some, all, or none of a prison term.

Role in the offense

Chief probation officers ranked role in the offense second in importance as an area requiring substantive change; district and circuit judges ranked it sixth and seventh, respectively. In response to an open-ended question, few respondents named the role guidelines as the one area they would change.

We asked respondents to rate the importance of changes to the role guidelines previously proposed by the committee, including: (1) clarifying the distinction between “minor” and “minimal” participant; (2) clarifying the distinction between “organizer/leader” and “manager/supervisor”; (3) allowing flexible adjustments for role based on a list of typical culpability factors; and (4) allowing role adjustments of more than four levels. Respondents rated the importance of each change on a scale of 1 to 7, with 1 denoting low importance and 7 denoting high importance. Overall, they rated each change as moderately important, with average ratings around the middle of the scale. District and circuit judges rated highest in importance having flexible adjustments for role in the offense, with average (mean) ratings of 4.8 and 4.3, respectively. Chief probation officers, on the other hand, gave their highest average rating (5.2) to clarifying the distinction between “minor” and “minimal” participant.

Multiple-count guidelines

Circuit judges ranked the multiple-count rules fifth as an area requiring substantive change, while district judges ranked it eighth and chief probation officers ranked it twelfth. Few respondents cited this as the one area of the guidelines they would change, although both district judges and chief probation officers, when asked to rate the difficulty of various steps in the sentencing process, gave an average rating higher than the midpoint of the seven-point difficulty scale to “applying the multiple-count rules.” Only two other steps in the sentencing process—fashioning a departure and determining monetary loss in fraud cases—were assigned higher average difficulty ratings by district judges.

When asked specific questions about the multiple-count guidelines, the majority of district judges and chief probation officers (65% and 74%, respectively) said they thought the multiple-count guidelines are clear as to what counts are to be grouped together, and similar majorities (68% and 71%, respectively) said they agreed with the general approach of treating counts involving “substantially the same harm” differently from independent counts, as they are in the current guidelines. Most who did not agree with the current approach objected to the fact that basing sentences on the most severe counts results in some counts having no effect on the sentence.

Stabilizing the guidelines

While judges and chief probation officers clearly see a need for change in a number of guideline areas, they also desire a stable system that is not continually undergoing amendment. When we asked respondents to rate, on a 1 to 7 scale, the importance of each of sixteen potential changes to the guidelines, each group assigned one of its top five highest mean ratings to (1) amending the guidelines less frequently and (2) amending fewer guidelines per amendment cycle.

Similarly, several respondents in narrative comments expressed the desire for a stable system. Examples include:

Less frequent changes should be made. Permit the existing guidelines to be used for a while without constant tinkering.

I think we should let the system work for a while without any changes.

[I would change] the process of continual amendment—I would discontinue all amendments for at least five years.

[I would change] nothing. A growing body of case law has developed in each circuit guiding guidelines decisions. Change for change’s sake merely upsets the predictability of the case law and creates more appeals until the case law covers the changes.

I would require the Sentencing Commission to take a five-year vacation, permitting amendments during that period only to conform to changes in the law.

4. Areas of less concern among respondents

In response to our question about guidelines areas requiring substantive change, certain issues ranked among the bottom half for all three respondent groups: acceptance of responsibility; supervised release and probation; standards of appellate review; and retroactivity of guideline amendments. District and circuit judges also assigned low rankings to changing the criminal history guidelines. These patterns do not necessarily mean that respondents see no need for change in these areas—in fact, respondents supported proposed changes in several of the areas—but they suggest that respondents think changes in these areas should be given lower priority than changes in areas that received high rankings. Finally, although this area was not listed in the ranking question, responses from other questions reveal that respondents are generally pleased with the operation of the Chapter 2 offense guidelines.

Offense guidelines

When asked to rate on a 1 to 7 scale the importance of sixteen potential changes to the guidelines, all three groups of respondents assigned relatively low average ratings—below the midpoint of the scale—to decreasing the number of offense guidelines in Chapter 2 of the guidelines manual. In another question, where district judges and chief probation officers were asked to rate the difficulty of eighteen different steps in the sentencing process on a 1 to 7 difficulty scale, both groups gave their lowest average difficulty ratings—all below 2.5—to (1) identifying the appropriate offense guideline; and (2) determining the appropriate base offense level.

