Special Report to the Congress:

Mandatory Minimum Penalties in the Federal Criminal Justice System*

United States Sentencing Commission
August 1991
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In 1984, Congress enacted the most sweeping and dramatic reform of federal sentencing -- the Sentencing Reform Act. The Act was part of the Comprehensive Crime Control Act, whose purpose was to address the problem of crime in society. The goals of the Sentencing Reform Act were to reduce unwarranted disparity, increase certainty and uniformity, and correct past patterns of undue leniency for certain categories of serious offenses.

In order to achieve these goals, Congress created the United States Sentencing Commission as an independent, permanent agency in the judicial branch; the seven appointed members were to be confirmed by the Senate, bipartisan, judges and non-judges, and drawn from the ranks of those who had demonstrated expertise in the criminal justice area. An overriding mandate to the Sentencing Commission was to determine the appropriate type(s) and length of sentence(s) for each of the more than 2,000 federal offenses. Congress simultaneously eliminated parole so that sentences pronounced would be sentences served.

Discretion previously vested in the federal judiciary to set sentences would be vastly curtailed by the mandatory guidelines that the Sentencing Commission would promulgate. Discretion would not be eliminated; rather, it would be structured by a guidelines system responsive to congressional direction as set forth in the Sentencing Reform Act.

The Sentencing Commission was appointed in 1985. The first set of guidelines was submitted to Congress in April 1987, and became law in November 1987. Between 1987 and 1989, more than 300 challenges to the constitutionality of the guidelines and the Sentencing Commission precluded full nationwide implementation. In January 1989, the Supreme Court upheld the constitutionality of the Sentencing Commission and the guidelines in Mistretta v. United States, 488 U.S. 361 (1989). Full nationwide implementation of the federal sentencing guidelines thus began in late January 1989.

Simultaneous to the development and implementation of the federal sentencing guidelines, Congress enacted a number of statutes imposing mandatory minimum sentences, largely for drug and weapons offenses, and for recidivist offenders. The Sentencing Commission drafted the new guidelines to accommodate these mandatory minimum provisions by anchoring the guidelines to them.

In 1990, Congress 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. It is to this directive that the attached report is addressed.

Based upon a review of available data, the Sentencing Commission makes the following observations:

- There are over 60 criminal statutes that contain mandatory minimum penalties applicable to federal offenses in the federal criminal code today. Only four of these sixty statutes, however, frequently result in convictions; the four relate to drug and weapons offenses. (See discussion, Chapter 2.)

- Despite the expectation that mandatory minimum sentences would be applied to all cases that meet the statutory criteria of eligibility, the available data suggest that this is not the case. This lack of uniform application creates unwarranted disparity in sentencing, and compromises

the potential for the guidelines sentencing system to reduce disparity. (See general discussion of data and findings at Chapter 5 and discussion related to lack of uniformity at Chapter 4.)

- In 35 percent of cases in which available data strongly suggest that the defendant's behavior warrants a sentence under a mandatory minimum statute, defendants plead guilty to offenses carrying non-mandatory minimum or reduced mandatory minimum provisions. Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised. (See Chapter 5 for findings related to the charging and plea negotiation processes and Chapter 4 for potential conflicts between the guidelines system and a non-reviewable plea process.)

- The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum; and to the circuit in which the defendant happens to be sentenced, where defendants sentenced in some circuits are more likely to be sentenced below the applicable mandatory minimums than defendants sentenced in other circuits. This differential application on the basis of race and circuit reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce. (See findings, Chapter 5.)

- Whereas the structure of the federal sentencing guidelines differentiates defendants convicted of the same offense by a variety of aggravating and mitigating factors, the consideration of which is meant to provide just punishment and proportional sentences, the structure of mandatory minimums lacks these distinguishing characteristics. Under the guidelines, offenders classified as similar receive similar sentences; under mandatory minimums, offenders seemingly not similar nonetheless receive similar sentences. It thus appears that an unintended effect of mandatory minimums is unwarranted sentencing uniformity. (See discussion, Chapter 4.)

- Deterrence, a primary goal of the Sentencing Reform Act and the Comprehensive Crime Control Act, is dependent on certainty and appropriate severity. While mandatory minimum sentences may increase severity, the data suggest that uneven application may dramatically reduce certainty. The consequence of this bifurcated pattern is likely to thwart the deterrent value of mandatory minimums. (See Chapter 4 for general discussion of issues and Chapter 5 for discussion of data and findings.)

- The Sentencing Reform Act was meant to structure and curtail the pre-guidelines pattern of unfettered judicial discretion. Congress, however, expressed a concern that judicial discretion not be transferred to federal prosecutors in a manner that would undermine the benefits expected to be gained from the guidelines system. The guidelines structure attempts to strike an appropriate balance by implementing a modified real offense system. Mandatory minimums, in contrast, are wholly dependent upon defendants being charged and convicted of the specified offense under the mandatory minimum statute. Since the power to determine the charge of conviction rests exclusively with the prosecution for the 85 percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution. To the extent that prosecutorial discretion is exercised with preference to some

and not to others, and to the extent that some are convicted of conduct carrying a mandatory minimum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced. (See Chapter 4 for discussion of issues and Chapter 5 for discussion of findings.)

- The sentencing guidelines system is essentially a system of finely calibrated sentences. For example, as the quantity of drugs increases, there is a proportional increase in the sentence. In marked contrast, the mandatory minimums are essentially a flat, tariff-like approach to sentencing. Whereas guidelines seek a smooth continuum, mandatory minimums result in "cliffs." The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act. (See Chapter 4.)

- The United States Sentencing Commission, consistent with the mandate established by Congress, promulgates guidelines and amendments to the guidelines in an iterative fashion. Amendments reflect changes in statutory maximums, new directives from Congress to the Sentencing Commission, empirical research on the implementation and effect of guidelines, emergent case law, the changing nature of crime, changing priorities in prosecution, and developments in knowledge about effective crime control. The guidelines system, as envisioned by Congress, is thus a self-correcting, and, hopefully, ever-improving system. In contrast, mandatory minimums are generally single-shot efforts at crime control intended to produce dramatic results. They lack, however, a built-in mechanism for evaluating their effectiveness and easy adjustment. (See Chapter 7.)

- Congress has ultimate authority over sentencing policy. The question is how Congress can best translate its judgment as to appropriate levels of sentence severity into sentences imposed. Our analyses indicate that the guidelines system established by Congress, because of its ability to accommodate the vast array of relevant offense/offender characteristics, and its self-correcting potential, is superior to the mandatory minimum approach. Congress has effectively communicated its policies on sentencing through the provisions contained in the Sentencing Reform Act and subsequent legislation. It has continuing oversight of the work of the Sentencing Commission through the statutory requirement that proposed guidelines and amendments to guidelines be submitted to Congress for 180-day review before they become effective. The Sentencing Commission is always open to guidance from the Congress through its established oversight mechanisms.

Accordingly, we conclude that the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums. There is every reason to expect that by so doing, Congress can achieve the purposes of mandatory minimums while not compromising other goals to which it is simultaneously committed. (See discussion of alternative methods in Chapter 7.)

Chapter 1

Introduction: The Statutory Directive and Organization of this Report

This Report to Congress is submitted by the United States Sentencing Commission. The Sentencing Commission was created by the Sentencing Reform Act of 1984, and its authorities and duties are set out in chapter 58 of title 28, United States Code.

The Sentencing Commission's primary function is to "establish sentencing policies and practices for the federal criminal justice system," 28 U.S.C. § 991(b), through a system of guidelines that prescribes the appropriate form and severity of punishment for offenders convicted of federal crimes. See 28 U.S.C. § 994.

As required by 28 U.S.C. § 991(b), the sentencing guidelines promulgated by the Sentencing Commission are intended to:

- Promote the purposes of sentencing enumerated in 18 U.S.C. § 3553(a)(2); briefly, these purposes are just punishment, deterrence, incapacitation, and rehabilitation;

- Provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors; and

- Reflect, to the extent practicable, advancement in the knowledge of human behavior as related to the criminal justice process.

The Sentencing Commission submits this Report to Congress pursuant to its general authority under 28 U.S.C. § 995(a)(20),[1] and, more specifically, to the statutory directive contained in section 1703 of Public Law 101-647[2] (hereafter the "statutory directive") requiring a report on mandatory minimum sentencing provisions. Subsection (b) of the statutory directive requires that this Report include the following:

1) a compilation of all mandatory minimum sentencing provisions in Federal law;

2) an assessment of the effect of mandatory minimum sentencing provisions on the goal of eliminating unwarranted sentencing disparity;

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[1]Section 995(a)(20) of title 28, United States Code, provides that the Commission shall have authority to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy."

[2]104 Stat. 4846.

3) a projection of the impact of mandatory minimum sentencing provisions on the Federal prison population;

4) an assessment of the compatibility of mandatory minimum sentencing provisions and the sentencing guidelines system established by the Sentencing Reform Act of 1984;

5) a description of the interaction between mandatory minimum sentencing provisions and plea agreements;

6) a detailed empirical research study of the effect of mandatory minimum penalties in the Federal system;

7) a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can express itself with respect to sentencing policy, such as:

   A) specific statutory instructions to the Sentencing Commission;
   B) general statutory instructions to the Sentencing Commission;
   C) increasing or decreasing the maximum sentence authorized for particular crimes;
   D) Sense of Congress resolutions; and

8) any other information that the Commission would contribute to a thorough assessment of mandatory minimum sentencing provisions.

To meet the objectives of the statutory directive, this Report is organized in the following manner. Chapter 2 of the Report provides an overview of mandatory minimum sentencing in the federal criminal justice system, including a brief history of the development of this approach to sentencing and a description of the status of mandatory minimums today. Chapter 2 is intended to provide background helpful to an understanding of the analysis presented in later chapters.

Chapter 3 of the Report describes the advent of the federal sentencing guidelines system established by the Sentencing Reform Act of 1984 -- a congressionally chartered approach to determinate sentencing that is distinct from mandatory minimum sentencing provisions. This chapter lays a foundation for Chapter 4 which offers a comprehensive analysis of the compatibility of mandatory minimum sentencing provisions and the federal sentencing guidelines system, as called for by subsection (b)(4) of the statutory directive. In providing a comparison of these two approaches to determinate sentencing, Chapter 4 discusses implications relating both to the goal of eliminating unwarranted sentencing disparity, as called for by subsection (b)(2) of the statutory directive, and to the operation of the plea process, as called for by subsection (b)(5).

Chapter 5 of the Report provides a detailed empirical study of mandatory minimum sentencing as required by subsection (b)(6) of the statutory directive. This chapter analyzes historical trends in the use of mandatory minimum provisions, provides a profile of defendants convicted of offenses carrying mandatory minimum penalties, and examines the use of mandatory minimum charges in the plea process. The analysis in Chapter 5 relating to plea bargaining provides the principal means by which the Report satisfies the requirement in subsection (b)(5) of the statutory directive (requiring analysis of the impact of mandatory minimums on plea agreements). Chapter 5 also

presents key analyses relating to the issue of how mandatory minimums may affect unwarranted sentencing disparity, as required by subsection (b)(2) of the statutory directive.

Chapter 6 provides a range of information helpful to an understanding of the impact of mandatory minimums on the federal criminal justice system. Included in this chapter are a synopsis of views from the Judicial Conference of the United States and a description of findings by the congressionally chartered Federal Courts Study Committee. Also presented in Chapter 6 are the results of extensive interviews conducted by the Sentencing Commission with the principal actors in the federal criminal justice system -- judges, assistant United States attorneys, assistant federal defenders and other defense attorneys, and probation officers -- regarding their views on mandatory minimum sentencing. The detailed information provided through these interviews is supplemented by a preliminary survey of these key criminal justice professionals. Finally, Chapter 6 presents an assessment of the impact of mandatory minimum sentencing provisions on the federal prison population, as required by subsection (b)(3) of the statutory directive.

Chapter 7 presents an analysis of methods Congress may employ to effect sentencing policy other than through enactment of mandatory minimums. This chapter focuses on new alternatives available to Congress in an era of guidelines sentencing and assesses the general merits of each alternative approach. Chapter 7 is intended to meet the requirement of subsection (b)(7) of the statutory directive.

This Report contains numerous appendices. Appendix A provides a listing of the mandatory minimum sentencing provisions in effect today, as required by subsection (b)(1) of the statutory directive. Other appendices, referenced in the text of the Report, provide information the Sentencing Commission believes may be useful to a thorough understanding of the underlying issues.

A Note About Terminology

As used in this Report, "mandatory minimums," "mandatory minimum sentencing provisions," and related terms refer to statutory[3] provisions requiring the imposition of at least a specified minimum sentence when criteria specified in the relevant statute have been met. Criteria requiring imposition of minimum sentences vary. For example, some mandatory sentences are triggered by offense characteristics, such as an amount of drugs or where the drugs were sold.[4] Others are triggered by offender characteristics, such as a prior conviction for the same offense, or by victim characteristics, such as the age of the person to whom drugs were sold.[5] Under some statutes, a

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[3]Consistent with the intent of the statutory directive for this Report, only minimums required by statute are considered to be "mandatory minimums." Not included in the definitions (and in fact contrasted with mandatory minimums in a later chapter of this Report) are sentences required by the federal sentencing guidelines. Although this distinction is commonly understood, there appears to be sufficient confusion among some observers that the distinction warrants note.

[4]See, e.g., 21 U.S.C. §§ 841, 845a, respectively.

[5]See, e.g., relevant penalties in 21 U.S.C. §§ 841(b)(1)(A), 845b, respectively.

mandatory prison term is only required when the court otherwise determines to impose a sentence of imprisonment.[6]

The operation of mandatory sentencing provisions also varies. Most mandatory minimum provisions are found within a statute proscribing a particular offense and serve as one feature of the overall penalty scheme for that offense. For example, under 21 U.S.C. § 841(b)(1)(A), distribution of certain quantities of drugs is punishable by a prison term of ten years to life. In this instance, the mandatory minimum is ten years but the sentence could be higher.

Other statutes provide for what might be called a "flat" mandatory sentence. These provisions typically, though not necessarily, operate as sentence "enhancements" or "add-ons." For example, 18 U.S.C. § 924(c) requires an unvarying five-year sentence when a defendant is convicted of using a firearm during a "crime of violence" or "drug trafficking crime." The mandatory minimum in this instance is "flat" in the sense that the five-year term is the only sentence that may be imposed for the section 924(c) offense. The section 924(c) penalty tends to operate as an "enhancement" or "add-on" in the sense that a section 924(c) violation by definition occurs in connection with an underlying offense (although a defendant need not be convicted of that underlying offense). If a conviction is obtained for both the underlying offense and a section 924(c) count, the section 924(c) penalty must be made consecutive to the sentence for the underlying offense.

For purposes of this Report, the term "mandatory minimums" and like terms are intended to subsume all of these and any related permutations.

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[6] See, e.g., 15 U.S.C. § 1245.

Chapter 2

An Overview of Mandatory Minimums in the Federal Criminal Justice System

A. The Development of Mandatory Minimum Sentencing Provisions

Mandatory minimum sentences are not new to the federal criminal justice system. As early as 1790, mandatory penalties had been established for capital offenses.[7] In addition, at subsequent intervals throughout the 19th Century, Congress enacted provisions that required definite prison terms, typically quite short, for a variety of other crimes.[8] 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.[9]

A change in practice occurred with the passage of the Narcotic Control Act of 1956,[10] which mandated minimum sentences of considerable length for most drug importation and distribution offenses. Explaining its rationale for the bill, the Senate Judiciary Committee endorsed the following passage from the report of the President's Interdepartmental Committee on Narcotics:

> [T]here is a need for the continuation of the policy of punishment of a severe character as a deterrent to narcotic law violations. [The committee] therefore recommends an increase of maximum sentences for first as well as subsequent offenses. With respect to the mandatory minimum features of such penalties, and prohibition of suspended sentences or probation, the committee recognizes objections in principle. It feels, however, that, in order to define the gravity of this class of crime and the assured penalty to follow, these features of the law must be regarded as essential elements of the desired deterrents,

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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.

Approximately a dozen provisions that date back to the 1800's 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.

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.

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

> although some differences of opinion still exist regarding their application to first offenses of certain types.[11]

The 1956 Act provided mandatory ranges within which the court was required to select a specific sentence. 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.[12] For example, the sale of heroin was made punishable under the Act by a term of imprisonment of from five to ten years for a first conviction, ten to 30 years imprisonment for a second conviction, and by life imprisonment or death for a third or subsequent conviction. Enhanced penalties were prescribed for particular offense characteristics such as the sale of narcotics to a person under the age of 18. The enhancement for this conduct was a minimum penalty of ten years imprisonment and a maximum of life imprisonment or death.[13]

In 1970, Congress drew back from the comprehensive application of mandatory minimum provisions to drug crimes enacted 14 years earlier. Finding that increases in sentence length "had not shown the expected overall reduction in drug law violations,"[14] Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970[15] 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,"[16] 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."[17] 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 circumstances, and which treat casual violators as severely

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[11]S. Rep. No. 1997, 84th Cong., 2d Sess. 6 (1956).

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

[13]Id., Sec. 107.

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

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

[16]Id.

[17]Id.

> as they treat hardened criminals, tend to make conviction somewhat more difficult to obtain.[18]

In any case, "[t]he 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."[19]

Despite this pulling back from mandatory minimum sentences, a shift in attitude toward sentencing was underway that was to lay the groundwork for new rounds of mandatory minimums in the state and federal systems during the 1980's. To understand that shift, however, it is first necessary to understand how the criminal justice community has tended to view prisons historically.

For much of this century a dominant view in the field of corrections was that prisons existed primarily to "cure" and rehabilitate inmates.[20] As a result, courts and parole and correctional authorities had virtually unfettered control over the amount of time an offender served in prison. Courts were expected to use their discretion to assess an offender's potential for rehabilitation; parole authorities were to use their discretion to evaluate the progress the offender actually made; and correctional authorities dictated the amount of sentence reduction an offender might receive due to "good" behavior while in prison.

Over the past 20 years or so, this approach to sentencing has become subject to gradual but increasing criticism. Critics posited that rehabilitation was difficult to accomplish and measure and that wide-open judicial discretion and parole actually exacerbated the problems of controlling crime. They urged that a system of determinate sentencing would increase sentencing effectiveness by requiring sentences that are more certain, less disparate, and more appropriately punitive.[21]

This shift in attitude toward sentencing took legislative form in two ways during the 1980's. In 1984, after nearly a decade of bipartisan effort, Congress enacted the Sentencing Reform Act of 1984.[22] This law established the United States Sentencing Commission and directed it to develop an unprecedented body of laws to regulate federal sentencing: the federal sentencing guidelines.[23] The second approach

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

[19]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.

[20]For a discussion of the rehabilitative view toward prisons, see Nagel, "Foreword: Structuring

[20]Sentencing Discretion: The New Federal Sentencing Guidelines," 80 J. Crim. L. & Criminology 883, 893-95 (1990).

[21]See id. at 895-99.

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

[23]The theory and approach of the Sentencing Reform Act is described in detail in Chapters 3 and 4 of this Report.

lawmakers took was to renew support for mandatory minimum penalties. On the state level 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 of the 50 states had passed such provisions.[24] Most states added mandatory minimum provisions to their books 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.[25]

On the federal level, a comparable but more comprehensive trend was underway. Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime. In 1984, 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 also established mandatory minimum sentences for drug offenses committed near schools,[26] mandated prison for all serious felonies and established a minimum one-year term of probation for less serious felonies,[27] and provided sentencing enhancements for the possession of especially dangerous ammunition during drug and violent crimes.[28] A particularly significant feature of the 1984 Act was a change made to 18 U.S.C. § 924(c) that provides for substantial mandatory sentencing add-ons or enhancements for the use or carrying of a firearm during a broadly defined crime of violence.[29]

Responding to ever-heightening public concern,[30] the trend of targeting drug and violent crimes to receive mandatory minimum sentences continued with the Firearm Owners' Protection Act[31] and the Anti-Drug Abuse Act of 1986.[32] 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

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

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

[26]See Pub. L. 98-473, §503(a), 98 Stat. 2069 (1984), amending 21 U.S.C. § 860 (formerly § 845a).

[27]See Pub. L. 98-473, §212(a)(2), 98 Stat. 1992 (1984), amending 18 U.S.C. § 3561(b)(1).

[28]See Pub. L. 98-473, §1006(a), 98 Stat. 2139 (1984), adding 18 U.S.C. § 929.

[29]See Pub. L. 98-473, §1005(a), 98 Stat. 2138 (1984).

[30]See, generally, *U.S. News and World Report*, July 28, 1986, Aug. 25, 1986, Sept. 22 and 29, 1986; *Time*, Sept. 15 and 22, 1986; *Newsweek*, Sept. 22 and 29, 1986.

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

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

crime.[33] The 1986 Anti-Drug Abuse Act also contained mandatory minimum provisions that stiffened penalties for the offender who sold drugs to a person under age 21,[34] who employed a person under age 18 in a drug offense,[35] and who possessed certain weapons.[36]

Most significantly, the 1986 Anti-Drug Abuse Act set up a new regime of non-parolable, 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 conviction of the same offense. Thus, for example, one kilogram or more of a mixture or substance containing heroin triggered the ten-year mandatory minimum, as did five kilograms or more of a mixture or substance containing cocaine.[37]

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. The Act triggered the five-year mandatory minimum by 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. 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.[38] 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.