These results suggest that respondents believe the offense guidelines function well mechanically and that their numbers are not excessive. Presumably of greater interest, however, is the fairness of sentences under the various offense guidelines. For the twelve most frequently used offense guidelines, we asked district judges and chief probation officers to rate the guidelines' clarity and the fairness of sentences under them. Clarity—which we defined as the degree to which the terms and definitions in the guideline are understandable—was rated on a 1 to 5 scale with 1 denoting low clarity and 5 denoting high clarity. Fairness of sentences—which we defined as the degree to which the guideline results in sentences that are neither too harsh nor too lenient relative to the offense conduct—was also rated on a 1 to 5 scale, with 1 indicating the sentences were too lenient and 5 indicating they were too harsh. As Table 13 shows, respondents generally rated these offense guidelines high on the clarity scale, with all but one average rating above the midpoint of the scale. Guidelines rated least clear by both groups were those for money laundering and tax offenses.

Table 13
District judge and chief probation officer ratings of clarity and fairness of frequently used offense guidelines

	Average Clarity Rating		Average Fairness Rating	
	District Judge	Chief Prob. Officer	District Judge	Chief Prob. Officer
§ 2B1.1, Larceny, Other Forms of Theft	3.6	3.9	2.8	2.5
§ 2B3.1, Robbery	3.8	4.3	2.7	2.6
§ 2B5.1, Counterfeiting, Infringement of Copyright	3.5	3.7	2.8	2.9
§ 2D1.1, Drug Manufacture, Import/Export, Trafficking	3.5	4.0	3.6	3.7
§ 2D1.2, Drug Offenses Near Protected Locations	3.5	3.8	3.5	3.4
§ 2D2.1, Unlawful Possession of Drugs	3.7	4.1	3.6	3.1
§ 2F1.1, Fraud and Deceit; Forgery; et al.	3.3	3.3	2.7	2.5
§ 2K2.1, Crimes Involving Firearms or Ammunition	3.4	3.4	3.1	2.9
§ 2L1.1, Smuggling/Transporting/Harboring Illegal Alien	3.5	3.8	2.8	2.8
§ 2L1.2, Unlawfully Entering or Remaining in U.S.	3.6	3.9	3.0	2.9
§ 2S1.1, Laundering of Monetary Instruments	3.1	3.2	3.0	3.0
§ 2T1.1, Tax Evasion, Tax Fraud	3.3	2.9	2.8	2.5

Notes: The averages in this table are the means of the ratings. This appeared as Question 36 in the district judge and chief probation officer questionnaire and was not asked of circuit judges.

Similarly, average ratings for fairness clustered around the midpoint of the fairness scale, indicating that sentences under these offense guidelines are considered neither too harsh nor too lenient. Drug guidelines—particularly those for drug manufacture and drug trafficking—were rated the most harsh by both groups. The view that these guidelines are somewhat too harsh may reflect respondents’ disapproval of the effect of mandatory minimums on the guidelines, including their emphasis on quantity-based drug sentences.

Fraud guidelines were rated by both groups as among the most lenient. Answers to specific questions about the fraud and theft guidelines—based on the committee’s interest in these areas—provide further insight into why respondents rate these guidelines as somewhat too lenient overall.

These specific questions had to do with the role played by quantity of monetary loss in determining sentences for fraud and theft. Specific offense characteristics in each of these guidelines increase the base offense level according to the amount of monetary loss involved. We asked district judges and chief probation officers whether they thought the quantity of monetary loss should have a greater, the same, or a smaller effect on sentences for theft and fraud as it currently does. Just over half of each group said they thought the effect of quantity should remain the same for both types of offenses. Of the remaining respondents, chief probation officers more frequently said quantity should have a greater effect than a smaller effect, while district judges were fairly evenly divided as to whether they thought quantity should have a greater or smaller effect.

On an issue slightly different from the overall effect of quantity on theft and fraud sentences, respondents apparently believe that the loss tables in the theft and fraud guidelines do not result in sentences that are appropriate relative to the size of the loss incurred. For both the theft and fraud guidelines, fewer than half of the re-

sponding district judges (47% and 45%, respectively), and only about a third of chief probation officers (34% and 32%, respectively) said the loss tables in these guidelines appropriately punish defendants. When asked to indicate what was inappropriate about the tables, respondents from both groups most frequently noted that the tables *underpunish* defendants whose offenses involve large monetary losses. It appears, then, that respondents might favor reapportioning the effect of quantity on theft and fraud sentences. On the other hand, they did not strongly support merely broadening the monetary loss categories in these tables: when asked to rate the importance of this potential change on a scale from 1 (low importance) to 7 (high importance), all three respondent groups assigned average ratings at or below the midpoint of the scale: the mean rating for district judges was 4.0; for circuit judges, 3.6; and for chief probation officers, 3.7.

Thus, respondents are generally pleased with the offense guidelines but would like to see changes made to the guidelines that are based primarily on quantity.

Acceptance of responsibility

As a guidelines issue requiring substantive change, acceptance of responsibility was rated relatively low by each group of respondents. In addition, large majorities of district judges (73%) and chief probation officers (86%) reported that the acceptance of responsibility guideline appropriately rewards early guilty pleas.⁴

When asked about specific potential changes to the acceptance of responsibility guidelines, however, the majority of district judges and chief probation officers agreed with the proposed changes. First, we asked whether the acceptance guidelines should provide separate reductions for (1) entry of a guilty plea; and (2) other indicators of acceptance of responsibility. About two-thirds of district judges and chief probation officers (62% and 69%, respectively) agreed with this proposal. Second, smaller majorities of each group (61% and 54%, respectively) said that a total offense level reduction of three levels for acceptance of responsibility should be permitted for all offenders, rather than only those at offense level 16 or greater.

Supervised release and probation

Respondents appear to be generally pleased with how supervised release and probation work under the guidelines; all three groups ranked it very low as an area requiring substantive change, and few mentioned problems with supervised release or probation in response to open-ended questions. Answers to the two specific questions we asked of district judges and chief probation officers about these issues reveal that large majorities of each of these groups (86% and 84%, respectively) believe that violations of probation and supervised release should be treated equivalently, and that about two-thirds of district judges (64%), but only one-third of chief probation officers (36%) believe that a violation of probation should require the offender to be sentenced within his/her original guideline range rather than the current revocation guideline range.

4. Most of those who did not think this guideline appropriately rewards early guilty pleas said that it rewards such pleas too little, rather than too much.

Appellate issues

All three groups of respondents ranked standards of appellate review relatively low as an area requiring substantive change, and few noted appellate review as a problem in response to open-ended questions. When asked whether the current “clearly erroneous” standard of review for determination of facts in guideline cases is appropriate, more than 85% of district judges, circuit judges, and chief probation officers said that it was. Slightly smaller majorities of each group (70%, 68%, and 85%, respectively) reported that the “due deference” standard for review of application of the guidelines to facts is appropriate. For both questions, those who did not think the standard of review was appropriate most frequently cited a preference for an “abuse of discretion” standard.

As with other issues that were ranked relatively low as areas requiring substantive change, there were several statements or changes about appellate review that most respondents agreed with. Table 14 shows statements about appellate review that were presented to some or all groups of respondents, and the number and percentage of respondents agreeing with each. The great majority of district judges and chief probation officers believe that district judges should have more authority, and more time, to correct their own errors in sentencing. In addition, majorities of each group (district judges, circuit judges, and chief probation officers) agree that: (1) when courts of appeals have split on an issue, the Sentencing Commission should clarify its intent through guideline amendments; (2) there should be no post-conviction collateral review of sentences under the guidelines; and (3) waivers of appeal should be used more frequently. Furthermore, 83% of circuit judges believe that sentence agreements in plea bargains ordinarily should be binding and not reviewable.

The table also shows that the majority of circuit judges believe that the *number* of guideline sentence appeals is unduly burdensome on appellate judges. In contrast, in response to another question asking them to rate the difficulty of deciding appeals relating to various guidelines and issues, circuit judges overall assigned difficulty ratings at or below the midpoint of the difficulty scale. These responses, combined with the fact that circuit judges did not consider appellate review standards to be a priority area requiring substantive change, suggest that it is the sheer number of appeals, rather than their type or the review standard applied, that circuit judges would like to see changed. One way to decrease the number of appeals would be to increase the use of waivers of appeal, which was supported by the majority of circuit judges. In addition, in response to an open-ended question about what one change they would make to reduce any burden from appellate review of sentences, the largest proportion of circuit judge respondents (17%) cited making appellate review discretionary.