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[33] See Pub. L. 99-308, §104(a)(2)(A-E), 100 Stat. 456 (1986), amending 18 U.S.C. § 924(c); Pub. L. 99-570, §1402(a), 100 Stat. 3207-39 (1986), amending 18 U.S.C. § 924(e)(1).

[34] See Pub. L. 99-570, §1105(a), 100 Stat. 3207-11 (1986), amending 21 U.S.C. § 859 (formerly § 845).

[35] See Pub. L. 99-570, §1102, 100 Stat. 3207-11 (1986), amending 21 U.S.C. § 861 (formerly § 845b).

[36] See Pub. L. 99-570, §10002, 100 Stat. 3207-167 (1986), amending 15 U.S.C. § 1245. See also Pub. L. 99-308, §104(a)(4), 100 Stat. 458 (1986), (amending 18 U.S.C. § 924(e)(1) to provide increased penalties for certain felons and others in possession of a firearm).

[37] See 21 U.S.C. § 841(b)(1)(A).

[38] See Pub. L. 100-690, §6470(a), 102 Stat. 4377 (1988).

Although early versions of the legislation contained a substantial number of mandatory minimum provisions relating to drugs and guns, Congress ultimately limited enactment of mandatory minimums in the 1990 Omnibus Crime Bill to a ten-year mandatory sentence for organizing, managing, or supervising a continuing financial crimes enterprise.[39]

B. Mandatory Minimum Penalties Today

A General Overview

Today there are approximately 100 separate federal mandatory minimum penalty provisions located in 60 different criminal statutes.[40] The sheer number of these provisions, however, creates a somewhat misleading picture of the way in which federal mandatory minimum provisions are applied. In practice, relatively few statutes requiring mandatory minimum sentences are used with frequency; a considerably larger number of mandatory minimum statutes are virtually never used.

Efforts to identify the frequency with which mandatory minimum provisions have resulted in convictions are frustrated by a lack of data. Prior to 1989, data collection efforts did not identify specific sections within statutes of conviction, making it impossible to clearly enumerate the number of convictions under mandatory minimum provisions. However, some idea of the extent of usage can be gleaned by examining the number of convictions under statutes that contain mandatory minimum sections and subsections.

Table 1 sets forth the number of cases during the period 1984-90 that were sentenced pursuant to statutes containing mandatory minimum sentencing provisions.[41] Of the 59,780 cases sentenced under mandatory minimum statutes during this period, four statutes account for approximately 94 percent of the cases. These four statutes, 21 U.S.C. § 841 (manufacture and distribution of controlled substances), 21 U.S.C. § 844 (possession of controlled substances), 21 U.S.C. § 960 (penalties for the importation/exportation of controlled substances), and 18 U.S.C. § 924(c) (minimum sentence enhancements for carrying a firearm during a drug or violent crime) all involve drugs and weapons violations. All other mandatory minimum statutes (93 percent of these statutes) account for only six percent of the sentences imposed pursuant to mandatory minimum statutes. More than one-half of the 60 statutes containing mandatory minimum provisions were never used during the 1984-90 period,

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[39] See 18 U.S.C. § 225.

[40] Pursuant to Pub. L. 101-647, §1703(b)(1), a complete listing of these statutes is set forth in Appendix A.

[41] Some statutes listed in Table 1 contain both mandatory minimum and non-mandatory minimum sentencing provisions. Since Table 1 reports cases sentenced pursuant to statutes "that contain" mandatory minimum provisions, some cases accounted for may not have had a mandatory minimum sentence imposed. Nevertheless, Table 1 provides a general means of gauging the frequency with which various mandatory minimum statutes are used.

For further discussion of the frequency with which these provisions are used, see Chapter 5, Section B of this Report.

while six were used six or fewer times. This is not to diminish the impact of the mandatory minimum provisions in force today. As noted, nearly 60,000 cases have been sentenced under federal statutes with mandatory minimum provisions since 1984. In principle, it appears very likely that the mandatory minimum provisions in the four statutes noted above are contributing to substantially longer terms served in prison than in the past -- a result that Congress appears to have intended.[42]

The likely increase in time served should not be surprising due to the increased penalties provided by statute. For example, the minimum sentence required for a first offense use of a firearm during a drug or violent crime has evolved from none prior to 1968, to one year prior to 1984, to five years plus the sentence for the underlying offense (which may well also carry a mandatory minimum) thereafter. See 18 U.S.C. § 924(c). The minimum penalties for second offenses of this type have evolved from two-year sentences prior to 1984, to ten-year add-ons prior to 1988, to 20-year add-ons today. Enhancements for the first offense use of a machine gun have evolved from no enhancements to 30 years in two decades. These mandatory increases would necessarily lead to increases in actual time served. Similar trends hold for drug offense statutes.

Pending Legislation

The Violent Crime Control Act of 1991,[43] which passed the Senate on July 11, 1991, includes a substantial increase in the number of mandatory minimum provisions. 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. A complete list of pending[44] bills containing mandatory minimum provisions is set out in Appendix B.

C. Reasons Cited in Support of Mandatory Minimums

In examining the reasons that have led to support for mandatory minimum penalties, the Sentencing Commission conducted a comprehensive review of relevant legislative history, Executive Branch statements, and views expressed in academic literature.[45] The Sentencing Commission conducted and subsequently analyzed field interviews with judges, assistant United States attorneys, defense attorneys, and probation officers to better understand the perceived costs and benefits ascribed to mandatory

[42]A more complete treatment of the impact of mandatory minimum provisions on prisons and other aspects of the federal criminal justice system is set forth in Chapters 5 and 6 of this Report.

[43]S. 1241, 102d Cong., 2d Sess., 137 Cong. Rec. 59982 (daily ed. July 15, 1991).

[44]As of the submission of this Report.

[45]Selected articles on mandatory minimums from academic and professional literature, along with articles from the popular press, are listed in Appendix C.

minimums by those with practical federal criminal justice experience.[46] These analyses identified six commonly-offered rationales for mandatory minimum sentencing provisions.

Retribution or "Just Deserts." Perhaps the most commonly-voiced goal of mandatory minimum penalties is the "justness" of long prison terms for particularly serious offenses. Proponents generally agree that longer sentences are deserved and that, absent mandatory penalties, judges would impose sentences more lenient than would be appropriate.

Deterrence. By requiring the imposition of substantial penalties for targeted offenses, mandatory minimums are intended both to discourage the individual sentenced to a mandatory minimum from further involvement in crime (i.e., specific deterrence) and, by example, to discourage other potential lawbreakers from committing similar offenses (i.e., general deterrence). Those supporting mandatory minimums on deterrence grounds point not only to the strong deterrent value of the certainty of substantial punishment these penalties are intended to provide, but also to the deterrent value of sentence severity that these penalties are intended to ensure in the war against crime.

Incapacitation, Especially of the Serious Offender. Mandating increased sentence severity aims to protect the public by incapacitating offenders convicted of serious crimes for definite, and generally substantial, periods of time. Proponents argue that one way to increase public safety, particularly with respect to guns and drugs, is to remove drug dealers and violent offenders from the streets for extended periods of time.

Disparity. Indeterminate sentencing systems permit substantial latitude in setting the sentence, which in turn can mean that defendants convicted of the same offense are sentenced to widely disparate sentences. Supporters of mandatory minimum penalties contend that they greatly reduce judicial discretion and are therefore more fair. Mandatory minimums are meant to ensure that defendants convicted of similar offenses receive penalties that at least begin at the same minimal point.[47]

Inducement of Cooperation. Because they provide specific lengthy sentences, mandatory minimums encourage offenders to assist in the investigation of criminal conduct by others. This is because cooperation -- that is, supplying information concerning the activities of other criminally involved individuals -- is the only statutorily-recognized way[48] to permit the court to impose a sentence below the length of imprisonment required by the mandatory minimum sentence.

Inducement of Pleas. Although infrequently cited by policymakers, prosecutors express the view that mandatory minimum sentences can be valuable tools in obtaining guilty pleas, saving scarce

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[46]A detailed description of the findings of these interviews is presented in Chapter 6, Section B of this Report.

[47]In the past, mandatory minimum supporters argued that mandatory penalties also reduced parole discretion. Under current federal law, sentences imposed for offenses committed on or after November 1, 1987, however, are no longer subject to parole. This change in federal law and other features of the Sentencing Reform Act are discussed in greater detail in Chapter 3 of this Report.

[48]See 18 U.S.C. § 3553(e).

enforcement resources and increasing the certainty of at least some measure of punishment. In this context, the value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge.[49]

[49] As discussed in Chapter 4, because the federal sentencing guidelines require courts to use a modified real offense approach to sentencing (i.e., an approach that to some extent looks behind the charge to the actual facts of the case), sentence lengths do not in all cases decrease when prosecutors drop or otherwise agree not to pursue a mandatory minimum charge in exchange for a guilty plea.

Chapter 3

The Establishment of the United States Sentencing Commission and the Advent of Guidelines Sentencing

A. The Sentencing Reform Act and its Goals

In 1984, after more than ten years of study and debate, a strongly bipartisan Congress launched an approach to determinate sentencing that, while sharing some common goals of mandatory minimum sentencing, was quite different. The Sentencing Reform Act of 1984 called on the President to appoint an expert, seven-member, full-time, bipartisan Commission to create sentencing guidelines that would effectively and rationally channel the sentencing discretion of the federal courts.[50]

The overarching mandate Congress gave the United States Sentencing Commission was to produce a guidelines system that would produce fair sentences and sharply curtail the unwarranted disparity in federal sentencing that Congress had found "shameful."[51] The reality of unwarranted sentencing disparity was well documented. In one study conducted prior to passage of the Sentencing Reform Act, 50 federal district court judges in the Second Circuit were given 20 identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant.[52] The variations in the judges' sentences were dramatic. In a bank robbery case, the sanctions ranged from a sentence of 18 years imprisonment and a $5,000 fine to five years imprisonment and no fine. In an extortion case, the range of sentences was even more striking -- one judge sentenced a defendant to 20 years imprisonment and a $65,000 fine, while another imposed a three-year prison sentence and no fine.

At the root of the problem was the fact that prior to November 1987 when the guidelines took effect, federal judges had virtually unlimited discretion to impose any sentence that they felt was appropriate in a given case. There were few constraints on what judges could or should consider when sentencing, save the statutory maximum sentence imposed by law. On the other hand, while judges wielded tremendous sentencing discretion, the potency of their sanction was often severely diluted by a parole commission that later resentenced the defendant according to its own set of rules.

Troubled by the unfairness and unwarranted disparity that resulted from such an unstructured system, Congress mounted a "sweeping"[53] overhaul of the federal sentencing process by passing the Sentencing Reform Act of 1984 that created the United States Sentencing Commission.

The legislation creating the Sentencing Commission identified three basic objectives:

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[50] See generally 28 U.S.C. §§ 991(b), 994.

[51] S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983).

[52] See Partridge and Eldridge, The Second Circuit Sentencing Study, A Report to the Judges 1-3 (1974). See also S. Rep. No. 225, 98th Cong., 1st Sess. 41-44 (1983).

[53] See S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983).

1) Congress sought certainty and honesty in sentencing. By abolishing parole and the indeterminate sentencing structure, the Act eliminated the need for federal judges to second guess future actions of the Parole Commission. A system of determinate sentencing allows a judge to sanction without fear that the sentence will be cut in half or more at a later date. The public, too, would be able to understand that the sentence imposed by the judge would represent the sentence the offender would serve.

2) Congress sought uniformity in sentencing so that similar defendants convicted of similar offenses would receive similar sentences. By enacting a law that limited the range of possible sentences to six months or 25 percent for similarly-situated offenders, Congress greatly reduced the ability of judges in the same or differing jurisdictions to sentence similarly-situated offenders to very different sentences.

3) Congress sought proportionality or just punishment in sentencing by creating a system that recognized differences between defendants and offenses and provided appropriate sentences with those differences in mind. In the drug area, for example, a courier whose role consisted solely of bringing drugs into the country would receive a sentence different from that of the kingpin who organized the drug distribution ring and received the bulk of its illicit profits.

Notably, these three overriding objectives -- certainty, reduction in unwarranted disparity, and just punishment -- are rationales frequently cited by those who support enactment of mandatory minimums. See Chapter 2, Section C of this Report. Congress also built directives into the Sentencing Commission's enabling statute that ensure that other goals of mandatory minimum provisions – deterrence, incapacitation of serious offenders, and cooperation with authorities -- would be fostered by the guidelines.[54]

B. The Sentencing Commission and the Development of the Guidelines

The U.S. Sentencing Commission, organized in late 1985, is an independent agency in the Judicial Branch of government. The Sentencing Commission 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. No more than four Commissioners may be of the same political party.[55] By statute, Commissioners hold full-time positions until November 1, 1993, at which time all Commissioners except the Chairman switch to part-time status.[56]

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 in the sentencing decision. These offense and offender characteristics were used to guide the development

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[54] See 28 U.S.C. § 991(b)(A) (citing 18 U.S.C. § 3553); 18 U.S.C. § 3553(a)(2)(A), (B), and (C); 28 U.S.C. § 994(h), (i), and (n).

[55] 28 U.S.C. § 991(a).

[56] 28 U.S.C. § 992.

of the guidelines. Thus, in drafting its guidelines, the Sentencing Commission, for the most part, provided judges with a norm predicated upon actual judicial experience. However, consistent with its mandate to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense,"[57] the Sentencing Commission drafted guidelines for some offense categories (e.g., civil rights violations, many white collar offenses, drug offenses) that increased penalties over past practice.[58]

The Sentencing Commission's initial guidelines were sent to the Congress on April 13, 1987, and after six months of review became effective on November 1, 1987. The guidelines and related sentencing provisions apply only to offenses that occur on or after this date. The Sentencing Commission 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 Sentencing Commission views the development of the guidelines sentencing system as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Sentencing Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

C. Guideline Implementation

A significant body of law has developed under the Sentencing Reform Act's provisions for appellate review of sentences. The Sentencing Commission analyzes the development of this federal law of sentencing in order to determine areas in which guideline amendments, research, or legislative action may be needed.

The Sentencing Commission has established a substantial research program to assist in the evaluation of the guidelines. A monitoring staff codes detailed sentencing information on every sentence imposed under the guidelines, and to date has collected data on over 78,000 cases. The Sentencing Commission uses this information to track application of the guidelines and make informed decisions regarding possible amendments.

Implementation statistics for the 29,011 defendants sentenced under the guidelines in fiscal year 1990 show that 83.3 percent received "within-guideline" sentences as established by the court. In 7.4 percent of the cases, the court departed downward upon a government motion that the defendant had substantially assisted authorities in the investigation or prosecution of others. The court

[57] 28 U.S.C. § 994(m).

[58] Guidelines sentences in the drug area were drafted to accommodate and, to the extent possible, rationalize mandatory minimum provisions established by the 1986 Anti-Drug Abuse Act.

departed upward from the specified guideline range in 2.3 percent of the cases and downward in the remaining 7.0 percent for aggravating or mitigating circumstances not considered by the guidelines.[59]

Research by the Sentencing Commission's monitoring division indicates that in fiscal year 1990, 87.1 percent of all defendants pleaded guilty; 12.9 percent were convicted after trial. While the proportion of guilty pleas to trials has remained relatively constant since implementation of the guidelines, the actual number of criminal trials has increased from 6,475 in 1985 to 8,931 in 1990, along with an increase in the overall number of criminal cases.

D. Guideline Development in the Future

As part of its mission to "establish sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process,"[60] the Sentencing Commission has a long-term research agenda. In the next few years, the Sentencing Commission will use its substantial research authority[61] to examine the effects of sentencing guidelines on the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2),[62] and such topics as deterrence, recidivism, and selective incapacitation. With the benefit of these studies, the Sentencing Commission expects to further the significant contribution to effective federal criminal justice policy it believes the guidelines are already making.

As explained more thoroughly in Chapter 4 of this Report, a court may depart from the guidelines only if the court finds reasons that meet a relatively narrow statutory standard. The court must state those reasons on the record, and the departure is subject to appellate review.

28 U.S.C. § 991(b)(1)(C).

[61] See generally 28 U.S.C. § 995.

[62] The purposes of sentencing as defined by statute include "the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

Chapter 4

The Guidelines and Mandatory Minimums: Sentencing Policies in Conflict

The previous two sections of this Report illustrate how, since 1984, Congress has pursued the goals of certain and effective sentencing along two distinct fronts: 1) the enactment of the Sentencing Reform Act and its creation of an expert, full-time Commission to develop a comprehensive system of sentencing guidelines; and 2) the enactment of offense-specific mandatory minimum sentencing statutes. The two approaches to sentencing, however, are not always easily reconciled. Although the Sentencing Commission has consistently sought to incorporate statutory minimums into the guidelines system in the most effective and reasonable manner possible,[63] in certain fundamental respects the general approaches of the guidelines system and mandatory minimums are inconsistent.[64]

This section of the Report details the key differences in the way in which mandatory minimums and the federal sentencing guidelines operate and describes how the two approaches can, in some instances, work at cross purposes.

A. The Guideline Principle of Varying Punishment in Light of Case-Specific Offense and Offender Characteristics

As noted in Chapter 3, the Sentencing Reform Act was prompted in large measure by Congress's concern that the lack of a comprehensive and systematic approach to sentencing in the federal courts permitted unwarranted sentencing disparity. Congress wanted the Sentencing Commission to reduce unwarranted sentencing disparity by developing a rational sentencing structure that would channel judicial sentencing discretion.

Starting with the premise that treating similar offenses and similar offenders alike forms the basis of a just and rational sentencing policy, the Sentencing Commission created guidelines that take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender's role in the offense and prior record. Using this information, the guidelines prescribe proportional individual sentences that, for example, punish the recidivist criminal substantially more than the first offender, and the organizer of a criminal enterprise substantially more than his minions. To understand how the guidelines system functions, and how that system contrasts with mandatory minimum sentencing, a description of the way in which a sentence is determined under the guidelines is helpful.

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[63] See, for example, discussion at pp. 29 (incorporation of 21 U.S.C. § 841 in Sentencing Guidelines drug quantity tables).

[64] Congress has noted the potential inconsistency of mandatory minimum sentencing provisions and a system of guidelines. See S. Rep. No. 225, 98th Cong., 2d Sess. 39, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3358 (stating that guidelines generally can better assure "consistent and rational" sentencing policy than mandatory minimums).

Step One Determining the Base Offense Level

The starting point for sentencing an individual defendant under the guidelines system is the determination of the base offense level. Federal law contains over 2,000 separate criminal offenses. Rather than construct a complex and potentially unmanageable system containing a separate guideline for each offense, the Sentencing Commission created generic guidelines that group offenses by offense type. The guidelines carefully rank these offense categories according to severity by assigning them base offense levels, varying from 4 to 43. In this way the guidelines not only ensure that like offenses are treated alike, but also that a logical, proportionate relationship exists among offenses according to their relative seriousness.[65]

Step Two: Examining the Specific Offense Characteristics

After determining the base offense level, the court determines whether certain attributes common to that type of offense are present in the case. These specific offense characteristics are specified in the applicable guideline and help establish the seriousness of the offense. When present in a case, specific offense characteristics require an adjustment in the offense level.[66] The robbery guideline provides, for example, a 3-level[67] increase if a firearm was possessed, a 5-level[68] increase if a firearm was discharged, a 6-level increase if life-threatening bodily injury occurred, and increases of zero to seven levels depending on the value of the property taken.

Similarly, the fraud guideline directs the sentencing court to consider specific offense characteristics and a range of adjustments relevant to that offense. Any fraud that results in loss to the victim exceeding $2,000 requires an increase in the offense level corresponding to the amount of loss caused. Evidence of more than minimal planning, creating a risk of serious bodily injury, or jeopardizing the safety and soundness of a financial institution also require increases of varying amounts.[69]

Step Three.- Applying the Chapter Three Adjustments

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[65]Thus, to cite one of countless examples, the base offense level for rape is higher than the base offense level for a nonsexual assault, which, in turn, is higher than that for a threatening communication.

[66]On average, each offense level increment changes the sentence by about 12 percent. Thus, a 4-level enhancement equates to about a 50 percent increase in sentence; an 8-level enhancement effectively doubles the sentence.

[67]An amendment submitted to Congress on May 1, 1991, to take effect November 1, 1991, increases this enhancement to five levels.

[68]An amendment submitted to Congress on May 1, 1991, to take effect November 1, 1991, increases this enhancement to seven levels.

[69]U.S.S.G. §2F1.1(b)(1).

After determining the base offense level and the specific offense characteristics identified by the relevant guideline for that type of offense, the court considers whether certain generic adjustments[70] to the offense level apply. The application of these adjustments (called "Chapter Three adjustments" because they appear in Chapter Three of the Guidelines Manual) is not limited to a particular offense or group of offenses, but rather can apply to any offense. Chapter Three adjustments act to further individualize the sentence. They require determinations, for example, as to whether the offense involved a vulnerable victim (2-level addition to the base offense level); whether the victim was a law enforcement or corrections officer (a 3-level increase);and whether the defendant willfully obstructed justice (a 2-level increase).

Importantly, Chapter Three adjustments require the court to consider the defendant's role in the offense. A finding that the defendant played an aggravating role in the offense (e. , organizing a criminal activity) requires an increase in the offense level of up to four levels. A finding that a defendant played a reduced role in the offense results in a decrease of up to four levels. The adjustments for role in the offense assure, for example, that the kingpin who organized a drug distribution ring and received the bulk of its illicit profits will receive a substantially greater sentence than a one-time drug courier or "mule," who had limited involvement in the crime.

Step Four Counting Multiple Counts

Because of a potential for irrational and disproportionate results absent detailed guidance when a defendant is to be sentenced for multiple counts of conviction, the guidelines carefully prescribe specific rules for sentencing in multiple count cases.[71] One potential problem in multiple count cases is how to increase the sentence when the multiplicity of counts does in fact reflect multiple harms. The Guidelines Manual describes this problem as follows:

> The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a right, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment.[72]72
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> The guidelines resolve this problem by directing that incremental amounts for each offense involving a distinct harm be added to the base offense level that corresponds to the most serious offense in the group. Thus, for example, two separate bank robberies will not result in a doubling of the offense level for one bank robbery, but will generally require a 2-level

[70]U.S.S.G. Ch. 3.

[71]The danger of irrational results when sentences rigidly depend on the number of counts charged was considered by Congress in the Commission's enabling legislation. See 28 U.S.C. § 994(l).

[72]U.S.S.G. Ch. 1, intro. comment. at p. 1.8.

increase in the applicable offense level. Grouping counts in this manner increases punishment where there is increased harm and culpability, but avoids disproportionate punishment when more than one count has been charged.

A second problem with multiple count cases that the guidelines address occurs when multiple counts do not particularly reflect the presence of multiple harms. Some offenses, although technically distinct under federal law, are so closely related that they result in essentially the same harm. Embezzling money from a bank and falsifying the related records, for example, are, two ways federal statutory law recognizes what can be essentially the same criminal conduct. In cases such as these, the guidelines group the offenses and apply the offense level for the most serious offense without adding levels for the closely-related offenses. In this way the seriousness of the offense is captured but without artificial increases for non-existent additional harms.

In other types of cases, such as drug distribution, it is the total quantity of drugs distributed that should influence the sentence, and not whether the government elects to charge the offense as several counts of distribution or one larger conspiracy. The guideline grouping rules assure this desired result as well.

Step Five: Acceptance of Responsibbility

The sentencing guidelines credit the defendant for certain post-offense conduct. If the defendant "demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct," the sentencing court may reduce the base offense level by two levels.[73] The guidelines detail the possible actions an offender can take that indicate acceptance of responsibility:

(a) voluntary termination or withdrawal from criminal conduct or associations;
(b) voluntary payment of restitution prior to adjudication of guilt;
(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;
(d) voluntary surrender to authorities promptly after commission of the offense;
(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense; voluntary resignation from the office or position held during the commission of the offense; and
(g) the timeliness of the defendant's conduct in manifesting acceptance of responsibility.[74]

Because of the judge's unique ability to assess this factor, the decision whether to award credit for acceptance of responsibility is left more substantially to the judge's discretion than other guideline sentence determinants for which judicial fact-finding is key but the operation of discretion is more limited. Guideline commentary states that "[e]ntry of a plea of guilty prior to the commencement of

[73]U.S.S.G. §3E1.1(a).

[74]U.S.S.G. §3El.l, comment. (n. 1).

trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility . . . ."[75]

Step Six. Assessing The Defendant's Criminal History

Because a defendant's prior record is relevant to such important sentencing goals as general deterrence, just punishment, and the need to protect the public from the defendant's propensity to commit crimes,[76] the guidelines evaluate criminal history with some care and complexity. Points are assigned to account for the severity of the prior criminal conduct (e.g. the points for more serious offenses committed as an adult, down to one point for less serious offenses resulting in probation). Additional points are added if the defendant committed the offense within two years after release from imprisonment or while under any criminal justice sentence, including probation, work release, or escape status. These factors reflect a need for heightened punishment due to the recency of the prior criminal conduct and the defendant's disregard for the earlier sanction.

The guidelines account for patterns of prior criminal conduct that warrant especially serious treatment. When a defendant is at least 18 years old at the time of the current offense, the offense is a violent felony or involved a controlled substance, and the defendant has at least two prior felony convictions involving a violent crime or a controlled substance, the defendant qualifies as a career offender.[77] The guidelines establish a special set of offense levels for the career offender that are calibrated, in conjunction with the highest criminal history category, to correspond to the maximum sentences authorized by statute for the instant offense.

After the defendant's entire record has been examined and the appropriate points assigned, the points are converted into criminal history categories ranging from I to VI. The career offender is always assigned the highest criminal history category, Category VI.

Step Seven: Determining the Applicable Sentencing Range

To determine the sentencing range for the particular offense involved, the sentencing judge turns to a sentencing table. Offense levels are set out in the vertical column of the table and criminal history categories are displayed in the horizontal column, forming a grid that contains the various sentencing ranges. By matching the applicable offense level and criminal history category, the court finds the guideline sentencing range that applies to the individual offender before the court. The court has discretion to pick the sentence from any point in the range. The ranges are relatively narrow. By

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[75]U.S.S.G. §3E1.l, comment. (n.3).

[76]76U.S.S.G. Ch. 4, intro. comment.

[77]The applicable guideline, §4B1.1, implements a congressional directive. See 28 U.S.C. § 994(h); U.S.S.G. §4B1.1. Federal law and the sentencing guidelines also require enhanced sentences for the armed career criminal. See 28 U.S.C. § 924(e); U.S.S.G. §4B1.4.

statute, the maximum of a sentencing range providing for imprisonment maynot exceed[78] the minimum by more than 25 percent.

SUMMARY

In sum, the sentencing guidelines seek to address all key aspects of the sentencing decision where the unguided judicial discretion of the past allowed unwarranted disparities to occur.

> Similar offenses are grouped together and assigned the same offense level, thus minimizing the chance that sentences will differ simply because a defendant is charged and convicted under one statute rather than another.
>
> Specific offense characteristics are considered to help determine the seriousness of the particular offense.
>
> Chapter Three adjustments are made to further gauge offense seriousness and individualize the punishment. Importantly, the defendant's role in the offense is measured to assure that the sentence properly accounts for the defendant's degree of cul pability, and incremental increases are provided for multiple convictions involving significant additional criminal conduct.
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> To credit the individual defendant who is truly remorseful and accepts responsibility for his or her crime (usually manifested by a truthful admission as part of a guilty plea), the guidelines permit a consistent, 2 -level adjustment in the appropriate circumstances.
>
> And, in order to increase punishment when the defendant has a significant record of prior criminal activity or qualifies as a career criminal, the guidelines provide the means for proportionate increases in the sentence that reflect these reasons as well.
>
> The guidelines provide a range of appropriate sentences within which the sentencing judge may consider such factors as family ties, community involvement, and degree of sophistication. As sentence exposure increases at the higher offense levels, the 25 percent within-range differential can result in considerable latitude for judges. For example, at level 30 there is a 24-month difference between the top and bottom of the guideline range.

Finally, as Congress expressly intended,[79] the guidelines system recognizes that doing justice in individual cases requires a margin of flexibility. Even the most finely-tuned system cannot anticipate every factual situation. Accordingly, the sentencing judge retains flexibility through the guidelines' departure provisions. In the unusual instance that the sentencing judge finds "an aggravating or

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[78]28 U.S.C. § 994(b)(2). A range of six months is permitted if six months exceeds the 25 percent difference. At the upper end of the imprisonment scale, if the minimum of the range is at least 30 years, the maximum may be life imprisonment.

[79]See 18 U.S.C. § 3553(b); 28 U.S.C. § 991(b)(1)(B).

mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" in the guidelines, the judge, for valid reasons stated in open court, may depart from the otherwise applicable guideline range, subject to review on appeal.

Through these various mechanisms, the guidelines seek to provide for sentences that are certain, substantial, proportionate, and fair. The guidelines represent a sophisticated, comprehensive, calibrated system that begins with a specified base penalty for particular offenses and modifies above and below for a variety of factors, without whose consideration, disparity would result.

B. Mandatory Minimum Sentencing Contrasted

The sentencing guidelines and mandatory minimum sentences have in common important objectives. For example, both seek to provide appropriately severe and certain punishment for serious criminal conduct. In numerous other respects, however, mandatory minimums are both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve. This section will examine three aspects of mandatory minimums in which they starkly conflict and contrast with sentencing guidelines. In general:

> Whereas the guidelines provide a substantial degree of individualization in determining the appropriate sentencing range for "each category of offense involving each category of defendant,"[80] mandatory minimums typically focus on one indicator of offense seriousness (e.g., the quantity of controlled substance involved in a trafficking offense[81]), and perhaps one indicator of criminal history (e.g., whether the defendant at any time was previously convicted of a felony drug offense[82]). In short, mandatory minimums employ a relatively narrow, tariff-like approach, under which the same sentence may result for widely divergent cases.
>
> Whereas the guidelines provide graduated, proportional increases in sentence severity for additional misconduct or prior convictions, mandatory minimums tend to result in sharp differentials or cliffs in sentences based upon small differences in offense conduct or criminal record.
>
> Whereas the guidelines, under a modified real offense approach to sentencing, require enhancemet of the sentence whenever a relevant aggravating factor (e.g. use of a firearm in connection with a drug trafficking offense) is present in the case,[83] mandatory minimums

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[80] 28 U.S.C. § 994(b)(1).

[81] 21 U.S.C. § 841(b).

[82] Id.

[83] The courts have generally held that a preponderance of the evidence standard is appropriate for making such findings under the sentencing guidelines.

> generally are effective in increasing punishment for specific offense characteristics only when the prosecutor charges and the defendant is convicted of the specific statutory offense containing the mandatory minimum. In other words, mandatory minimums are basically a charge-specific approach to sentencing. The guidelines are substantially less so.[84]
> Each of these three aspects warrants closer examination.

The "Tarrif' Effect of Mandatory Minimum

Years ago, Congress used tariff sentences in sanctioning broad categories of offenses, ranging fromquite serious crimes homicide) to fairly minor property theft. This tariff approach has been rejected historically primarily because there were too many defendants whose important distinctions were obscured by this single, flat approach to sentencing. A more sophisticated, calibrated approach that takes into account gradations of offense seriousness, criminal record, and level of culpability has long since been recognized as a more appropriate and equitable method of sentencing.

As detailed in Section A of this chapter, sentencing guidelines look to an array of indicators to determine offense seriousness, including the offense of conviction, any relevant quantity determinant (e.g., amount of drugs in a trafficking offense, dollar loss in fraud offense), weapon use, victim injury or death, the defendant's role in the offense, and whether the defendant accepted responsibility for the offense or, on the other hand, obstructed justice. Mandatory minimums, in contrast, typically look to only one (or sometimes two) measurements of offense seriousness.

The mandatory minimums set forth in 21 U.S.C. § 841(b), applicable to defendants convicted of trafficking in the more common street drugs, are illustrative.[85] For those convicted of drug trafficking under this section, one offense-related factor, and only one, is determinative of whether the mandatory minimum applies: the weight of the drug or drug mixture. Any other sentence-individualizing factors that might pertain in a case are irrelevant as far as the statute is concerned. Thus, for example, whether the defendant was a peripheral participant or the drug ring's kingpin, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, have no bearing on the mandatory minimum to which each defendant is exposed.

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[84]The Sentencing Commission considered and experimented with a “charge offense" approach to sentencing; i.e., sentences based “upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted.” (See, general discussion, U.S.S.G. Ch. 1, intro. comment. at 1.5.) 'Me Commission found the charge offense system lacking in several respects; it transfers discretion to the prosecutor where the prosecutors' decisions with respect to charging are generally private and unreviewable, and, generally, the sentence under this approach can rise and fall on the number of counts charged and convicted.

[85]Generally, heroin, cocaine, cocaine base ('crack"), LSD, PCP, marihuana, and methamphelamine.

Moreover, the mandatory minimum provisions in this statute throw a functional block in front of guideline factors -- in particular, a defendant's reduced role in the offense and acceptance of responsibility -- that might otherwise appropriately reduce the sentence below the applicable mandatory minimum. By requiring the same sentence for defendants who are markedly dissimilar in their level of participation in the offense and in objective indications of post-offense reform, these mandatory minimum provisions therefore short-circuit the guidelines' design of implementing sentences that seek to be proportional to the defendant's level of culpability and need for punishment.

By failing to take into account mitigating factors, mandatory minimums may have other unintended effects on the criminal justice system. For example, the failure of mandatory minimums to give credit for acceptance of responsibility may help explain why, as found by the empirical study described in Chapter 5, the plea rate is considerably lower for mandatory minimum cases than the plea rate generally. By failing to account for some defendants' reduced roles in the offense, mandatory minimums may be placing greater demands on prison resources than is necessary to satisfy the purposes of sentencing for these individuals.[86]

It might be argued that the broad-brush nature of mandatory minimums is necessitated by the proliferation of drugs and violent crimes in this country and that all offending actors, regardless of culpability, require tough sanctions. Accordingly, one might argue, if Congress established by statute the minimum sentence that should be imposed for an offense, the Sentencing Commission should select a starting point in the guidelines (base offense level) high enough that a defendant receiving all applicable guideline mitigators would have a guideline range at or above the mandatory minimum.

Generally, however, the Sentencing Commission did not design the guidelines in this manner for both policy and structural concerns. From the policy standpoint, the legislative history associated with enactment of the drug mandatory minimums suggests that Congress did not set the mandatory minimum sentences with the least severe case in mind.[87] All available information suggests that the ten- and five-year mandatory minimums were aimed at the high- and mid-level managers, respectively.

Additionally, from a structural standpoint, the Sentencing Commission found that, while it theoretically could design a structure that would equate the lowest guideline sentence with the mandatory minimum, adherence to that approach would produce in typical cases sentences that would reach or exceed the statutory maximum and, thus, there would be little if any opportunity for consideration of aggravating factors.[88] The Sentencing Commission therefore concluded that a more

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[86]'Chapter 6, Section 6 provides a discussion of the impact of mandatory minimums on federal prison populations.

[87] e.g., Chapter 2, Section A (discussion of mandatory minimums in 1986 Drug Abuse Act).

[88]The case of a deck hand on a boat containing 1,000 kilograms of marijuana who pleads guilty to 21 U.S.C. § 960 (importing controlled substance) is illustrative. In order for the guidelines to

reasonable, rational, and proportional approach to the sentencing of drug offenders would use the mandatory minimum penalties as starting points to determine the base offense level.[89] As noted, however, this structure means that the mandatory minimum provisions of 21 U.S.C. § 841 will nevertheless trump the mitigation scheme of the guidelines in the least serious cases.

Beyond the potential conflict with the proportional structure provided by the guidelines, the mandatory minimum tariff approach precludes any individualizing flexibility for the sentencing judge. The built-in calibration and flexibility of the guidelines allows for potential, inherent imperfections in any structured sentencing scheme that result from an inability to consider every potential factor in each offense category. The narrow tariff approach does not allow for en-or or extenuating circumstances, rather it provides a single, flat sentence for each defendant.

Additionally, mandatory minimums may intrude and distort the guidelines' scheme of assessing and calibrating a defendant's criminal history in a manner that is more appropriately related to the principles of just punishment, deterrence, and incapacitation.[90] Whereas the guidelines' assessment of criminal history is multi-dimensional, mandatory minimums typically look to only one or two indicators of criminal history -- for example, whether the defendant had a prior felony conviction for a crime of violence or drug offense. The relative seriousness of the prior conviction as indicated by sentence type and length, recency, and relatedness to the instant offense generally have no relevance to the application of mandatory minimum enhancements for prior record.[91]

Thus, for example, under 21 U.S.C. § 841, a single prior conviction for a felony drug offense doubles the mandatory minimum sentence. The effect is the same whether the sentence for the

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recognize this defendant's relatively minimal role and acceptance of responsibility (a cumulative, 6-level decrease) and still provide at least the ten-year mandatory minimum sentence, the base offense level would need to be set at 38 instead of 32 as it presently is under U.S.S.G. §2D1.1. 'Mat, in turn, would mean that the typical participant in the marijuana importation scheme who was neither a leader nor a minor participant, and who had no prior criminal record, would be subject to a minimum guideline sentence of about twenty years.

[89]Thus, for typical cases involving drug quantities equal to the five- and ten-year mandatory minimums specified by Congress, the base offense levels in the drug trafficking guideline are 26 and 32, respectively.

[90]See generally, U.S.S.G. Ch. 4, Pt. A, intro. comment., explaining the theoretical underpinnings for the guidelines' criminal history score. See also Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, U.S. Sentencing Commission (1987), at 41-44.

[91]Requiring that the prior conviction be for a "crime of violence" does not substantially narrow the grounds for a mandatory minimum penalty. A crime of violence is defined under 18 U.S.C. § 924(c), for example, to include crimes ranging from murder to offenses involving 'the attempted use ... of physical force against the ... property of another such as unsuccessfully attempting to break into an automobile to take an article of clothing lying on the seat.

prior conviction was probation or ten years; it is the same whether the conviction occurred 20 years ago or one month ago;[92] it is the same if the prior conviction occurred in state court for the same conduct as the instant offense of conviction in federal court. In sum, mandatory prior record enhancements, in contrast with the guidelines' fact-sensitive approach to criminal history, tend to account for the seriousness of a prior conviction with a very broad brush.

In some instances, mandatory minimums conflict with and render moot the guidelines approach in assessing both offense and prior record seriousness. The guidelines bring together these two dimensions of crime seriousness through the career offender guideline,[93] which ensures a sentence at or near the statutory maximum for defendants convicted of a crime of violence or drug trafficking offense who have at least two prior qualifying convictions in that category. This guideline functions, where necessary, to override an otherwise applicable lower guideline determination of either offense level or criminal history or both. Nevertheless, certain mandatory minimums override this carefully calibrated consideration of the interaction between offense and prior record.

For example, under 21 U.S.C. § 841, prior felony convictions that would not qualify a defendant as a career offender under the guidelines because they occurred long ago or were closely related to the instant offense, may require a doubling of the sentence under the statute. In another situation, a defendant sentenced under 2 1 U.S.C. § 841 (b) (1) (A) who has two prior convictions for a felony drug offense must be sentenced to life imprisonment without regard to the seriousness of the prior offenses, their recency, or relation to each other or the instant offense. Thus, the limited sentencing discretion available to the courts under the career offender guideline is eliminated by applicable mandatory minimums, and broad classes of apparently different offenders are treated alike.

The "Cliff" Effect of Mandatory Minimums

Related to the proportionality problems posed in mandatory minimums already described are the sharp differences in sentence between defendants who fall just below the threshold of a mandatory minimum compared with those whose criminal conduct just meets the criteria of the mandatory minimum penalty. Just as mandatory minimums fail to distinguish among defendants whose conduct and prior records in fact differ markedly, they distinguish far too greatly among defendants who have committed offense conduct of highly comparable seriousness. Unfortunately, the sentencing guidelines are unable to overcome entirely these effects and thereby successfully fulfill the Sentencing Reform Act's goal of ensuring comparable sentences for similarly-situated defendants.

This cliff effect can occure in several different ways. First a lack of coordination between statutory maximum and mandatory minimum penalties for the same or similar offenses can create dramatic sentencing cliffs among similarly-situated defendants. For example, 21 U.S.C.§ 884 mandates a minimum five-year term of imprisonment for a defendant convicted of first-offense, simple possession of 5.01 or more grams of "crack," a sentence that the guidelines accomodate by

[92]The conviction must, however, have become final.

[93]See p. 24, Step Six: Assessing the Defendant's Criminal History.

prescribing an imprisonment range of 63-78 months. However, a first-offender convicted of simple possession of 5.0 grams of crack is subjected to a maximum statutory penalty of one year imprisonment. The guidelines cannot harmonize a statutorily mandated four-year difference in penalties between defendants whose cases may differ only .01 grams of crack.

Second, when multiple counts of conviction are involved, mandatory minimums can produce large sentence differentials that override the guidelines approach of providing incremental increases in punishmnet for multiple counts of distinctly separate harms. Under 18 U.S.C. § 924(c), for example, a first conviction for use of a firearm in connection with certain crimes requires a minimum consecutive penalty of five years, and a second conviction mandates a minimum consecutive sentence of 20 years. A number of courts have interpreted the statute to require stacking of the mandatory penalties when the defendant is convicted of multiple section 924(c) counts, even if alleged in the same indictment.[94] Consequently, the mandatory minimums specified in 18 U.S.C. § 924(c) produce a sentencing cliff of 25 years between a defendant convicted of, say, robbing two banks with an unloaded gun[95] and a defendant who robbed two banks with what police later determine was a toy gun. This is true even if the threat of violence and the terror instilled is the same from the victims' viewpoint.

The "Charge-Specific" Nature of Mandatory Minimums

Mandatory minimums contrast with sentencing guidelines in respect to another feature that has profound implications in determining the sentence imposable by the court. In general, a mandatory minimum becomes applicable only when the prosecutor elects to *charge*[96] and the defendant is *convicted* of the specific offense carrying the mandatory sentence. On the other hand, sentencing guidelines are, more generic in nature and do not necessarily require conviction of a particular charge for an aggravating factor to be reflected in the sentence. Sentencing guidelines typically apply in the first instance to all offenses of a similar nature. For example, the fraud guideline, §2F1.1, applies regardless of which of several hundred federal fraud statutes may be charged by the prosecutor. The firearms guideline, §2K2.1, covers most of the several score of federal firearms

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[94]See, e.g., United States v. Rawlings, 821 F.2d 1543 (11th Cir. 1987) (defendant convicted under single indictment of committing two separate armed bank robberies about four weeks apart; court affirmed treating defendant as a repeat 18 U.S.C. § 924(c) offender for second robbery).