Table 14
Extent of agreement with statements about appellate review of guideline sentences

Response	Respondent Group		
	District Judges	Circuit Judges	Chief Probation Officers
The circumstances under which a district court can correct its own errors should be expanded.	538 (92.1%)	n/a	82 (94.3%)
The time period within which a district court can correct its own errors should be expanded.	498 (85.6%)	n/a	81 (94.2%)
When courts of appeals have split on an issue, the U.S.S.C. should clarify its intent through guideline amendments.	455 (78.2%)	113 (81.3%)	73 (83.9%)
There should be no post-conviction collateral review of sentences under the guidelines.	417 (72.1%)	81 (59.6%)	43 (51.8%)
Courts of appeals decisions provide adequate guidance for district court sentencing.	393 (67.4%)	n/a	63 (72.4%)
Waivers of appeal should be used <i>more</i> frequently.	366 (67.2%)	81 (62.3%)	52 (63.4%)
Waivers of appeal should be used <i>less</i> frequently.	155 (29.8%)	40 (24.2%)	22 (26.8%)
Sentence agreements in plea bargains should ordinarily be binding and not reviewable.	n/a	113 (83.1%)	n/a
The number of guideline sentence appeals is unduly burdensome on appellate judges.	n/a	88 (63.3%)	n/a
Waivers of appeal should not include ineffective assistance of counsel in pleading guilty.	n/a	80 (61.0%)	n/a
Waivers of appeal should not include appeal of upward departures.	n/a	67 (51.1%)	n/a
The appellate burdens created by the Sentencing Reform Act have leveled off or are decreasing.	n/a	67 (51.1%)	n/a
Appellate review of guideline sentences should be limited to cases in which the court of appeals grants leave to appeal.	n/a	66 (48.1%)	n/a

Note: This appeared as Question 32 in the district judge and chief probation officer questionnaire and as Question 5 in the circuit judge questionnaire. As indicated, there were some differences in the statements presented in the two surveys; statements below the line were presented only to circuit judges. Statements above the line are listed in descending order according to the number of district judges that agreed with them; below the line, statements are listed in descending order according to the number of circuit judges that agreed with them. The table shows the number and percentage of each group agreeing (either somewhat or strongly) with each statement.

Criminal history

Chief probation officers ranked criminal history sixth as an area requiring substantive change, while district and circuit judges placed it at or near the bottom of their rankings. In addition, when asked to rate on a 1 to 7 scale the importance of various potential changes to the guidelines, all three groups assigned their lowest average importance rating to decreasing the number of criminal history categories. Determining the relevant criminal history category also received a low average level-of-difficulty rating from both district judges and chief probation officers, who were asked to rate the difficulty of various steps in the sentencing process.

Although these responses suggest that respondents believe that the number of criminal history categories is appropriate and that the criminal history guidelines are relatively easy to apply, answers to other questions suggest that respondents believe certain changes to the criminal history guidelines should be made. In particular, more than 90% of district judges and chief probation officers agreed that: (1) criminal history points should rely more on the nature of the prior offense than on prior sentence length; and (2) prior violence should be given more weight in criminal history scoring. These responses reflect a view that offenders with a history of violent crime should be sentenced more severely than they currently are, and more severely than those without a history of violence.

Retroactivity of guideline amendments

All three groups assigned relatively low rankings to retroactivity of guideline amendments as an area requiring substantive change. When asked whether they thought amendments to the guidelines should be made retroactive, a slight majority (53%) of district judges said no, while larger majorities of circuit judges and chief probation officers (69% each) said yes. Even those who said amendments should be made retroactive under some circumstances, however, tended to say this should be done infrequently. Factors that all three groups thought should be of primary concern when determining whether an amendment should be made retroactive were: (1) fairness to incarcerated offenders; and (2) the rationale for the amendment.