[95]Courts have consistently held that an unloaded gun satisfies the criteria for the mandatory enhancement under 18 U.S.C. § 924(c). See United States v. Munoz-Fabela, 896 F.2d 908 (5th Cir.), cert. denied, 111 S.Ct. 76 (1990); United States v. Martinez, 912 F.2d 419 (10th Cir. 1990); United States v. Coburn, 876 F.2d 372 (5th Cir. 1989); United States v. York, 830 F.2d 885 (8th Cir. 1987), cert. denied, 108 S.Ct. 1047 (1988); United States v. Gonzalez, 800 F.2d 895 (9th Cir. 1986).

[96]As observed during the empirical study described in Chapter 5, prosecutors may also negate the applicability of mandatory minimums in some instances by entering into factual stipulations or not charging facts that trigger the mandatory penalty.

offenses. Thus, under the guidelines the offense charged, while certainly not irrelevant, is not necessarily crucial to the sentence imposed. What matters relatively more are the actual facts of the case. This guideline feature, sometimes called a modified real offense approach to sentencing, helps preserve structured sentencing authority for the courts and lessens the likelihood of unwarranted sentencing disparity due to inconsistent use of prosecutorial charging discretion.

Further, sentencing guideline enhancements are determined by the court based upon all available, reliable evidence. While the government necessarily carries the burden of proving such enhancements when they are contested, the potential application of the guidelines does not rest entirely in the hands of the prosecutor, as is more typically the case with mandatory minimums.

Mandatory minimums employ a structure that allows a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors. The manner in which prosecutorial discretion is exercised in charge selection, filing of informations to trigger mandatory enhancements based on prior convictions, plea bargaining, and the making of motions for sentence reduction based on a defendant's substantial assistance in the investigation of other crimes, determine the extent and consistency with which statutory minimum sentences are actually applied. As discussed more fully in Chapter 5, there is substantial reason to believe that mandatory minimums are not in fact pursued by prosecutors in all instances that the underlying statutes otherwise would require.

Finally, intertwined with the charge-specific and conviction-predicate nature of mandatory minimums, is the more stringent, beyond-a-reasonable-doubt evidentiary standard that generally must be met before many mandatory minimums apply.[97] In contrast, the courts of appeals[98] have determined that a less stringent, preponderance of the evidence standard is sufficient to determine the applicability of enhancements under the guidelines. This furthers the guidelines' general approach of determining the appropriate sentence based on a defendant's actual offense conduct, rather than what the prosecutor charged and the court convicted the defendant of doing.

C. Conclusion: The Guidelines and the Goals of Mandatory Minimums

In very general terms, the question as to whether the guidelines or mandatory minimums better serve to promote the purposes of sentencing cannot be answered without considering the more generic area of discretion. Congress recognized that the presence of unfettered discretion fostered

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[97]For example, a defendant must be convicted under 18 U.S.C. § 924(c) of using or carrying a firearm in connection with a crime of violence before the mandatory sentencing provisions of that statute apply. However, under 21 U.S.C. § 841, a defendant must be convicted of drug trafficking, but application of the various mandatory penalty provisions based on quantity of drugs and prior drug convictions is a sentencing determination for the court using a preponderance of the evidence standard.

[98]Applying McMillan v. Pennsylvania, 477 U.S. 79 (1986).

such problems as disparity, discrimination, lack of certainty and proportionality, and resulted in what Congress viewed as a tendency toward leniency in certain areas. Congress addressed this problem of discretion through both the Sentencing Reform Act and mandatory minimum penalty provisions, attempting to curtail the discretion of both the judiciary and the prosecution. Except for the issue of severity, mandatory minimums do not appear to address the other problems arising from the exercise of unfettered discretion.

Returning to the six rationales[99] commonly given for enactment of mandatory minimum sentencing identified in Chapter 2, the guidelines are structured so that they are as or more likely to achieve these goals than mandatory minimums.

> *Retribution/Just* Deserts. Mandatory minimums are advocated by some on a just deserts theory -- or, in simple terms, that the punishment should fit the severity of the crime. Because the guidelines allow for fine distinctions in offense severity, and because the Sentencing Commission has given substantial consideration to the relative seriousness of hundreds of offenses, the guidelines appear to serve this rationale better than mandatory minimums.
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> *Deterrence* and *Certainty.* The guidelines provide for the certainty of punishment that supporters of mandatory minimums quite correctly cite as crucial to adequate deterrence. Judges impose the sentence called for by the guidelines except in the unusual instance that a factor is present that justifies a different result and can withstand the scrutiny of an appeal. As noted in Chapter 3, this happens infrequently. Indeed, because the guidelines rely on a modified real offense approach to sentencing, which requires the court to assess conduct to some extent regardless of the particular offense charged, the certainty of punishment is greater under the guidelines than with mandatory minimums. With mandatory minimums, certainty depends fundamentally on the prosecutor's willingness to pursue the charge, and as the analysis in Chapter 5 of this Report strongly suggests, prosecutors do not always pursue mandatory minimum charges.[100] Certainty also depends on the prosecutor's success in obtaining a conviction on the charge carrying a mandatory minimum which necessitates proof of guilt beyond a reasonable doubt. In contrast, the courts have held that a lower, preponderance of the evidence standard suffices for typical enhancements under the sentencing guidelines.
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> *Incapacitation.* The guidelines assure the incapacitation of serious offenders. However, unlike mandatory minimums, which may result in the same length sentence for a minor participant as for the organizer of a drug distribution ring, the guidelines incapacitate offenders for time periods that more appropriately relate to the offenders' actual conduct and past history.

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[99] See Chapter 2, Section C.

[100] See also Chapter 6, Section D, noting that nearly 60 percent of federal prosecutors interviewed stated they do not always pursue applicable mandatory minimum charges.

Disparity. The guidelines are potentially superior to mandatory minimums in reducing unwarranted disparity for two interrelated reasons. First, because they operate with far greater specificity, the guidelines are better able to identify and categorize similarly-situated offenders. Mandatory minimums often have the contrary effect of adjudging the same penalty for quite different offenses and offenders. Second, because the guidelines depend less on the prosecutor's charging decision, they are better able to assure that similarly-situated offenders receive similar sentences.

Inducement of Cooperation. While mandatory minimums may well help induce defendants to cooperate with authorities, guidelines operate precisely the same way. Both systems permit sentence reductions for substantial assistance to authorities when the court grants a sentence reduction motion by the government.

Inducement of Pleas. Finally, while mandatory minimums may induce defendants to plead guilty, this occurs chiefly by the prosecutor agreeing not to pursue the mandatory minimum charge. Thus, to the extent prosecutors use mandatory minimums in this fashion (as findings set out in Chapters 5 and 6 of this Report strongly suggest), the incentive for pleading guilty is set by the prosecutor and can vary. Under the guidelines, acceptance of responsibility receives a consistent 2-level decrease and is determined by the court, on the record.

In summary, it would appear that all of the intended purposes of mandatory minimums can be equally or better served by guidelines, without compromising the crime control goals to which Congress has evidenced its commitment.

Chapter 5

Empirical Study of Mandatory Minimums

As specified in the statutory directive giving rise to this Report, this chapter provides the initial findings from an empirical research study of the effect of mandatory minimum sentencing provisions in the federal system. In addition to the specific congressional request for an empirical study, Congress asked for "an assessment of the effect of mandatory minimum sentencing provisions on the goal of eliminating unwarranted sentencing disparity" and "a description of the interaction between mandatory minimum sentencing provisions and plea agreements." These two questions lend themselves to at least an exploratory look at data, and this chapter provides the results of that investigation.

Before addressing the specific research questions, Section A provides a brief description of the data and analyses used to address these questions. A more comprehensive examination of the methodology is presented in the Technical Appendix at Appendix D.

Section B presents historical trends in the use of statutes and mandatory minimum provisions. This section addresses the extent to which mandatory minimum sentencing provisions are being used in the federal criminal justice system. In addition, this section addresses the question of whether prison terms have increased as a result of mandatory minimum sentencing provisions. In general, this precise question cannot be answered due to data limitations. However, some insight can be provided by looking at convicted defendants who have the requisite offense conduct necessary to invoke a mandatory minimum penalty. By looking, over time, at length of sentence imposed for defendants with similar offense conduct (conduct sufficient to invoke a mandatory minimum), one picture of sentence severity can be portrayed.[101] This information can be viewed solely as revealing general sentencing patterns that respond to particular kinds of offense conduct; it cannot be concluded that changes in sentence length are due solely to mandatory minimums.

Section C provides a general profile of mandatory minimums and the defendants who are sentenced under them. Specifically, Section C addresses the following research questions: which mandatory minimum sentence lengths are being used most frequently? Do particular judicial circuits sentence a larger proportion of the mandatory minimum defendants? What offense and offender characteristics best describe mandatory minimum convictions?

Section C also provides a comparison between defendants sentenced pursuant to mandatory minimum provisions and the population of federal guideline defendants. How do the mandatory minimum defendants compare to the population of federal defendants? Do mandatory minimum defendants have higher or lower plea rates, higher or lower guideline departure rates, and higher or

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[101]There is considerable debate about the appropriateness of looking at sentence length over time when such major interventions as mandatory minimum sentencing provisions, sentencing guidelines, and the abolition of parole have so dramatically changed the complexion of sentencing in the federal system. For discussion of these issues, see Section B of this chapter.

lower average prison lengths? What is the age, sex, race, and criminal history make-up of the mandatory minimum defendants as opposed to the population in general?

Turning to the question of the interaction between mandatory minimums and plea agreements, Section D presents the results of a study that examined the plea process in the federal system. This study takes defendants sentenced in the federal system who appear[102] to have circumstances warranting a conviction pursuant to a mandatory minimum provision, and asks the following research questions: what was the process by which the defendant moved through the system? What were the charges at indictment? What were the final statute(s) of conviction? What were the departure rates? Was the defendant sentenced above or below the mandatory minimum indicated?

The study discussed in Section D extends to congressional concern regarding the effect of mandatory minimum sentencing provisions on the elimination of unwarranted sentence disparity. Section E focuses more specifically on the issue of sentencing disparity and addresses the following questions: do defendants who appear to exhibit conduct warranting a similar mandatory minimum sentence receive such sentences? Does it appear that defendants are being charged differentially with respect to mandatory minimum provisions? Does sex or race play a role in determining who ultimately is sentenced under mandatory minimum sentencing provisions? Does the defendant's role in the offense differentially influence a mandatory minimum sentence? Are defendants sentenced in different circuits more or less likely to receive sentences pursuant to mandatory minimum provisions?

Finally, Section F briefly discusses the interaction between the sentencing guidelines and mandatory minimum sentencing provisions. This discussion focuses on the research question of whether the guidelines respond to congressional concerns about sentence severity.

A. Methodology[103]

A variety of available data sources were used for the empirical analysis of the application of mandatory minimum provisions, including FPSSIS data from 1984 to 1990,[104] U.S. Sentencing Commission Monitoring data for fiscal year 1990, and data from a 12.5 percent sample survey from the Sentencing Commission's files of defendants sentenced in FY 1990.

Administrative Office of the U. S. Courts' (AO) FPSSIS files from 1984 to 1990, consisting solely of defendants convicted of federal offenses, provide the basis for developing an historical perspective

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[102]These analyses are limited by the fact that no data as to the strength of the evidence, a key variable, are available.

[103]A more complete discussion of the data sources, analyses, and known data problems are provided in the Technical Appendix at Appendix D.

FPSSIS refers to the Federal Probation Sentencing and Supervision Information System of the Administrative Office of the U.S. Courts.

on mandatory minimum statutes, including numbers of defendants sentenced pursuant to relevant statutes, proportion of defendants with offense conduct sufficient to invoke a mandatory minimum, and distributions of defendants whose offense conduct is sufficient to invoke a mandatory minimum. Section B describes these historical trends.

The research staff of the Federal Judicial Center (FJC) contributed to this coordinated effort to study the historical trends of mandatory minimums by classifying defendants through identifiable offense components that qualified offenses as "mandatory minimum behaviors." (For example, in the FJC research study if the offense conduct, as entered by the probation officer, identified a drug amount sufficient to invoke a mandatory minimum, the case was coded as a mandatory minimum case. Statutes of conviction might or might not have been based on the same drug amount.) Sentencing trends for these defendants were analyzed in terms of the proportion of defendants sentenced to at least the minimum terms presently prescribed by statute. These data are provided in Sections B and E of this chapter.

The Sentencing Commission Monitoring data base for FY90 only provides a more complete picture of statutes and application of mandatory minimum provisions. This data base contains statutory minimums and maximums on each convicted defendant as identified in presentence reports. Section C provides profiles of sentences and defendants from this data base, as well as a comparative analysis of mandatory minimum defendants to all federal guideline defendants on demographic, offense, and systemic characteristics.

These data in their coded and automated form lack detailed information regarding real offense behavior, thus constraining the Sentencing Commission's ability to determine the presence of applicable mandatory minimums, independent of conviction and sentencing. Without such information, it is difficult to identify similar defendants who might warrant a mandatory minimum sentence -- an important ingredient in the development of a clear picture of the plea and criminal justice process.

Since Congress specifically requested the Sentencing Commission to address the plea process, it was necessary to assess the applicability of a mandatory minimum penalty prior to the conviction phase. This required an analysis of the actual offense behavior that occurred. For that purpose, the Sentencing Commission identified a 12.5 percent random sample of cases from the FY90 Sentencing Commission data base. Each case file was thoroughly analyzed in terms of mandatory minimum related issues, including the potential applicability of mandatory minimums based on factual offense components. Through review of both computerized files and case files, 1,165 defendants were identified who met the criteria for receipt of a mandatory minimum drug or weapons sentence.

In determining which defendants should be included in the sample study, facts of each case file were carefully scrutinized. Fact patterns in the files that called for legal interpretations were viewed in a conservative light. For example, in drug conspiracies occurring after 1988, drug amounts were not aggregated across events unless there was strong evidence of a single plan constituting the conspiracy. If the amount involved in a single event did not reach the level necessary to invoke a mandatory minimum, the case was not included as one warranting a

mandatory minimum penalty. While relevant cases were almost certainly excluded due to this strict approach, the procedure followed a considered preference to err on the side of "false negatives" (i.e., excluding cases for which mandatory minimums may have been applicable) rather than "false positives" (i.e., including cases for which mandatory minimums may not have been applicable). (For more detail, see the Technical Appendix at Appendix D.)

For cases in which strict legal evidence was not clearly defined, the Sentencing Commission made every effort to use the most reasonable standards for establishing which of these cases, on the basis of available data, could be classified as eligible for indictment and conviction for an offense carrying a mandatory minimum sentence. It must be underscored, however, that the available data contain no definitive measure of the strength of evidence (i.e., whether a charge was readily provable). What can be said is that from the data in the presentence report and other documents, there is strong indication of offense behavior for which mandatory minimum provisions are applicable.

Findings from this aspect of the research project present a more dynamic picture of the federal court system as a process. They shed some light on prosecutorial choices, plea practices, motions, and departures, and the relationship of these factors to the application of mandatory minimum sentences. Sections D, E, and F discuss the findings from this special data collection effort.

Additional data collection on each defendant for whom a mandatory minimum was indicated involved identification of the charging history from potential mandatory charges, to indicted charges filed by the government, to final charges of conviction. Any changes in the type, number, and penalty level of mandatory minimum charges were also tracked.

B. The Use of Statutes Carrying Mandatory Minimum Sentencing Provisions

In the Federal Criminal Code today, over 60 criminal statutes contain mandatory minimum sentencing provisions. However, only a small number of statutes, those regulating drug and weapons offenses, account for most of the convictions. For most statutes carrying mandatory minimum sentence provisions, convictions are quite rare.

Table 1 presents the number of defendants sentenced per year under provisions that potentially include applicable mandatory minimums, as reported by the Federal Probation Sentencing and Supervision Information System (FPSSIS) during the period January 1984 through August 1990. For most provisions (37 of 60 or 62%), no sentences under applicable statutes were identified for the seven year period. For another five provisions, one or no defendants per year were identified. The most frequently and consistently used statutes containing mandatory minimum penalties involved drug and weapons offenses.

It is important to note that the FPSSIS data system provides no indication, on a case-by-case basis, of whether defendants sentenced under relevant offense statutes were subject to the mandatory minimum sentencing enhancements. The Sentencing Commission's monitoring system of guideline defendants provides the ability to determine a more accurate picture of the number of defendants

sentenced pursuant to mandatory minimum provisions because this data collection system was designed to capture more complete statutory descriptions, as well as applicable statutory minimums and maximums. The Sentencing Commission's monitoring data encompass all defendants sentenced pursuant to the Sentencing Reform Act, approximately 70 percent[105] of all federal defendants, sentenced during the period October 1, 1989 through September 30, 1990; 6,685 guidelines cases include convictions for offenses that carry mandatory minimum provisions during that period. Table 2 presents the number of guideline defendants sentenced for each applicable offense statute, as well as the proportion of those sentenced pursuant to the mandatory minimum provisions.

In general, Sentencing Commission data indicate that of the 60 or more 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). Based on Tables 1 and 2, one might conclude that the number of defendants convicted of 18 U.S.C. § 924(c) and 21 U.S.C. § 841 has dramatically increased every year since 1984; and that most of those convicted of offenses carrying mandatory minimum sentencing provisions are convicted under 18 U.S.C. §§ 924(c), 924(e), 2252, and 21 U.S.C. §§ 841, 844, 845, 845a, 848, 960.

As a complement to the preceding analysis, the Federal Judicial Center (FJC) prepared extensive analyses depicting historical trends in sentencing from 1984 through 1990. This information, which utilizes FPSSIS data, probes sentencing trends employing measures representative of the types of offenses and offenders being sentenced, as opposed to the statutes of conviction presented above.[106]

As illustrated in Figure 1, the percent of federally-sentenced defendants whose offense behavior makes mandatory minimums potentially applicable has been steadily increasing since 1985. The percent of the federal population whose offenses involved either a sufficient amount of opiates, cocaine, marijuana, or weapons to invoke a mandatory minimum has been on the rise since 1985; the 10 percent of federal defendants involved in such behaviors in late 1984 has since risen to 20 percent in early 1990. These increases appear mainly in more serious drug offenses, and most significantly in cocaine activity.

Further analyses were undertaken to investigate changes in sentencing patterns over time for defendants whose offense behavior was sufficient to invoke a mandatory minimum sentencing

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[105]The Commission does not collect information on "old law" cases (i.e., cases involving only offenses committed prior to November 1, 1987 and therefore not subject to sentencing guidelines and other provisions of the Sentencing Reform Act). Approximately 30 percent of the federal caseload sentenced during the period October 1, 1989 through September 30, 1990 represent defendants sentenced pursuant to "old law."

[106]A full description of the data utilized, techniques of analysis, and cautions provided are contained in the Technical Appendix at Appendix D.

provision under current drug provisions. Figure 2 illustrates sentences imposed during the period 1984 through 1990. The boxes in Figure 2 represent the middle 80 percent of defendants sentenced each year. The lines above and, where applicable, below each box represent the 10 percent of defendants sentenced at the high end and 10 percent sentenced at the low end. By 1990, one can see, for example, that most defendants with drug amounts sufficient to invoke a five-year mandatory minimum no longer receive probation. Both the median and mean sentences for defendants with drug amounts sufficient to meet mandatory minimum criteria (but with no firearm) increased from 1985 through 1990. The median sentence length increased from 36 to 66 months for drug defendants with no firearms possessed or used. The mean sentence length, which is subject to fluctuation due to extreme cases, rose from 53 to 94 months during that same period.

Figure 3 provides similar information for defendants with drug amounts sufficient to invoke mandatory minimum sentences for drugs and use of firearms. Between 1986 and 1990, the median sentence for these defendants increased from 84 to 180 months, while the mean increased from 99 to 190 months.

As discussed in Chapters 2 and 3 of this Report, historical changes occurred between 1984 and 1990 that impact on the interpretation of sentence length. Some mandatory minimum provisions (most notably the 1986 drug statutes) eliminated the availability of parole for covered offenses. In addition, the Sentencing Reform Act of 1984 eliminated parole for all offenses occurring after November 1, 1987, and curtailed the amount of good time that potentially reduces sentences. Due to these measures, actual time served changed substantially throughout the reporting period. For example, a defendant receiving the median 36-month term for drug distribution in 1984 would likely serve only one-third of the sentence or 12 months. In 1990, a defendant receiving the median 66 months for drug distribution would likely serve 85 percent of the sentence or 56 months. Thus a sentence increase of 83 percent actually results in an increase of 367 percent in likely time served from 1984 to 1990.[107]

Finally, with respect to sentencing patterns, Figure 4 indicates that the proportion of defendants with eligible mandatory minimum behavior that were sentenced at or above the mandatory minimum term increased from 27 percent to 54 percent between 1984 and 1990.

While changes in sentencing patterns may be illustrated during this period, explanations for such changes cannot be drawn based on available information. Between 1984 and 1990 the federal criminal justice system underwent significant changes in many arenas. A few of the more dramatic

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[107]In addition to the confounding effects in sentence length resulting from the vast changes in sentencing policy, other decision points in the criminal justice system are seriously affected. For example, the potential effect of conviction under a mandatory minimum provision may cause prosecutors to rethink charging decisions and substantially alter charging practices. Perhaps the most important limitation in the data results from an inability to isolate the independent effects of mandatory minimums. The Sentencing Commission's Research Advisory Group strongly cautions any use and interpretation of cross-year comparisons when such major social interventions as mandatory minimums and sentencing guidelines have occurred.

changes include: 1) the increasingly more serious nature of the federal drug population (as previously illustrated in Figure 1); 2) increased drug activity (e.g., focus on the drug wars); 3) mandatory minimums implemented for drug offenses that occurred after November, 1986; and 4) the Sentencing Reform Act that eliminated parole and implemented a sentencing guidelines system.

Despite the above described concerns and data limitations described in the introduction to this chapter, two pieces of information suggest that increases in sentence length for drug defendants cannot be attributed solely to mandatory minimum provisions. First, evidence in this Report has shown that over time, convicted federal defendants have been involved in increasingly more serious drug activity, which in itself might lead to increased sentences.[108] And, second, the trends toward increased sentences appear to begin prior to the implementation of mandatory minimum terms. While this study cannot show the amount of sentence length increase attributable to mandatory minimums, it is reasonable to assume that this, along with other factors, results in increasing sentence length.

While additional data collection and more sophisticated, long term research may be able to disentangle the impacts of these numerous historical changes, data are currently not available to more fully address this complex issue.

C. Profile of Defendants Sentenced under Mandatory Minimum Provisions with Comparisons to the General Defendant Population

The Sentencing Commission's monitoring data set of guideline defendants sentenced in fiscal year 1990 provides a profile of defendants sentenced under mandatory minimum provisions, including sentence length, offense characteristics, system or processing characteristics, and offender characteristics. For 27,374 defendants sentenced during FY90, identifying their mandatory minimum status provides a useful comparison between defendants subject to mandatory minimum provisions and all defendants sentenced under the Sentencing Reform Act during that time.[109]

Table 3 provides a distribution of the mandatory minimum penalties applied to federal guideline defendants sentenced in FY90. Of all defendants with mandatory minimum sentencing information available, 75.6 percent did not receive sentences pursuant to the mandatory minimum provisions. For

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[108]Very preliminary regression analyses suggest that most of the variation in the proportion of defendants sentenced to mandatory minimums can be explained by variation in the proportion at risk. In general, these findings suggest that for every 10 percent increase in the number of sentenced defendants at risk, the percent sentenced to the mandatory minimum increases by about 2.5 percent. More thorough analyses must be undertaken, however, before such finding can be reported with any degree of confidence.

[109]FY90 monitoring data include 29,011 cases. Missing data for the mandatory minimum indicator preclude inclusion of 1,635 defendants.

these cases, the court was not bound to provide a mandatory sentence of imprisonment. For the remaining 24.4 percent, a mandatory term was applicable. Five- and ten-year mandatory minimum sentences were most common, with 60-month mandatory minimum terms provided most frequently (in 12.7% of federal guidelines cases), followed by 120-month mandatory minimums (in 8.4% of federal guidelines cases).

As would be expected from the distribution of statutes, the primary offense of conviction for most mandatory minimum defendants involves drug activity. Table 4 indicates that 91.1 percent of all mandatory minimum defendants have as their most serious offense of conviction a controlled substance violation. The remaining mandatory minimum defendants have violent crimes or firearms offenses as the primary offense of conviction. Although comprising the most serious offense category, violent crime offenses generally do not invoke a mandatory minimum penalty in the federal system. Most typically, a firearm enhancement provision charged in connection with these violent offenses triggers the applicable mandatory minimum (e.g., robbery with a firearm). Table 4 also provides comparisons between defendants sentenced under mandatory minimum provisions and all federal guideline defendants. While 46.8 percent of the federal defendants are involved in drug activity, 91 percent of mandatory minimum defendants are involved in drug activity.[110]

Approximately two-thirds of mandatory minimum defendants were found to have some prior criminal activity, while one-third had no prior record. The one-third with no prior record did not show any major demographic trends that differed from those with prior records; e.g., older defendants were just as likely to be first offenders as were younger defendants. Defendants with mandatory minimum convictions were no more likely than the federal population as a whole to have previous criminal behavior known to the court. (See Table 4.)

Table 5 provides the distribution of mandatory minimum and all federal defendants across judicial circuits. Two of the twelve federal circuits, the Ninth and Eleventh, account for almost 35 percent of mandatory minimum cases. These same two circuits account for almost 30 percent of the overall population. Compared to circuit distributions for the total population, the Fifth Circuit appears to be underrepresented, while the Eleventh Circuit appears to be overrepresented in the use of mandatory minimum provisions. While only 3.3 percent of mandatory minimum defendants are sentenced in the D.C. Circuit, 44 percent of all defendants within that circuit are sentenced under applicable mandatory minimum provisions.

Table 5 also provides the trial and plea rates of the mandatory minimum defendants and the total federal population. Nearly 30 percent of mandatory minimum defendants are convicted by trial. This trial rate is significantly higher, statistically, than the 12.9 percent trial rate found for the general defendant population.

In describing average sentence length, it is generally more appropriate to use the median sentence length (i.e., the point at which 50% of the sentences fall above and 50% percent below) than the mean

[110]Other offense categories frequently convicted in the federal system are not generally covered under mandatory minimum provisions.

sentence length. The mean is subject to unusually high or low sentences, with the former pulling the mean too high and the latter pulling the mean too low to provide a representative number. Therefore, the median sentence for mandatory minimum defendants is 96 months (mean of 121 months). This median sentence length is 63 months higher than the average of the total federal population (33 months). As shown in Table 5, these figures are substantially higher than the median and mean sentence lengths of 33 and 60 months, respectively, found for the overall federal population.

Mandatory minimum defendants received downward departures 21.6 percent of the time. These departures generally represent substantial assistance motions filed by the prosecutors. This downward departure rate is higher than the 14.4 percent rate for the general population and may result because the law provides for substantial assistance motions as the only basis for sentencing below the mandatory minimum, or because complex, multi-defendant drug cases make substantial assistance both more feasible and at times crucial. Alternatively, the increased departure rate may reflect a greater tendency to exercise prosecutorial or judicial discretion as the severity of the penalties increases. (See Table 5.)

As shown in Table 6, which provides offender characteristics, approximately 90 percent of mandatory minimum defendants are male. In terms of race, 38.5 percent are Black, 34.8 percent White, and 25.4 percent Hispanic. Almost 60 percent of mandatory minimum defendants are between the ages of 22 and 35.

Comparatively, Table 6 indicates that mandatory minimum defendants are proportionally more likely to be male (89.9%) than in the total population (83.9%); proportionally more likely to be Black (38.5% of mandatory minimum defendants and 28.2% of the total population), and likely to be slightly younger.[111]

D. Criminal Justice Processing and Plea Practices

Congress directed the Sentencing Commission to provide "a description of the interaction between mandatory minimum sentencing provisions and plea agreements."[112] The empirical study assists in that description by investigating the processing patterns of federal defendants subject to mandatory minimum provisions. The investigation attempts to shed light on the variety of plea patterns. In general the plea process does not lend itself to quantitative analysis because many of the important factors cannot be found in available data. Discussions and decisions between parties generally occur in

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[111]Appendix E describes comparative profiles among mandatory minimum defendants within similar offense types. It compares controlled substance defendants sentenced under 1) mandatory minimum provisions that did not include weapons enhancement penalties, 2) mandatory minimum provisions that did include weapons enhancement penalties, and 3) statutory provisions containing no mandatory minimum provisions. Generally, the overall percentages provided in the above discussion hold for these controlled substance categories of defendants.

[112]Pub. L. 101-647, §1703, 104 Stat. 4846 (1990).

private, often leaving to speculation the process by which a plea agreement was reached. As part of its evaluation effort, the Sentencing Commission interviewed judges, prosecutors, defense attorneys, and probation officers about their perceptions regarding the plea process. Chapter 6 of this Report provides a description of the interview questions that relate to mandatory minimum provisions, and, of import to the present discussion, charging practices that involve mandatory minimum provisions. That discussion underscores the frequency and circumstances under which prosecutors decide not to bring mandatory minimum charges.

This section of the Report describes a special study, undertaken by the Sentencing Commission, designed to follow cases from indictment through the sentence actually imposed. This study looked solely at defendants who had been convicted and sentenced in the federal courts, and determined which defendants' offense conduct indicated that a mandatory minimum sentence was warranted (regardless of whether the mandatory minimum provision was actually charged or convicted). It must be underscored that inclusion in this sample was based solely on available data from the presentence report. Importantly, data on the strength of evidence, a key consideration for prosecutors, were not available. Thus, if a decision was made to dismiss the mandatory minimum count because of lack of strong evidence, the case, nonetheless, might be included in this sample.

The study tracked the processing (i.e., charging, conviction, and sentencing) of 1,165 sample cases identified through review of case files as exhibiting behaviors specified in mandatory minimum provisions relating to drug offenses and weapons use in drug offenses or bank robberies.[113] The study specifically tracked the use of mandatory minimum provisions throughout various phases of the system.[114] Figure 5 sets forth the major findings of this special study.[115]

Overview of Case Processing

Charging Patterns

[113]Review of case files included an examination of presentence reports, plea agreements, reports on the sentencing hearing, and judgment of conviction orders. A full description of the methodology utilized for this study is provided in the Technical Appendix at Appendix D. Of the 2,210 cases in the original sample for which case files were reviewed, 1,165 defendants were found to exhibit mandatory minimum behavior. Of these defendants, full historical information was available on 1,084.

[114]It is important to note that this sample was drawn exclusively from defendants who were convicted and sentenced in the federal system. The model, therefore, cannot track defendants who exited the system because no federal charges were filed, for whom all charges were dismissed, or who were found not guilty of all charges.

[115]Recall from earlier discussion that data are not available as to strength of evidence. Nevertheless, following a conservative approach to prescribing defendants for inclusion in the sample, there is strong indication of offense behavior for which mandatory minimum provisions are applicable.

The first column in Figure 5 indicates the population of convicted defendants who were determined to warrant mandatory minimum terms of imprisonment under existing statutory provisions. Determinations were made using descriptions of defendants' offense conduct from the presentence reports employing a conservative definition of applicability.

The second column in Figure 5 shows that at the indictment stage (original indictment if applicable; superseding indictment if one existed), 74.3 percent of the defendants were charged under the highest mandatory minimum provisions indicated by the offense behavior. Another 13.7 percent were charged with mandatory minimums requiring lower penalties and 12.0 percent were charged under statutory provisions not requiring minimum penalties.

Because this stage of the process is not fully documented, the study cannot assess the prosecutors' reasons for not charging the full mandatory minimum provisions for 25.7 percent of the defendants. Among the possible explanations for not charging at the full mandatory minimum level are lack of evidence to support full charges at the levels required, plea arrangements made prior to charging easily-indictable lesser charges that are not superseded after plea discussions, or workload issues.

Mandatory minimum reductions at this stage, however, involve the following patterns:

- Drug charges were filed specifying no amount of drugs or specifying lower amounts of drugs than appeared supportable.[116] Specifying no amount of drugs resulted in no applicable mandatory minimum, while specifying a lower amount resulted in lower or no applicable minimums, depending on the amount specified.

- Charges for mandatory weapons enhancements under 18 U.S.C. § 924(c) were not filed. For 45 percent (138 of 309) of drug defendants for whom weapons enhancements were found appropriate, no gun charges were filed.

- Increased punishments for prior felony convictions were not sought by the prosecutor. For 85 of 135 (63%) defendants for whom increased punishments were possible due to prior felony convictions, increased minimums were not sought or obtained.

Plea/Conviction Patterns

The third column of Figure 5 indicates that at conviction, 59 percent of the sample defendants were convicted at the full mandatory minimum level possible; 16.2 percent were convicted at a reduced minimum; and 24.5 percent were not convicted under any mandatory minimum provision.

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[116]In general, the courts have held that the mandatory minimum penalty provisions in 21 U.S.C. §§ 841(b) and 960(b) are sentencing determinations for the court; hence it is unnecessary that the indictment specify drug quantity. Nevertheless, where it is still the practice to specify drug quantities in the indictment, it is sometimes the case that prosecutors state a smaller drug quantity than an indicated mandatory minimum amount.

An analysis of case flow between the indictment and conviction stages indicates that of the defendants fully charged at the outset who went to trial, convictions involving the full minimum accounted for 96 percent, reductions of mandatory minimums accounted for 2 percent, and no minimums for 2 percent. Of defendants fully charged at the outset who pleaded guilty, 26.8 percent pleaded guilty to charges involving lesser or no mandatory minimums. Of defendants originally charged with mandatory minimum provisions providing penalties below those determined to be indicated by the study who pleaded guilty, 12.6 percent pleaded to no mandatory minimum charges.

Of defendants in the study entering into oral or written plea agreements, 31.5 percent had no mandatory minimum at conviction, an additional 18.9 percent received motions for substantial assistance, and 52.9 percent were sentenced below the mandatory minimum indicated. The prosecutors' reasons for reducing or dismissing mandatory minimum provisions at this stage cannot be assessed through this study, but may be attributable to problems in evidence, strategies to induce a plea, or satisfaction with the punishment received. According to the Thornburgh Memorandum,[117] prosecutors may drop or reduce readily provable charges for a variety of reasons, including a change in the evidence, the need to protect a witness, when it does not affect the sentence length, and workload issues (e.g., the burden a trial will place on an office).

Charging patterns identified at this stage of processing, relating to defendants who pleaded to lower mandatory minimum or no mandatory minimum provisions, include the following:

- Superseding informations were filed specifying lesser or no mandatory minimum charges and the original charges were dismissed. This typically involved specification of lesser drug amounts involved in drug distribution. However, for 13 defendants (4.5% of those with no minimum at conviction), superseding informations specified only simple possession or use of a communication facility and no mandatory minimum charges.

- Charges carrying mandatory minimum enhancements were dismissed. For 26 percent of defendants originally charged with weapons enhancements under 18 U.S.C. § 924(c), these provisions were later dismissed. For five defendants (1.7% of those with no minimum at conviction) mandatory minimum counts were dropped, leaving only simple possession or communication facility counts for the indicted charges. Frequently, in multiple count drug distribution cases, mandatory minimum counts were dismissed while non-mandatory drug distribution counts remained.

Also present at this stage in the plea process were plea agreements stipulating to sentencing factors that could substantially reduce sentences. Of the 716 defendants for whom plea agreements were evident, 23.7 percent were known to have stipulated to specific drug amounts, 5.6 percent to status of gun possession, 6.4 percent to role in the offense, and 28.5 percent to offense level, sentencing range, or sentence. The merits of all stipulations cannot be assessed and many appeared to reflect the full amount indicated in the case file. In addition, stipulations were not always accepted by the court as

[117]Memorandum to Federal Prosecutors from Attorney General Richard Thornburgh (March 13, 1989).

factual findings. However, for 17 percent of the defendants whose plea involved stipulations to drug amount, the amount used at sentencing was lower than that pertaining to the mandatory minimum indicated by the study.

Motions for Substantial Assistance

The fourth column in Figure 5 illustrates the effect of substantial assistance motions. As noted elsewhere in this Report, following conviction the prosecutor may make a motion to the court for a reduction in sentence due to substantial assistance by the defendant in the investigation and/or prosecution of other criminal activity. As provided by statute, a substantial assistance motion granted by the court removes the mandatory minimum requirements that otherwise would be binding at sentencing. This step in the model indicates that through substantial assistance motions, 17.6 percent of those subject to the full mandatory minimum penalty after conviction, and 14.2 percent of those subject to reduced minimums after conviction, were not subject to any mandatory minimum penalties at the time of sentencing.

Sentencing

The final column in Figure 5 compares the sentences actually imposed by the courts to the sentences called for by the mandatory minimum provisions indicated by the study. As shown in the last column, 60.3 percent of the defendants were found to be sentenced at or above the mandatory minimum indicated by the study, while 39.7 percent were sentenced below the indicated level.

As explained more fully in Chapter 4, the sentencing guidelines system, based on conviction and real offense conduct, is designed to standardize sentencing for similar defendants by giving weight to certain real offense characteristics. After initial consideration of counts of conviction, the guidelines provide enhancements or reductions based on conduct that occurred in association with the offense. Base offense levels and adjustments are typically constructed to reflect mandatory minimum provisions for similar defendants. For example, under the guidelines the base offense level for an offense involving 100 grams of heroin is set to result in a minimum five-year sentence if drug distribution is charged, independent of the penalty provision pursued (i.e., mandatory minimum). Due to the real offense characteristics of the guidelines, therefore, many offenders not convicted under mandatory minimums were sentenced at or above the level indicated by the study.

However, several processing factors were found to result in sentences below the indicated mandatory minimum levels:

- If the defendant substantially assisted the government and a motion was made by the prosecutor for reduction of sentence, the judge had grounds to depart below the mandatory minimum level and the guideline range. For 31 percent of the defendants sentenced below the indicated mandatory minimum, downward departures for substantial assistance were provided.

- Assuming no mandatory minimum is applied, a court may depart downward from the guideline range for mitigating circumstances unique to a particular case. For 12 percent of the

defendants sentenced below the indicated mandatory minimum level, a downward departure below the guideline range was provided.

- Additional factors can contribute to guideline ranges below the indicated mandatory minimum sentences. Because the guidelines do not employ a "pure" real offense approach, some charging strategies result in lower guideline ranges if mandatory minimum counts are dropped. For instance, simple possession and communications facility charges will reduce guideline levels, as well as statutory maximums, below the indicated mandatory minimums. In other situations, guideline adjustments for behavior that is not charged provide for lesser increases than originally charged. For example, firearms adjustments under the guidelines typically enhance the range less when uncharged than the 60-month enhancement required after conviction under 18 U.S.C. § 924(c).[118] For 60 percent of those defendants falling below the mandatory level that were not due to downward departures, the guideline range would have been higher if charged differently. (This figure includes defendants with both reductions in mandatory minimum counts and stipulations to lower amounts that were accepted by the court.)

- In some cases, otherwise applicable guideline sentencing ranges are not as high as mandatory minimum sentences require.[119] For instance, for defendants involved in drug distributions at levels close to the minimum amounts that trigger a mandatory minimum, or first offenders involved as minor participants, guideline requirements are typically lower than those called for by the mandatory minimum penalty provision (were it applicable). In addition, the criminal history enhancement slope for prior sentences under the guidelines is not as steep as dictated for prior convictions in the statutes. As a result, guideline sentences will not be as high for certain categories of defendants when enhanced statutory punishments are not pursued by the prosecution. For 40 percent of the defendants sentenced below the indicated minimum that were not a result of downward departure, the guideline range would not have been higher despite different charging practices.

E. Impact of Mandatory Minimums on Reducing Unwarranted Sentencing Disparity

In mandating minimum terms of imprisonment, one of Congress's goals was to eliminate unwarranted sentencing disparity for certain categories of defendants. To accomplish this, Congress identified these categories and designated appropriate penalties below which defendants were not to be sentenced.

The following analyses address the goal of reducing unwarranted sentencing disparity only in terms of application of the minimum terms mandated to convicted defendants who exhibit behavior sufficient

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[118]Guideline amendments pending before Congress rectify this in the case of firearm use in connection with robbery. These amendments will become part of the guidelines on November 1, 1991, assuming no further legislation alters this result.

[119]The guidelines ensure, however, that if a mandatory minimum sentence is applicable at sentencing, the guideline minimum will be not less than the statutory minimum.

to invoke a mandatory minimum penalty. They do not address potential disparity among defendants sentenced above the minimum, a form of disparity Congress did not intend to address through mandatory minimums. As discussed in Section D, the Sentencing Commission's sample study found that approximately 40 percent of defendants determined to exhibit behavior warranting mandatory minimum terms were sentenced below those indicated terms. Whether due to plea agreements, workload issues, substantial assistance, or evidence problems, these sentences are disparate by statutory definitions established by Congress. If a defendant exhibits the requisite conduct necessary to invoke a mandatory minimum but is sentenced below the indicated term, the threshold for reducing disparity does not hold.

In order to further investigate the nature of the offense and eligible defendants who received sentences lower than those warranted, an analysis of case processing was undertaken, targeting specified system, offense, and offender characteristics. This information sheds additional light on potential disparity occurring under mandatory minimum sentencing.

Circuit Variations

While federal statutes are meant to be applied consistently in all federal courts, variations across circuits in case handling may occur due to differing defendant populations, crime rates or types, caseloads, and other factors. As a result, conclusions about variations in sentencing behavior across circuits must be made cautiously in the absence of multivariate analyses that control for these types of between-circuit differences.

Table 7 presents the percentage of eligible defendants sentenced at or above the indicated statutory minimum by circuit. The processing of defendants in the D.C., First, Eighth, and Eleventh Circuits most consistently result in sentences at or above indicated mandatory minimums (all at or above 70%), while the Second and Tenth Circuits (below 49%) least consistently result in such sentences.

For two selected offense types, controlled substance defendants with possible 60-month minimums and controlled substance defendants with 120-month minimums, Tables 8 and 9 track case processing by circuit. Although numbers of defendants within categories become small and less accurate in generalizing within each circuit, review of these figures is enlightening to understanding processing patterns. For instance, the D.C. and First Circuit (with high proportions of defendants above indicated mandatory minimum penalties) have the highest rates of charging statutes mandating the highest minimum sentence. Their rates of loss at conviction, however, are generally not higher than others. The D.C. Circuit has consistently lower proportions of reductions for substantial assistance. Some of the highest reduction circuits (e.g., the Second and Ninth Circuit) show reductions in applicable penalty levels at every stage of the process.