5. Respondents' evaluations of various participants in the guideline process

As a follow-up to an earlier study conducted by the Sentencing Commission,⁵ we asked respondents for their evaluations of the level of guideline knowledge of various participants in the sentencing process, including judges, probation officers, and attorneys. We also asked for their views of how well the Sentencing Commission and the Judicial Conference have kept the judiciary informed about guideline changes and responded to judges' concerns about the guidelines.

5. 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, December 1991.

Participants' levels of knowledge

Tables 15 and 16 show chief probation officer and district judge ratings of the level of guideline knowledge of district judges, probation officers, assistant U.S. attorneys, federal public defenders, CJA panel attorneys, and private defense attorneys.

Table 15
Chief probation officer ratings of participants' guidelines knowledge

Participant	Chief Probation Officer Rating of Participants' Guidelines Knowledge				
	Excellent	Very Good	Fair	Poor	Very Poor
District Judges	13 (15.1%)	56 (65.1%)	15 (17.4%)	2 (2.3%)	0
Probation Officers	67 (76.1%)	21 (23.9%)	0	0	0
Asst. U.S. Attorneys	7 (8.1%)	41 (47.7%)	34 (39.5%)	3 (3.5%)	1 (1.2%)
Fed. Public Defenders	28 (38.9%)	33 (45.8%)	9 (12.5%)	1 (1.4%)	1 (1.4%)
CJA Panel Attorneys	0	15 (17.4%)	49 (57.0%)	19 (22.1%)	3 (3.5%)
Private Attorneys	2 (2.4%)	7 (8.3%)	39 (45.9%)	33 (38.8%)	4 (4.7%)

Note: This appeared as Question 37 in the district judge and chief probation officer questionnaire, and was not asked of circuit judges.

Table 16
District judge ratings of participants' guidelines knowledge

Participant	District Judge Rating of Participants' Guidelines Knowledge				
	Excellent	Very Good	Fair	Poor	Very Poor
District Judges	117 (21.1%)	352 (63.5%)	81 (14.6%)	4 (0.7%)	0
Probation Officers	335 (58.4%)	206 (35.9%)	32 (5.6%)	1 (0.2%)	0
Asst. U.S. Attorneys	109 (19.0%)	322 (56.2%)	128 (22.3%)	13 (2.3%)	1 (0.2%)
Fed. Public Defenders	148 (28.6%)	293 (56.6%)	69 (13.3%)	7 (1.4%)	1 (0.2%)
CJA Panel Attorneys	32 (5.6%)	164 (28.9%)	284 (50.0%)	78 (13.7%)	10 (1.8%)
Private Attorneys	29 (5.1%)	139 (24.6%)	260 (45.9%)	113 (20.0%)	25 (4.4%)

As these tables show, both of the groups generally rated probation officers, district judges, assistant U.S. attorneys, and federal public defenders as having excellent or very good knowledge of the Sentencing Guidelines. Within this grouping, probation officers received the most favorable ratings and assistant U.S. attorneys the least favorable. CJA panel attorneys and private defense attorneys were generally rated as having fair or poor knowledge of the guidelines. These results are largely consistent with those from the Commission's 1991 inquiry and suggest that private defense attorneys have not greatly improved in their level of guideline knowledge over the last five years.

Also consistent with these responses, more than 80% of district judges and chief probation officers said they think that more guidelines education and training is needed for CJA and private defense attorneys. Respondents generally supported

further guidelines education for all groups, but smaller majorities agreed there was a need for such education for the groups that were rated as having higher current levels of guideline knowledge.

Responsiveness of Sentencing Commission & Judicial Conference

More than three-quarters of each respondent group (district judges, circuit judges, and chief probation officers) agreed that the Sentencing Commission and the Judicial Conference have kept the judiciary adequately informed about pending amendments to the guidelines. Respondents were less likely to agree that the two bodies have adequately responded to judges' concerns about the guidelines: fewer than two-thirds of each group agreed that the Sentencing Commission adequately responds to judges' concerns about the guidelines, while the percentages agreeing that the Judicial Conference adequately responds to such concerns were 56% (district judges), 59% (circuit judges), and 88% (chief probation officers). Although these percentages are lower than those agreeing that the judiciary is kept adequately informed, they still reflect a majority of respondents who believe the Sentencing Commission and Judicial Conference are sufficiently responsive to judges' concerns.

Appendices A, B, and C are omitted