Of additional interest are variations in proportions of drug defendants who go to trial by circuit. (See Tables 8B and 9B.) For instance, the D.C. and Seventh Circuits, with generally lower overall reduction patterns, have fairly high trial rates compared to other circuits. However, there appears to be no consistent pattern across all circuits.

Offense Variations

Data regarding four offense conduct variables relevant to controlled substance offenses were collected and studied: drug amount, role in the offense, scope of the criminal activity, and primary drug type involved. This section reviews the effect of offense characteristics on mandatory minimum sentencing, and reviews processing patterns for drug cases in the sample at the 60-month and the 120-month indicated minimum levels for selected characteristics.

Sixty-five percent of defendants in the sample involved with high amounts of drugs were sentenced at or above the indicated statutory minimum, compared to 56.3 percent and 57.4 percent, respectively, with medium or low drug amounts. (See Table 10.) However, the fact that 35 percent of defendants at the highest drug levels did not receive mandatory sentences reveals potentially significant disparity in sentences if it is assumed that other similar defendants should and do receive sentences well above the minimums suggested by Congress.

Defendants with a peripheral role in the offense (e.g., girlfriend, spouse, courier with little knowledge of contents of package) are less likely to receive sentences at or above the indicated mandatory minimums: 21 percent compared to the average 60 percent for the entire sample. (See Table 11.) The defendants most likely to be sentenced at or above the minimums are those who distribute at the street level, and not those with higher roles involved in such activities as large scale distribution, manufacturing, and importation. Of greatest importance to the disparity issue, however, is the fact that 30 to 40 percent of those in higher roles received sentences lower than warranted by statutory criteria of drug amount and/or weapons use.

Several observations can be made when examining the case processing of defendants by role in the offense. The highest and lowest role categories for the 60-months indicated defendants have the lowest probability of being charged with the applicable minimum (58.5 and 62.5 percent respectively), and greater probabilities of reductions at conviction. Fewer reductions are evident in the three mid-level roles. (See Tables 12A, 12C.) This relationship holds true for peripheral roles, but disappears for the highest level role for defendants with the 120-month indicated minimum. (See Tables 13A, 13C.)

For defendants subject to the 120-month minimum, those with higher roles are less likely to plead guilty. No comparable pattern is found in the 60-month category. (See Tables 12B, 13B.) For both categories, street level distributors are less likely to receive downward departures than defendants in either lower or higher roles. (See Tables 12D, 13D.)

A longitudinal comparison of the effect of role (defined as degree of culpability) on sentence is provided by the FJC analysis of FPSSIS files. (See Figure 6.) Those with mid-level roles, while initially treated more like defendants with minor roles, were found to be treated over time more and more like defendants with higher roles, a result not unlike the one presented for the sample described above.

As indicated in Table 14, defendants known to have been involved in ongoing drug activity are just as likely to be sentenced below mandatory minimums as those for whom only a single drug event was known. Over 40 percent of defendants in both categories received sentences below the mandatory minimums.

The proportion of cases sentenced at or above the indicated minimum varies considerably by drug type. (See Table 15.) Defendants involved in cocaine and cocaine base offenses are significantly more likely to receive sentences at or above the minimums (64.9% and 67.5%, respectively) than those involved in marijuana and methamphetamine offenses (43.5% and 41.7%, respectively). The likelihood of heroin defendants receiving full sentences falls between the two groups at 50 percent.

It appears that defendants involved in cocaine and cocaine base offenses are more frequently charged and convicted under mandatory minimum provisions, while marijuana and methamphetamine defendants receive greater reductions at the conviction/plea stage. (See Tables 16, 17.) The greatest single reduction from the 60-month level involves marijuana: 78.8 percent of these defendants are originally indicted under mandatory minimum provisions, but only 49.5 percent are convicted under such provisions, a reduction of 29 percent between the two process steps. (See Tables 16A, 16C.) At the 120-month level, methamphetamine defendants benefit from the greatest reduction, with 74.2 percent indicted and 42.9 percent convicted under the indicated statutory minimum, a reduction of 31 percent. (See Tables 17A, 17C.)

FPSSIS data provide historical background to the relevance of drug type to mandatory minimum penalties. The FJC analysis found that cocaine and opiate defendants were equally likely to receive sentences below the minimum in 1984, but by 1990 cocaine defendants were more likely to receive sentences above the applicable minimum terms. (See Figure 7.)[120] The percent of sentences above the minimum for marijuana defendants was noticeably less until 1987 and increased considerably by 1989.

Finally, variations due to prior criminal history were reviewed. As would be expected, first offenders (54.4%) were found to be less likely than repeat offenders (61.7%) to receive a sentence at or above the indicated mandatory minimum. (See Table 18.)

Relationships of Defendant Characteristics to Case Processing and Sentences

Finally, of importance to the disparity issue is differential treatment of defendants based on personal characteristics. Relating defendant characteristics to case processing and sentencing patterns reveals some interesting initial findings.[121]

Sex Variations

First, female defendants who commit offenses subject to mandatory minimum sentences are less likely to be sentenced at or above the indicated mandatory minimum level than are male defendants. Table 19 shows that 50.4 percent of females as compared to 61.5 percent of males receive indicated penalties. As revealed by the case tracking tables (see Tables 20 and 21), females are charged almost

[120]The "cocaine" category includes both cocaine powder and cocaine base.

[121]Given the sample size and lack of sufficient time for stringent study, these findings cannot be considered conclusive, and explanations for them cannot be provided. Accordingly, further study of these issues may be warranted.

as frequently as males, but tend to be convicted less frequently. Males and females plead guilty at the same rate at the 60-month level, but males are more likely to go to trial at the 120-month level. The proportion of females receiving applicable minimums is further reduced by a higher percentage of downward departures (see Tables 20D, 21D), which is especially high for females providing substantial assistance in the 120-month minimum indicated category. Using a more sophisticated and robust statistical technique[122] to explore the relationship between sex and sentence indicates, however, that the statistically significant relationship between sex and sentence above or below the mandatory minimum indicated disappears when considered in conjunction with offense characteristics. Put differently, differences in offense behavior apparently account for much of the apparent discrepancy in processing between males and females.

Figure 8, based on historical FPSSIS data, indicates that, consistently, a lesser proportion of females have received applicable mandatory minimum sentences since 1984.

Race Variations

Race was classified in the sample as White, Black, Hispanic (including Black Hispanics and White Hispanics), and all others. Table 22 describes the relationship between race and sentence at or above the indicated statutory minimum. A greater proportion of Black defendants received sentences at or above the indicated mandatory minimum (67.7%), followed by Hispanics (57.1%) and Whites (54.0%). Reviewing case tracking in Tables 23 and 24 shows that a greater proportion of Hispanics and a lesser proportion of Whites are originally indicted at the indicated mandatory minimum level. Whites are more likely to plead guilty, and less likely to be convicted at their indicated statutory minimum level.

Downward departures are most frequently granted to Whites and least frequently to Hispanics.[123] This is most evident at the 120-month level, at which Whites received substantial assistance departures in 25 percent of their cases, compared to 18.3 percent of Blacks and 11.8 percent of Hispanics. (See Tables 23D, 24D.) The effect of reductions below the mandatory levels for Whites at indictment and conviction, combined with more frequent departures for substantial assistance, appears to explain the overall lower probability of these defendants receiving sentences above the mandatory minimums.

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[122]A probit analysis was used to test the significance of the relationship between sex and sentence. Probit is a statistical technique that allows for the use of regression when there are only two possible outcomes (e.g., term of imprisonment or not). Regression allows for consideration of the effects of one variable (e.g., sex) when controlling for other explanatory variables (e.g., offense seriousness, criminal history, race, region, caseload). For more detailed discussion, see Appendix F.

[123]It should be noted that this relationship might simply be a function of the difference in the willingness to cooperate by different race/ethnic groups; or, in the worst case, it might reflect racial bias.

Again, a more sophisticated technique[124] was used to explore the relationship between race and sentence. The statistically significant relationship between race and sentence above or below the indicated mandatory minimum remained after consideration of factors related to the nature of the offense and prior criminal record. In contrast to the apparent differences between males and females, which disappears in the multivariate analysis, the differences among Blacks, Hispanics, and Whites do not disappear when measured differences in offense behavior are controlled. However, this is not to say that other unmeasured characteristics account for these differences.

The difference found across race appears to have increased since 1984. This difference develops between 1986 and 1988, after implementation of mandatory minimum drug provisions, and remains constant thereafter. (See Figure 9.)

Citizenship Variations

Twenty-seven percent of sample defendants were non-U.S. citizens. No significant differences were found in the proportion of these defendants who received sentences at or above the indicated mandatory minimum when compared to U.S. citizens. (See Table 25.)

Age Variations

Finally, no consistent relationship was found between age of the defendant and proportion sentenced at or above the indicated mandatory minimum level. (See Table 26.) While young defendants (under 22) are the most often charged under indicated mandatory minimums originally, they are not more likely to be convicted and sentenced under these provisions than the other age groups. Historical tables, contributed by FJC, indicate that age variations in sentencing have decreased since implementation of mandatory minimums, and even more since implementation of the guidelines. (See Figure 10.)

Findings imply that defendants are treated differently under mandatory minimums, based on race and sex, suggesting that Whites receive benefits in reduced application of mandatory minimum provisions and sentences below such provisions. Exploration of all possible reasons for these findings cannot be completed with available data sets, but such findings suggest a need for further study in the area of sentencing disparity.

F. Sentence Severity under Sentencing Guidelines and Mandatory Minimum Provisions

[124]A probit analysis was used to test the significance of the relationship between race and sentence. Probit is a statistical technique that allows for the use of regression when there are only two possible outcomes (e.g., term of imprisonment or not). Regression allows for consideration of the effects of one variable (e.g., race) when controlling for other explanatory variables (e.g., offense seriousness, criminal history, sex, region, caseload). For more detailed discussion, see at Appendix F.

One of the goals of mandatory minimum provisions strives to provide increased penalties for certain classes of defendants. This section of the empirical study addresses this question of sentence severity and contrasts sentencing patterns under sentencing guidelines with those patterns under mandatory minimum sentencing provisions.

The operation of the federal sentencing guidelines is highly related to the operation of statutory mandatory minimum penalties. When appropriately charged, guideline ranges for most defendants will encompass or be higher than the mandatory minimum applicable. As previously noted, if counts of conviction involve drug distribution or trafficking, the minimum guideline levels based on offense conduct are set to induce penalties at the mandatory minimum desired by Congress. Guideline requirements for use of a firearm, when charged, increase the underlying guideline range by the 60 months required by statute.

Results from the sample study indicate that when convictions under mandatory minimums are involved, the majority of sentencing ranges applicable under the guidelines encompass (22.4%) or are above (71.6%) the mandatory minimum provision applied. In the remaining 5.8 percent of the cases, the guideline range was below the applied mandatory minimum level; in such cases the guidelines instruct the court to sentence at the mandatory minimum. (See Table 27.)

In only a few instances will sentencing ranges calculated by the guidelines be lower than mandatory minimums imposed. Under one set of circumstances, combinations of mitigating factors (e.g., minimal role, acceptance of responsibility) and the lowest statutorily-directed drug amounts will result in guideline ranges below the mandatory minimums applied. Under another set of circumstances, guideline enhancements for prior felony convictions (if career criminal requirements are not met) will not rise as rapidly as required under mandatory minimum provisions.

Thus, available data suggest that the sentencing guidelines have incorporated the mandatory minimum provisions at the lowest drug amounts and, therefore, have met the congressional desire to raise sentence levels for particular groups of defendants, if appropriately charged. In fact, with the proportionality that is built into the guidelines' scheme, some defendants receive proportionally higher sentences than would be indicated by the mandatory minimum.

G. Summary of the Empirical Findings

This chapter provides a number of compelling topics that may warrant further research or congressional action. Three major findings stand out:

- Although there are over 60 mandatory minimum sentencing provisions contained within the Federal Criminal Code, very few are ever used in practice. In fact, only four statutes are used with any regularity. These four statutes refer to either drug or weapons offenses, and potentially contribute to substantial prison terms for increasing numbers of defendants.

- Defendants whose offense conduct and offender characteristics appear to warrant application of mandatory minimum sentencing provisions do not receive those sentences approximately 41 percent of the time.

- Disparity may be entering the federal criminal justice system through mandatory minimums in two ways: defendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon such factors as race, circuit, and prosecutorial practices; and defendants who appear to be quite different with respect to distinguishing characteristics (e.g., role and nature of the offense) receive similar reductions in sentences below the mandatory minimum provisions.

Chapter 6
The Impact of Mandatory Minimum Sentences on the Federal Criminal Justice System

This chapter provides relevant background information regarding the impact of mandatory minimum sentencing provisions on the federal criminal justice system. The first two sections of the chapter summarize the positions of the Judicial Conference of the United States and the congressionally chartered Federal Courts Study Committee. The next section presents a detailed description of field interviews conducted by the Sentencing Commission with judges, assistant U.S. attorneys, defense attorneys, and probation officers that elicited views regarding mandatory minimums.[125] The following section reports initial results from a survey conducted by the Sentencing Commission that sought answers to specific questions regarding mandatory minimums from members of the federal court family. The final section of this chapter assesses the impact of mandatory minimum sentences on the federal prisons.

A. Resolution of the Judicial Conference of the United States

The Judicial Conference of the United States and the judges of the twelve Circuit Courts of Appeals that hear criminal cases have adopted resolutions that oppose mandatory minimum sentencing statutes.[126] In its formal resolution, the Conference urges Congress to "reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act." The resolution goes on to state that many judges have imposed long, non-parolable sentences on defendants whom they believe Congress did not have in mind when it enacted mandatory minimum sentencing provisions.

B. Recommendations of the Federal Courts Study Committee

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[125]Regrettably, because of limited time and resources, the Sentencing Commission was not able to survey the opinions of the public, victims, or the Congress either as to their attitudes toward mandatory minimum sentencing provisions, or their assumptions about the presumed effects of mandatory minimum sentences. This limitation must be recognized as potentially creating an imbalance in the overall picture here reported. Steps to solicit the views of these groups should be taken in the future.

[126]Appendix G provides copies of the Judicial Conference and Circuit resolutions. The Federal Circuit Court of Appeals does not hear criminal cases.

At the direction of Congress, the Chief Justice of the United States appointed a 15-member committee to study the problems of the federal courts and provide a series of recommendations for improvement.[127] The Committee's extensive review included examination of mandatory minimum sentencing statutes. In Chapter 7 of its April 2, 1990 report, the Committee wrote, "Congress should repeal mandatory minimum sentence provisions, whereupon the United States Sentencing Commission should reconsider the guidelines applicable to the affected offenses." The Committee stated that mandatory minimums "create penalties so distorted as to hamper federal criminal adjudication." By way of illustration, the report highlights Sections 841(b)(1)(B) and 844(a) of Title 21, United States Code. The former was enacted in 1986 and provides a minimum sentence of five years for possession with intent to distribute five grams of crack cocaine. The latter, a 1988 statute, created the same mandatory five-year sentence for simple possession of the same amount of crack. The Committee wrote:

> [The Sentencing Reform Act] contemplated sentences that would vary, for example, depending on whether the defendant used a weapon . . . . The recent mandatory minimum sentence provisions ignore these offender and offense variables and in the process inhibit the efforts of the Sentencing Commission to fashion a comprehensive and rational sentencing system . . . .

C. Litigation Regarding Mandatory Minimum Sentences

Mandatory minimum sentences have generated extensive litigation, especially in recent years as Congress has increased the severity of mandatory penalties for drug and firearm offenses. Among the principal challenges to mandatory minimum provisions are contentions that they offend the Eighth Amendment and the Due Process clause of the Fifth Amendment. Criminal defendants have also challenged mandatory minimum sentencing schemes on equal protection, double jeopardy, and separation of powers grounds. Generally, these challenges have not succeeded.

A detailed summary of the litigation that has occurred in the federal courts over mandatory minimum sentencing provisions is set forth in Appendix H.

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[127]Committee members were Hon. Joseph F. Weis, Jr., Chairman, United States Court of Appeals for the Third Circuit; J. Vincent Aprile, II, General Counsel of the Kentucky State Department of Public Advocacy; Hon. Jose A. Cabranes, United States district court for the District of Connecticut; Hon. Keith M. Callow, Chief Justice, Supreme Court of Washington; Hon. Levin H. Campbell, United States Court of Appeals for the First Circuit; Edward S. G. Dennis, Jr., Assistant Attorney General for the Criminal Division of the U.S. Department of Justice; Hon. Charles E. Grassley, United States Senate; Morris Harrell, Locke Purnell Rain Harrell; Hon. Howell T. Heflin, United States Senate; Hon. Robert W. Kastenmeier, United States House of Representatives; Hon. Judith N. Keep, United States District Court for the Southern District of California; Rex E. Lee, Jr., President, Brigham Young University; Hon. Carlos J. Moorhead, United States House of Representatives; Diana Gribbon Motz, Frank, Bernstein, Conway & Goldman; and Hon. Richard A. Posner, United States Court of Appeals for the Seventh Circuit.

D. Sentencing Commission Evaluation Interviews: Views from the Field

The Sentencing Reform Act of 1984 requires the Sentencing Commission to study and report on the operation of the guidelines sentencing system. As part of this ongoing assessment, the Sentencing Commission visited twelve judicial districts, selected randomly by circuit, during the period December 1990 through March 1991, and conducted interviews with judges, assistant U.S. attorneys (AUSAs), federal and private defense attorneys, and probation officers.

The field interviews of court personnel at the twelve sites provided opinion data on the impact of the mandatory minimum sentencing laws used in this Report. A total of 234 interviews were conducted, including 48 judges, 72 AUSAs, 48 defense attorneys, and 66 probation officers.[128] It is important to note that data from a sample of this size may not necessarily be representative of all federal court personnel across the system. However, the interviews do contain a wide range of opinions from respondents with different interests and diverse caseloads. Certain patterns and groupings of opinions emerge from the data that provide some insight into the reasons that judges, prosecuting and defense attorneys, and probation officers favor, oppose, or remain neutral about mandatory minimum sentencing statutes.

Method

Each interview was conducted by a team of two persons. At least one member of the research team was from the evaluation staff of the Sentencing Commission. Other interview team members were from the Sentencing Commission's legal staff, technical assistance staff, or were federal probation officers. The structured interviews each lasted approximately one hour and consisted of 45-50 questions appropriate to the respondent's profession. The interviews contained questions about caseload and caseflow, plea bargaining, dispute resolution, guideline application, departures and appeals, roles and relative influence of the court participants, general impact of the sentencing guidelines, and the effects of mandatory minimums on the federal courts. The majority of opinions on the issue of mandatory minimums were offered in response to the following question:

> *In your opinion, how are mandatory minimum sentence requirements, as distinct from the guidelines, affecting the criminal justice system?*

It should be noted that this is an open-ended question (as opposed to one designed to elicit a specific response), and answers varied according to what was salient to each respondent. In an effort to invite candid responses, respondents were assured of confidentiality and anonymity at the beginning of the interview. When the data were compiled and categorized, it was discovered that respondents also mentioned mandatory minimums in response to other open-ended questions about the guidelines. This occurred frequently enough to warrant study of other questions as well. Consequently, when any of the

[128] In an additional twelve interviews the question relevant to this Report was not answered, due either to the respondent not having a caseload dealing with mandatory minimums or to time constraints.

interview questions about guidelines triggered a comment on mandatory minimums, that response was considered along with the direct question on mandatory minimums.

Responses were separated into three general categories: (1) favorable to the mandatory minimums, (2) opposed or unfavorable, and (3) neutral. Within each of these categories, the response was coded with a few descriptive words and placed in the appropriate category (favorable, unfavorable, or neutral) and the context of the remark was considered in order to determine its classification. Similar responses might require different placement depending on the context in which statements were made. For example, "Result in More Trials" was categorized as favorable for one AUSA who cast it that way, and negative for other AUSAs and defense attorneys. Similarly, "Result in Longer Prison Sentences" was a criticism by one AUSA and a neutral comment by another. In most cases it was clear whether the response was favorable or unfavorable. In the instances where the response was not clear, the comment was considered neutral. Statements that were observations of fact having neither a positive nor negative connotation were coded neutral, as were obviously neutral responses such as "No Opinion." All responses were coded for each of the four groups of respondents: judges, AUSAs, defense attorneys, and probation officers. (Views expressed by each respondent are provided in Appendix I.) Results are summarized in Tables 1-5 (one for each group plus a summary table). The following sections discuss the findings for each group of participants as summarized in the tables.

Judges' Views on the Impact of Mandatory Minimum Sentencing

In general, the judges were unfavorable in their comments concerning the impact of mandatory minimum statutes. (See Table 1.) Of the 48 judge respondents, 38 made unfavorable comments, although 6 of these 38 judges noted some favorable features as well. (See Table 5.)

The unfavorable comment most frequently expressed by judges (n = 18) was that the mandatory minimum sentencing requirements were too harsh. Most of the judges who described the mandatory minimum sentences as too harsh believed that the mandatory minimum penalties were too high in general. Five judges specified that the minimums were too harsh for offenders whose role in a criminal operation was minimal. One judge whose response was coded "Too Harsh" said: *"Very bad. Congress did not give much thought to the minimums, and picked figures out of the air. The minimums are grossly excessive."*

The second most frequent negative response to questions on the mandatory minimums was that they eliminate judicial discretion. Fifteen judges expressed this view, including one who said, *"I think they are distorting the criminal justice system and what's appropriate. They leave the sentencing judge with no discretion. The guidelines say that you can depart, but with mandatory minimums you can't. They make no sense."* Eleven of the 48 judges felt that mandatory minimums cause more trials. One judge stated that they are *"Weighing [the system] down. Defendants facing mandatory minimums have nothing to lose so they go to trial. Therefore there are more trials. We're further behind. Sentences should be as close to the act as possible. Punishment is now further from the act than it should be."* As shown in Table 1, judges offered other unfavorable comments related to a number of different topics. For example, the effect on prisons (Prison Overcrowding) was a concern for seven of the judges, while four feared that long prison terms would not allow any rehabilitation of offenders and eventually would result in increased recidivism.

While the numbers of favorable and unfavorable comments by judges related to mandatory minimum sentencing laws explain their reactions to some degree, the force of their expression tells more about their opinions. For example, the range of responses that were categorizedas "Too Harsh" included such remarks as: *"Generally too harsh. On balance they are helpful if they may have some general deterrent value. If there is no evidence to support this then there is no value . . ."* This fairly mild negative comment can be contrasted with the following: *"They are rotten. They are ruining the system. They are one of the worst things that have happened . . . They are grossly unjust."*

In contrast to the strongly negative view of most of the judges interviewed, eight judges made favorable comments concerning mandatory minimums. However, six of thesetempered their favorable comments with unfavorable statements, leaving two judges who made exclusively positive responses. One example of a "mixed opinion" is a judge who said *"Mandatory minimums are good sometimes. People know what they will get. A good deterrent. Sometimes people just happen to get caught or they are minimal participants and in those cases, mandatory minimums are unjust... . It takes away the discretion of the court to be able to take into account individual characteristics."* Other favorable comments included the opinion that mandatory minimums areappropriate for at least some offenders. One judge expressed this opinion by saying *"I think the mandatory minimums are all right. I've seen a few cases in which a 924(c) consecutive count really inflates the sentence, particularly when you start with a drug offense."* Two judges felt that mandatory minimum sentences have a deterrent effect on crime.

Eight judges made neutral comments concerning the impact of mandatory minimums. The most frequent neutral comment of judges was that the effects of mandatory minimums are hard to distinguish from those of the guidelines.

Assistant U.S. Attorneys' Views on the Impact of Mandatory Minimum Sentencing

In contrast to the judges, assistant U.S. attorneys were more evenly divided in their comments about the impact of mandatory minimums. (See Table 2.) Of the 72 prosecuting attorneys interviewed, 38 mentioned favorable effects, although 11 of the 38 also included unfavorable comments. Thus, there were 27 attorneys who had no negative opinions, while 23 made no positive remarks. (See Table 5.)

The most frequent favorable opinion is reflected by the "Generally Appropriate" category with 16 AUSAs expressing this in various ways. Examples of responses that were coded "Generally Appropriate" ranged from *"The minimums as a whole are good,"* to *"all for them."*

A positive effect mentioned by nine AUSAs was that the mandatory minimums reduce disparity. For example, one AUSA expressed the view that *"they are doing what they should be doing--[setting] a consistent standard across the country."* It appeared from the interview data that those AUSAs whosaid "reduce disparity" were contrasting the impact of mandatory minimums with pre-guideline sentencing practices rather than with the current guideline system. There were also AUSAs who thought that mandatory minimums encourage cooperation by offenders and cited this as an advantage. One AUSA expressed it this way: *"They have a positive effect. They induce people to cooperate and the ability to bargain around them enables us to dispose of a lot of cases at an early stage."* The next most frequent favorable comment was that the mandatory minimum sentences have a deterrent effect on crime. According to one AUSA, *"When we send some guy [away] for long periods we hear about the talk on the*

street. People who before were only being sent away for short periods, which were a joke, are now gone for a long time. This has a very positive effect." Another effect that was viewed positively by four AUSAs was that mandatory minimums encourage pleas.

Although the number of AUSAs with favorable comments exceeded the number with unfavorable comments, the margin was narrow. In addition to the 11 AUSAs who had mixed views, 23 held totally negative views of the mandatory minimums (as contrasted with 27 who had totally positive views). By far, the most frequent unfavorable comment of the group was that they result in more trials. Twenty-four AUSAs mentioned this as a negative effect, while one considered it to be a positive result. Typical of the negative comments was: *"The downside is in the people who are facing them, if they can't fashion a plea to avoid them there's a tendency to go to trial."* Similar responses included: *"They are causing more trials because defendants feel that they may as well take a run at it since they're facing time if they get convicted or plead guilty."*

The second most frequent negative comment by AUSAs (6 times) was that the mandatory penalties are too harsh. Four of the six AUSAs limited their criticism to cases involving minimal participants; one attorney singled out first offenders; and another cited offenses involving marijuana plants.

Another unfavorable comment from four AUSAs was that the mandatory minimums encourage manipulation. As noted in subsequent interviews, defense attorneys and probation officers also mentioned this effect. One AUSA said, *"There is very little that anyone can say if mandatory minimums are involved. The question is how to get around it. Either that or the people are not pleading. It's one or the other."* Another AUSA spoke in terms of judges' actions: *"Judges use this [relevant conduct] to get under the mandatory minimums. It is up to the court to find out what is relevant conduct and this depends on the judge."*

Eleven of the AUSAs had mixed opinions about the mandatory minimums. An example of one recorded response from an AUSA who saw both advantages and disadvantages is: *"They are good for three reasons: (1) they put bad people away, (2) they give the government a strong bargaining position to settle cases, (3) it gives the government a handle to force cooperation. Bad effects: Trouble is that about one-third of Black youth are in the criminal justice system. I think I am for mandatory minimums, but [there's a] need to distinguish first-time offenders. Too severe--10 years for a first offense . . . Need some built-in flexibility in the system."*

Eleven AUSAs made neutral observations about the effects of the mandatory minimums. Common responses in the neutral category were that the guideline ranges are higher, or that the effects of mandatory minimums are hard to distinguish from those of the guidelines, and (in contrast to several of their colleagues) there are about the same number of trials as before.

In addition to the general question regarding mandatory minimums asked of all respondents, AUSAs (excluding supervising AUSAs) were asked the following additional questions:

> *Do you ever charge particular counts because they carry mandatory minimum sentences?*
>
> *Are there circumstances when you might not charge an offense that carries a mandatory minimum sentence?*

Based on the responses to these two questions, it was determined that ten AUSAs had no cases in which a mandatory minimum might be applicable. Of the remaining 46 AUSAs, 15 said that they always charged a mandatory minimum if possible; four reported that they charged according to the facts of the case without reference to mandatory minimums but that mandatory minimums would be charged if applicable; one stated that AUSAs have no influence over the charge; and 26 reported that they did not always charge a mandatory minimum even when it was warranted by the facts in the case.

The 26 respondents who reported that they did not always charge a mandatory minimum whenever possible offered a variety of explanations. Eight AUSAs said that they might not charge a mandatory minimum if the offender was cooperating. For example, one AUSA reported: *"In the case of extreme cooperation, we'll cut the defendant a break to avoid the mandatory minimum."* Another four AUSAs said they might not charge a mandatory minimum if the offender had a lesser role in the offense. For example, in discussing the charging of mandatory minimums one said, *"If the person was not heavily involved, I would not charge that person as compared to the more involved player."* Other respondents stated that they might not charge a mandatory minimum if the offense involved a first offender (n = 1); if it encouraged a plea bargain (n = 1); if the guidelines were higher than the mandatory minimum (n = 1); if the guidelines were lower than the mandatory minimum (n = 1); if the resulting sentence was too harsh (n = 1); while others (n = 3) offered no clear explanation.

Finally, six respondents specifically mentioned the armed career criminal statute as opposed to mandatory minimums in general. Four said that they would not charge the offender as an armed career criminal if the resulting sentence was too harsh or unjust, and two said that they would not charge the offender as an armed career criminal if the offender was already a career offender under the guidelines. For example, one AUSA reported: *"When you have some person who technically qualified for the armed career criminal and in our judgment this would be unjust, we do not charge them at all and give it to the state. I have done this a number of times."*

In summary, it appears that mandatory minimums are not always charged when supported by the facts of the case. As reported by the AUSAs, the two general reasons for this are: 1) offender cooperation, and 2) the perceived harshness of mandatory minimums as applied to minimal participants.

Defense Attorneys' Views on the Impact of Mandatory Minimum Sentencing

Defense attorneys overwhelmingly were unfavorable in their reactions to mandatory minimums. (See Table 3.) There was no significant difference between federal defenders and private attorneys, and therefore they were treated as one group. Only one of the 48 defense attorneys made any favorable comment about mandatory minimums, and this was offered along with unfavorable statements. The

only advantage that any defense attorney saw in mandatory minimum sentencing laws was that they encourage cooperation.

Twenty-one of the defense attorneys said that mandatory minimum penalties are too harsh. Of these, 13 thought they are generally too harsh, three said they are too harsh for first offenders, and three said they are too harsh for minimal participants. "Too Harsh for Weapons Offenses" and "Too Harsh for Marijuana Plant Offenses" were each mentioned once. As was true for the AUSAs, the strength of defense attorneys' opposition varied from relatively mild to very strong. Two examples illustrate the range of responses: (1) *"I am opposed in principle to determinate sentencing. Mandatory minimums are unnecessarily long and they force me to take cases to trial that I might not otherwise."* (2) *"Horribly. I can't tell you how many times mandatory minimums significantly exceed the guideline range with inequitable results, particularly for first-time offenders. There is no flexibility in, say, a diminished case. The results are hideous."*

The response "Result in More Trials" was another negative effect cited by 17 defense attorneys as was "Eliminate Judicial Discretion" (cited 10 times). Referring to judges' lack of discretion, one defense attorney protested, *"There's nothing good about them. Federal judges are appointed and know cases. Congress knows nothing about how to go about [sentencing.]"* Nine of the defense attorneys were concerned about prison overcrowding. For example, *"[They are] overburdening the prison system. We can't warehouse that many people without building more prisons, and there's no money for that."*

The next most frequent negative comment was a non-specific response that was coded "Generally Inappropriate." As with the "Too Harsh" category, there was variance in the strength of the response. Comments ranged from *"Any mandatory minimum has an impact. They take away hope, and are always worse for the client, never better"* to *"There is no single worse evil. For the judicial system to work, people have to believe in it. When you see how it works [with mandatory minimum sentences], it exhausts any fertile soil in the judicial system."*

As can be seen from Table 3, some of the other negative responses that occurred with less frequency (3 times or fewer) include "Create Disparity," "Make the Plea Process More Difficult," "Do Not Deter Crime," and "Encourage Manipulation." Although there was only one mixed opinion that contained both positive and negative statements, 19 respondents made either neutral comments or neutral along with negative comments. The most frequent neutral response of defense attorneys (13) was that the effects of mandatory minimums are hard to distinguish from those of the guidelines.

Probation Officers' Views on the Impact of Mandatory Minimum Sentencing

The number of probation officers who responded with unfavorable comments exceeded by a wide margin those who responded favorably. (See Table 4.) Of the 66 probation officers questioned, 41 made only unfavorable comments, while five made solely favorable comments, and five others had mixed opinions.[129] (See Table 5.)

[129]The remaining respondents were totally neutral.

Sixteen probation officers expressed the view that the mandatory minimum sentences were too harsh. Nine of the 16 specified a particular type of offender for whom this type of sentence was too harsh (i.e., drug offenders, minimal participants, or youthful offenders). For example, one probation officer said, *"They are often too harsh and result in young offenders who have high quantities of drugs getting long sentences. You have 18-year-olds getting 30-year sentences. We will wind up warehousing a lot of people who will be very bitter when they get out of prison."*

The next two most frequently cited disadvantages occurred roughly the same number of times: "Result in Prison Overcrowding" (13) and "Eliminate Judicial Discretion" (12). Eight of the probation officers felt that, in view of the guidelines, the mandatory minimum sentencing laws are unnecessary. An example of that viewpoint: *"I don't see the point of mandatory minimums; the guidelines can set a better range."* Seven of the 66 probation officers felt that the mandatory minimums create disparity, and an equal number observed that they encourage manipulation. One probation officer explained how disparity occurred and suggested a means of manipulation: *"They're [mandatory minimums] an absolute mess. They give the U.S. Attorneys such a hammer, and they use it indiscriminately. They try to get around them via substantial assistance."* Another probation officer offered the following scenario: *"Judges find a way to depart to accommodate the plea bargain. The impact is not applying them when they should be applied. [In a methamphetamine case], there was a mandatory minimum of ten years, the plea bargain was for 60 months, and the sentence was for 60 months."* In contrast to this, two of the probation officers interviewed believed that the mandatory minimums reduce disparity. As one explained, *"[It] takes away AUSA bargaining power, which is good, because it gets away from behind-the-door settlements."*

Ten probation officers found advantages to the mandatory minimums, but one-half of these also saw disadvantages. Three respondents commented that the mandatory sentences promote deterrence. For example, one probation officer said that *"there is some impact -- a message to the community that certain behaviors will be punished severely . . . . There is a message to the community that you will have to do time in federal court."* Other advantages included "Promote Certainty" and "Promote Public Protection."

More frequently than any other group, probation officers gave neutral responses to questions about mandatory minimum sentences. Fifteen either expressed no opinion or gave a neutral response such as "Hard to Distinguish from the Guidelines" or "Higher than the Guidelines."Conclusions

Three of the four groups of participants responded unfavorably to mandatory minimum sentencing laws, with assistant U.S. attorneys providing the most favorable sentiment to these provisions. (See Table 5.) Of the 72 AUSAs interviewed, 53 percent believed there were at least some positive effects brought about by mandatory minimums. Thirty-eight percent of the AUSAs provided only favorable comments. The two most frequent favorable comments offered by this group fell into the categories of "Generally Appropriate" and "Reduce Disparity." A substantial number of AUSAs (32%) made only unfavorable comments about the mandatory minimums, however. The disadvantages they cited did not differ greatly from unfavorable comments by other groups, with the two most frequently mentioned negative effects being "Result in More Trials" and "Too Harsh."

When compared as groups, judges, defense attorneys, and probation officers responded similarly to each other, both in terms of frequency and specific effects of mandatory minimums. Unfavorable comments far outnumbered favorable ones among judges, defense attorneys, and probation officers. Sixty-seven percent of judges gave only unfavorable comments. The number of probation officers who saw only negative effects was also fairly high -- 62 percent of those interviewed. Only one defense attorney interviewed had any positive comment.

Overwhelmingly, the most frequent response given by judges, defense attorneys, and probation officers to the question about the effects of the mandatory minimums was that they are too harsh. The rest of the negative comments fell into similar patterns of frequency for judges, defense attorneys, and probation officers. Judges' second most frequent negative response was that mandatory minimums eliminate judicial discretion. This was third (in order of frequency) for both defense attorneys and probation officers. Judges' third most frequent negative response was "Result in More Trials," which was second according to defense attorneys, but not mentioned by probation officers. The fourth negative effect cited by judges was "Prison Overcrowding," which was also fourth by defense attorneys and second by probation officers.

Few of the judges, defense attorneys, and probation officers made favorable comments. Of the 48 defense attorneys who responded, none gave an answer that was wholly favorable. Similarly, there were only two out of 48 judges (4%) and five out of 66 probation officers (8%) who noted only positive effects. The favorable effect most often cited by these few judges and probation officers was "Promote Deterrence."

Taken as a whole, 15 percent of respondents (34 of 234) made only favorable comments about mandatory minimums, while 58 percent of all respondents (135 of 234) made only unfavorable comments. Ten percent of those who were asked the question gave mixed responses.[130] If answering with unfavorable comments can be equated to opposition to the mandatory minimums, and responding with favorable comments is the same as favoring them, it might be concluded that there is considerable opposition to mandatory minimum sentencing laws by the court personnel interviewed in this study. Support for such laws appears to come primarily from federal prosecutors, but even in that group, opinions are divided.

E. Preliminary Sentencing Commission Survey Results: Additional Views from the Field

As part of the Sentencing Commission's four-year evaluation of the sentencing guidelines, district court judges, probation officers, assistant U.S. Attorneys, and defense attorneys were surveyed on a range of issues concerning the operation of the guidelines. During May 1991, surveys were sent to 745 active and senior district court judges, 750 probation officers, 750 assistant U.S. attorneys, 475 panel

[130]The remaining percentage of respondents made only neutral comments.

attorneys, and 278 assistant federal defenders.[131] As of late June, 1,261 (42.1%) of the 2,998 individuals sampled had returned a completed survey. These 1,261 respondents are composed of 306 judges, 279 assistant U.S. attorneys, 443 probation officers, 152 panel attorneys, and 81 assistant federal defenders.

Four questions in the survey dealt with mandatory minimum sentences:

- *Should Congress raise, lower, eliminate, or not change current mandatory minimum sentences for drug distribution?*

- *Should Congress raise, lower, eliminate, or not change current mandatory consecutive sentences for possession of a firearm during commission of a violent or drug trafficking offense?*

- *Should Congress establish mandatory minimum or mandatory consecutive sentences for additional offenses?*

- *When Congress wants to raise sentences imposed for certain offenses, what action should Congress take?*

Each of the questions was accompanied by a set of close-ended responses. (See Tables 6-9 for the responses and frequency of occurrence for each group.)

From these preliminary findings, two general patterns can be detected. First, there are differences among the respondents in the degree of their support for mandatory minimum sentences. A majority of judges, panel attorneys, and federal defenders are in favor of their elimination and/or reduction for both drug distribution and possession of a firearm. Probation officers and especially assistant U.S attorneys show more support for the current system of mandatory minimum sentences as they apply to these offenses.

The second preliminary finding is that, without exception, each of these groups would prefer to raise sentences for individual offenses by some means other than mandatory minimum sentences. Among judges, assistant U.S. attorneys, and probation officers, a majority of respondents would prefer to have Congress direct the Sentencing Commission to study the issue and, where necessary, amend the base offense level or various adjustments for the offense in question. Across all five groups, a majority indicated that they would rather Congress establish a new base offense level under the sentencing guidelines or direct the Sentencing Commission to study the issue.

In summary, respondents were somewhat divided about the status of current mandatory minimum sentences for drug distribution and firearm possession. However, the groups were much more uniform in their support of the guidelines system as the means for altering sentencing structures, either by directive from Congress or by action of the Sentencing Commission.

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[131]The samples of probation officers, assistant U.S. attorneys, and panel attorneys were randomly selected from their individual populations nationwide. Only probation officers who write presentence reports and assistant U.S. attorneys with criminal caseloads were eligible for selection.

F. Impact of Mandatory Minimum Statutes on Federal Prison Population

The Crime Control Act of 1990 directs the Sentencing Commission to provide a projection of the impact of mandatory minimum sentencing provisions on the federal prison population. In a dynamic system, such as the federal criminal justice system, disentangling the effects of a single set of policies is problematic at best. Policies regarding crime in a single jurisdiction may change on a daily basis due to such issues as rising crime rates, changes in prosecutorial or investigative priorities, increased funding or staffing for arresting and prosecuting agencies, and public attitudes toward crime. When policy considerations spread through 94 districts, the potential for variation expands exponentially.

In addition to the vagaries of a dynamic criminal justice system, particular difficulties arise when attempting to disentangle the effects of mandatory minimum provisions from the sentencing guidelines which largely incorporate these provisions within their basic structure. When the Sentencing Commission developed guidelines for statutes containing mandatory minimum provisions, the penalties inherent in these provisions were incorporated within the particular guidelines. For example, specific drug amounts provided in the drug distribution statute formed the base around which the drug distribution guidelines were built. Section 841(b)(1)(A) of title 21 calls for a mandatory minimum term of imprisonment of ten years for a person convicted of distributing, for example, five kilograms of cocaine. The guidelines provide for a base offense level that ensures adherence to the statutory ten-year minimum.

Historical Overview of Prison Impact Projections

To understand the impact of mandatory minimum provisions in 1991, it is useful to revisit prior Sentencing Commission research related to prison projections and the initial set of guidelines, guidelines that incorporated the critical Anti-Drug Abuse Act of 1986 mandatory minimum provisions. The Sentencing Commission, in conjunction with the Federal Bureau of Prisons, developed a sophisticated prison impact model to carefully consider the impact of the guidelines on correctional facilities and services and reported to Congress the projected impact with respect to those guidelines.[132]

This earlier research attempted to disentangle the impact of the Anti-Drug Abuse Act of 1986, the career offender provisions of the Sentencing Reform Act of 1984, and the sentencing guidelines. While both the drug laws and the career offender provisions were incorporated within the structure of the guidelines, incorporating the effects of these initiatives within the prison projections due to the guidelines would have been misleading at best. Careful attention to methodological issues and

[132]For more complete discussion of the data, methodology, and findings resulting from the Commission's earlier research, see "Chapter Seven - Prison Impact," U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, 53-75, June 18, 1987; and Block and Rhodes, "Forecasting the Impact of the Federal Sentencing Guidelines," 7 Behavioral Sciences & the Law 1, 51-71 (1989).

substantive concerns, as well as the recency of the data relative to the enactment of the law (sample data were drawn from the 1985 cohort of defendants sentenced in the federal system), make this separate examination of the Anti-Drug Abuse Act of 1986 especially insightful given the present question of discerning the impact of mandatory minimum provisions on the federal prison population.

In very summary fashion, the original prison impact findings suggest that:

- Probation without any conditions of confinement will be reduced from approximately 42.4 percent to 18.9 percent;

- Probationary sentences will decline greatly under the guidelines for especially serious crimes, but will not change radically for other crimes (although probation will more likely have some conditions attached to the sentence);

- Average time served will increase from a pre-guideline practice of 15.3 months to 28.7 months under the guidelines, with the greatest increase concentrated in a few, more violent offenses; and

- For most offenses that involve neither the new drug laws or the career offender provisions, the average sentence lengths will not increase appreciably. (See Figure 1.) The marked increase in federal prison populations will result more from the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act than from the guidelines.[133]

In developing prison projections, numerous unknowns prevent projecting population increases with absolute certainty. To attempt to account for those unknowns, the Sentencing Commission's earlier research provided a low growth scenario that assumed low increase in the prosecution rate; the other model assumed high growth in the prosecution rate. These growth rate assumptions provide the base growth in prison population assuming that the new drug laws, the career offender provisions, and the guidelines did not exist. Figure 2 illustrates the results of the prison projections over a 15-year period given the low and high growth assumptions, and adding the impact of the drug laws, career offender, and guidelines. Taking a conservative look (see Figure 2), one can see that the Anti-Drug Abuse Act of 1986 along with a relatively low rate of increase in prosecutions result in a doubling of the federal prison population over a ten-year period (from approximately 42,000 in 1987 to approximately 85,000 in 1997). If one looks at the high growth scenario, the increase due to the drug laws is even more dramatic; from a population of 42,000 to one of approximately 108,000.

The results of this research were clear. While the guidelines were expected to provide some increase in the federal prison population, the greatest expected impact could be attributed to the Anti-Drug Abuse Act of 1986 and to some incremental extent, the career offender provisions of the Sentencing

[133]Block and Rhodes, supra note 118, at 59-64.

Reform Act of 1984. In a recent paper by Gaes, et al.,[134] the performance of the projection models appears to be holding up quite well. For example, the model projected a three-year growth, from 1987 to 1990, to a population of 59,909. On December 31, 1990, the Federal Bureau of Prison's actual population was 59,400. Although, as the authors point out, they do not expect the model to perform as well over the long run, it provides increased confidence in the general appropriateness of such a model and lends credence to the earlier findings.

Impact of Mandatory Minimum Provisions on the Federal Prison Population, 1990

To further analyze the impact of mandatory minimum provisions on the federal prison population, the Sentencing Commission reviewed cases sentenced under the sentencing guidelines in fiscal year 1990. This analysis attempts to identify the increase in sentences caused by the mandatory minimums, above those sentences that would have been appropriate under the guidelines if no enhanced statutory penalties had been applied.

In order to develop prison population estimates, the 12.5 percent sample utilized for the empirical analysis component of this Report (see Chapter 5) was used to project the impact of drug trafficking and weapons cases, and the complete Sentencing Commission data file was used to analyze the smaller number of cases falling under other mandatory minimum provisions.[135]

To determine population estimates for drug and other provisions (except 18 U.S.C. § 924(c)), a number of assumptions are required. If a court sentenced at a mandatory minimum above the guideline range, the model assumes that absent the mandatory minimum the court would have sentenced within the guideline range. The model provides a range of projections, with the low impact projection assuming the court would have sentenced at the top of the range, and the high impact projection assuming a sentence at the low end of the range. When the mandatory minimum fell within the guideline range and the court sentenced at the mandatory minimum, the model assumes the court could have sentenced lower if no mandatory minimum was applicable. If the court sentenced above the mandatory minimum or departed below the guideline range, no impact of the mandatory minimum was assumed (i.e., the court would have imposed the same sentence and was not restricted by the statutory provision).

In firearms cases, when 18 U.S.C. § 924(c) is applied, the guidelines impose the additional 60-month statutory enhancement, but do not incorporate additional firearm enhancements within the underlying guideline range. If the 924(c) conviction was not present, a weapons enhancement under the guidelines was likely. To estimate the impact of the weapons provisions, the guidelines were

[134]Gaes, Simon, and Rhodes, "20/20 Hindsight: Effectiveness of Simulating the Impact of Federal Sentencing Legislation on the Future Prison Population" (paper in draft) (1991).

[135]Cases analyzed from the 12.5 percent sample were appropriately weighted (by 8) to achieve annual estimates.

recalculated to achieve the appropriate range assuming no mandatory minimum.[136] The projection model assumes that the court would have sentenced at the same relative position (or higher) within the recalculated guideline range as was actually sentenced within the range upon which the 60 months was added.

Finally, when 18 U.S.C. § 924(c) was charged with no charges involving underlying drug or violent behavior (106 cases in fiscal year 1990), the model assumes that absent a mandatory minimum conviction the lowest charge would have been gun possession (18 U.S.C. § 922(g)), resulting in a guideline range of 8-14 months. The low impact model assumes no impact, while the high impact model assumes the court may have sentenced the case as low as eight months for the gun possession.

The low impact projections obtained using this methodology suggest that 981 offenders in fiscal year 1990 received sentences above the applicable guideline range for an estimated total of 4,412 additional years of prison imposed due to the mandatory minimum sentencing provisions. The high impact projections suggest that 2,121 offenders received higher sentences due to mandatory minimums with an estimated total of 6,971 additional years of prison imposed. Utilizing the annual cost per inmate for FY90,[137] as estimated by the Federal Bureau of Prisons, these findings suggest that mandatory minimum provisions generated between $79 million and $125 million additional costs for offenders sentenced in FY90. It should be reiterated that these projections are for prison impact above that attributable to the guidelines, and that the guidelines generally build within their structure many of the applicable mandatory minimum provisions.

Chapter 7
Alternative Methods by which Congress Can Influence Sentencing Policy Within a Guidelines Framework

As prior chapters of this Report have detailed, when Congress enacted the Sentencing Reform Act of 1984, it ushered in an historic new approach to determinate sentencing through which the sentencing decisions of federal judges would be circumscribed by a comprehensive set of binding guidelines to be written and refined over time by a permanent, expert body. In opting for this approach to sentencing, Congress opened the door to new methods by which the legislative branch could continue to shape sentencing policy. This section of the Sentencing Commission's Report describes a number of such alternative means, together with the advantages and disadvantages of each from the Sentencing Commission's perspective.

A. Formal and Informal Avenues Prior to Guidelines

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[136]Two offense levels were added to drug cases and three to five levels for violent offenses, depending on how the gun was used.

[137]The annual cost per inmate amounts to $17,909 (provided by the Federal Bureau of Prisons). This figure represents the cost of housing an inmate including administrative costs. It does not include construction costs.

Prior to creation and implementation of the sentencing guidelines, Congress used a number of means, formal and informal, to influence sentencing policy. The formal statutory methods included: (1) enactment of a variety of different forms of mandatory minimum sentencing provisions;[138] (2) requirements that sentences imposed for certain offenses be served consecutively to any other federally imposed sentence;[139] (3) enactment of increases in statutory maximum penalties;[140] and (4) enactment of special-purpose sentencing statutes.[141] While each of these statutory approaches remain available to Congress today, enactment of the Sentencing Reform Act makes fixed and/or minimum statutory penalties a less necessary means of legislating sentencing policy.

Less formal means of influencing sentencing policy used by Congress in the past include sense of the Senate or House (or Congress) resolutions,[142] oversight hearings, and a variety of actions undertaken by individual Members within the purview of their legislative offices. These non-statutory means likewise remain fully available to Congress as an institutional body, and to individual Members, in the era of sentencing guidelines. Indeed, the creation by Congress of a permanent, expert body to develop sentencing policy provides a single focal point for such initiatives, and the Sentencing Commission today actively encourages formal and informal congressional input into the guideline improvement process. From its inception the Sentencing Commission has invited Members or their staff representatives to attend Sentencing Commission meetings and public hearings on guideline proposals. Additionally, the Sentencing Commission has corresponded with individual Members about diverse issues of sentencing policy, compiled and provided data on sentences imposed and other related

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[138]See statutory provisions listed in Appendix A. For a discussion of the forms mandatory minimum provisions take, see Chapter 1 ("A Note on Terminology").

[139]See, e.g., 18 U.S.C. § 3146(b)(2), requiring that a term of imprisonment imposed for failure to appear after being released on bail "shall be consecutive to the sentence of imprisonment for any other offense." See also supra note 1, as to 18 U.S.C. § 924(c).

[140]See, e.g., Act of August 9, 1989, Pub. L. 101-73, Title IX, § 961(b), 103 Stat. 499, increasing the maximum term of imprisonment for bank embezzlement offenses, codified at 18 U.S.C. § 656, from five years to twenty years, and Act of November 29, 1990, Pub. L. 101-647, Title XXV, § 2504(b), 104 Stat. 4861, further increasing that maximum from twenty years to thirty years.

[141]See, e.g., 21 U.S.C. § 848(e)-(r) (death penalty sentencing provisions for certain drug-related murders); former 18 U.S.C. §§ 5005-6, §§ 5010-26, repealed by Pub. L. 98-473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027 (pertaining to sentencing of youthful offenders).

[142]See, e.g., section 239 of Pub. L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2039, stating the sense of the Senate regarding factors federal judges should consider during the period between passage of the 1984 Sentencing Reform Act and implementation of the sentencing guidelines.

sentencing information in response to congressional requests, and conducted briefings for Members and staff on various guidelines issues.

B. New Approaches in a Guidelines Era

As stated at the outset of this chapter, the advent of a comprehensive guidelines system provides new opportunities for Congress to work through and with the Sentencing Commission to implement sentencing policy. From Congress's standpoint, it may be important to note that these avenues, like mandatory minimums, can achieve a high degree of sentence uniformity throughout the federal court system for targeted offense conduct. At the same time, these guideline-focused means preserve court discretion to appropriately consider the offense and offender characteristics of individual defendants in sometimes highly atypical cases. Among the alternative approaches that Congress may wish to consider carefully are the following.

Changes in Statutory Maximums, Accompanied by Expressed Congressional Intent for Guideline Responses

Since the promulgation of the initial guidelines in 1987, the Sentencing Commission has issued guideline amendments in response to a variety of legislative enactments that increased the maximum fine, term of imprisonment, or other penalties for diverse offenses. Noteworthy among the recent laws that spawned guideline changes were the Anti-Drug Abuse Act of 1988,[143] the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA),[144] and the Crime Control Act of 1990.[145]

Furthermore, the Sentencing Commission has recommended a number of changes in maximum statutory penalties in conjunction with its statutory mandate to "recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate."[146] In its report to Congress dated February 12, 1991, the Sentencing Commission enumerated changes in statutory penalty provisions in four areas[147] in which existing maximums appeared to the Sentencing Commission to be inconsistent with the goals of sentencing reform.[148]

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[143]Pub. L. 100-690, 102 Stat. 4181 (1988).

[144]Pub. L. 101-73, 103 Stat. 183 (1989).

[145]Pub. L. 101-647, 104 Stat. 4789 (1990).

[146]28 U.S.C. § 994(r).

[147]The four areas included offenses in deprivation of civil rights, assault, The Travel Act, and manslaughter.

[148]The Commission is pleased to note that the Senate recently incorporated its recommendations into S.1241, the Violent Crime Control Act of 1991.

Increasing (or reducing) statutory maximum penalties affords the Sentencing Commission latitude to adjust the sentencing guidelines accordingly. For the Sentencing Commission to be appropriately responsive, however, it is important that such changes be accompanied by legislative history (in the form of Committee or Conference Report language, statements of a bill's managers, statements by an amendment sponsor, or a combination of these) indicating congressional intent with respect to sentencing consequences in general, and guideline amendment consequences in particular.[149] While the Sentencing Commission has a responsibility to carefully consider any statutory penalty changes and accompanying legislative history within the context of its overall statutory mandate, the Sentencing Commission welcomes any sentencing policy guidance Congress may see fit to provide in conjunction with enacted changes in penalty maximums.

Specific Statutory Directives to the Sentencing Commission

The Sentencing Commission's organic statute contained a detailed list of both specific and general directives from Congress that the Sentencing Commission endeavored to follow rigorously in developing the initial guidelines. Subsequently, Congress has enacted ten additional instructions to the Sentencing Commission regarding desired amendments to the guidelines, of which seven may fairly be regarded as specific in nature (in the sense that the statutory directive states the congressional will in terms of a designated, resulting guideline offense level that the Sentencing Commission amendments are to achieve). Among the seven instructions that direct specific increases in guideline offense level, some are more constraining on the Sentencing Commission than others.[150]

The enacted specific directives to the Sentencing Commission may be described briefly[151] as follows:

1) Minimum offense level of 26 for common carrier operation under influence of alcohol or drugs if death results; minimum level of 21 if serious bodily injury results;

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[149]Congress may prefer to couple statutory maxima amendments with general or specific directives to the Sentencing Commission, discussed in subsections B and C infra, to ensure that the congressional will on sentencing policy is clearly communicated and implemented.

[150]For example, section 401 of the 1990 Crime Control Act directed the Commission to amend its kidnapping guideline by including four additional, sentence-enhancing specific offense characteristics, each of which would increase the offense level by a specified number. As a policy matter, although not necessarily as a matter of law, the Commission generally viewed the directive as setting forth enhancements that it should neither reduce nor exceed. In contrast, all other enacted specific directives to the Commission have required a minimum guideline enhancement but have clearly left it open for the Commission to elect a greater increase.

[151]These directives are set forth in their entirety in Appendix J.

2) Increase of at least 2 offense levels, minimum offense level of 26 for drug offenses within federal prisons;

3) Increase of at least 2 offense levels, minimum offense level of 26 for drug offenses involving minors;

4) Increase of at least 2 offense levels, minimum offense level of 26 for importation of controlled substances by aircraft or other vessel;

5) Increase of at least 2 offense levels for "ice" methamphetamine;

6) Minimum offense level of 24 for bank fraud if defendant derives more than $1,000,000 in gross receipts; and

7) Minimum increase in kidnapping guideline for certain offenses involving child victims of 4 levels if victim intentionally maltreated, 3 levels if victim sexually exploited, 3 levels if for money or other consideration victim placed in care of person who does not have legal right to such custody, 2 levels if defendant allowed child victim to be subjected to any of above-specified conduct.

Specific directives to the Sentencing Commission potentially offer advantages over mandatory minimum sentencing provisions. First, when carefully crafted in terms of policy considerations and technical detail, specific directives permit the Sentencing Commission to integrate the congressionally-desired penalty into the guidelines structure in an appropriate, consistent manner. The effect of this integration is to prescribe the requisite, higher level of punishment for the targeted offense, while also permitting meaningful distinctions among defendants based on each defendant's role in the offense, whether or not the defendant accepted responsibility, the defendant's criminal history, and other pertinent factors specified in the guidelines.

Second, integration of congressionally-desired punishments into the guidelines structure permits courts to sentence below the guideline range for atypical mitigating factors, subject to the government's right to appellate review if it believes the resulting sentence is unreasonable. Thus, by focusing its attention on the design of the guidelines instead of on a mandated sentence to be imposed by courts for every conviction of a particular offense, Congress can achieve its objective of uniform, appropriately severe punishment, while preserving some discretion for sentencing courts to individualize sentencing in appropriate cases.

Third, Congress can construct specific guideline amendment instructions to ensure that a desired sentence enhancement will be applied broadly to an entire class of related offense conduct, rather than to only one or several offenses, as typically is the case with mandatory minimums.

While specific directives to the Sentencing Commission offer advantages over enactment of mandatory minimums, these directives potentially also have some disadvantages. First, if not carefully crafted,

narrowly drawn directives can present the Sentencing Commission with technical and conceptual difficulties in faithfully implementing the congressional instructions without creating anomalies in the guidelines structure.[152] Second, to the extent that the Sentencing Commission finds it necessary to deviate from a literal interpretation of a specific statutory instruction in order to implement that directive consistent with the Sentencing Reform Act and overall guidelines scheme, there is an increased likelihood of litigation, and an enhanced likelihood of its success. Third, specific directives, while clearly within the congressional prerogative, are potentially in tension with the fundamental Sentencing Reform Act objectives of delegating to an independent, expert body in the judicial branch of the government the finer details of formulating sentencing policy, and revising that policy in light of actual court sentencing experience over time.[153]

General Statutory Directives to the Sentencing Commission

Subsequent to the implementation of the guidelines, Congress has also provided the Sentencing Commission with additional directives couched in more flexible terms. In appearance, these directives follow the form of many of the original instructions to the Sentencing Commission embodied in the 1984 Sentencing Reform Act. In substance, the three general directives that the Sentencing Commission has received involve the following:[154]

1) Appropriate penalty increases in fraud guidelines for conduct resulting in conscious or reckless risk of serious personal injury; Sentencing Commission to consider appropriateness of minimum 2-level enhancement of offense level for such conduct;

2) Provision for substantial period of incarceration for violation of any of several bank fraud, bribery, and embezzlement statutes if conduct substantially jeopardizes the safety and soundness of a federally insured financial institution; and

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[152]For example, two directives in the 1990 crime bill presented the Commission with problems of this nature. First, a directive to amend the drug trafficking guideline to provide a two-level enhancement for offenses involving "ice" methamphetamine, while seemingly straightforward, created considerable technical definitional and guideline integration problems. A second directive requiring specific enhancements for child kidnapping offenses failed to take into account key guideline principles of "relevant conduct" (U.S.S.G. §1B1.3).

[153]See, e.g., discussion in the Report of the Senate Judiciary accompanying the Sentencing Reform Act (S. Rep. No. 225, 98th Cong., 1st Sess. (1983)) at pp. 160, 169, 177-78.

[154]The general directives are set forth in their entirety in Appendix J.

3) Study and amendment of guidelines for sexual crimes against children to provide more substantial penalties if Sentencing Commission determines current penalties are inadequate.

In the Sentencing Commission's view, general statutory instructions offer many advantages. Flexible directives permit the Sentencing Commission to apply its expertise in implementing congressional objectives consistent with the overall guidelines scheme and Sentencing Reform Act goals. They also permit consideration of the full range of sentencing information that the Sentencing Commission otherwise would consider in the absence of additional legislative instruction. Moreover, to the extent that there may be concern that the Sentencing Commission will either underestimate (or overestimate) the congressionally-desired response, general directives may be accompanied by legislative history suggesting in more specific language the kind of Sentencing Commission response that would fulfill congressional expectations.[155]

Like their more specific counterparts, general statutory directives need to be carefully drafted to ensure that they can be readily implemented without creating anomalies and new sentencing disparities.[156]

C. Analysis, Reporting and Amendment as Appropriate Directives

One method of congressional input that combines desirable features of the above alternatives is a general directive to the Sentencing Commission to investigate sentencing practices for a given offense area and amend the guidelines as appropriate to ensure that stated congressional objectives are accomplished. Directives of this kind may be coupled, if Congress desires, with a requirement for a report to Congress within a reasonable time.

Congress recently included a "study and amend" directive of this nature in the 1990 crime bill when it directed the Sentencing Commission to "amend existing guidelines for sentences involving sexual crimes against children . . . so that more substantial penalties may be imposed if the Sentencing

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[155] See also the general directive concerning fraud offenses that create a conscious or reckless risk of serious personal injury, supra, in which Congress also included in the directive itself a suggestion that the Commission consider the appropriateness of at least a 2-level enhancement for such conduct.

[156] To illustrate, in implementing the general directive regarding bank fraud conduct "that substantially jeopardizes the safety and soundness of a federally insured financial institution," the Sentencing Commission elected a broader form of implementation to avoid a disparity in the guideline sentence among similar conduct that affected different types of victims (e.g., union pension funds and non-federally insured banks, as well as federally insured banks may be subject to the enhancement).

Commission determines current penalties are inadequate."[157] In response to this directive, the Sentencing Commission included several relevant amendments in its 1991 amendments package,[158] and it has a comprehensive study underway that may result in the proposal of additional amendments in 1992.

For a number of reasons, a "study and amend" directive is a highly effective means of congressional influence over sentencing policy. Congress retains the authority, and will inevitably have the opportunity, to review the adequacy of any Sentencing Commission analysis and amendment response. The Sentencing Commission, by statute, must report any amendments to Congress by May 1 of each year, and Congress thereafter has an 180-day period to review the adequacy of what is included (or omitted) from the Sentencing Commission's amendment report.[159]

Moreover, a directive combining analysis and appropriate amendments closely adheres to the manner in which the Sentencing Reform Act indicated the Sentencing Commission should approach the evolutionary task of improving its guidelines and policy statements. Congress gave the Sentencing Commission distinct, ongoing tasks to compile and analyze data on sentences imposed, as well as to conduct other sentencing research. It is therefore entirely appropriate for Congress to require the Sentencing Commission to combine its research, analysis, and guideline amendment functions to address aspects of criminal conduct of particular concern to Congress. In light of the multifaceted responsibilities Congress gave the Sentencing Commission in the Sentencing Reform Act, the Sentencing Commission particularly commends this approach for Congress's consideration.

D. Conclusion

There are a number of ways in which Congress effectively can shape sentencing policy without resorting to mandatory minimum provisions. Working together with the Sentencing Commission, Congress has already provided an opportunity to demonstrate the viability of these alternative mechanisms. There is every reason to expect that their continued and expanded use would meet with equal success.

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[157]Pub. L. 101-647, Title III, § 321, Nov. 29, 1990, 104 Stat. 4817.

[158]These amendments were submitted to Congress for the requisite 180-day review on May 1, 1991, and will take effect November 1, 1991, barring legislation to the contrary.

[159]28 U.S.C. § 994(p).

Appendices to the Special Report:

Mandatory Minimum Penalties in the Federal Criminal Justice System

Appendix A
Statutory Provisions Requiring
Mandatory Minimum Terms of Imprisonment

U.S. CODE SECTION (SENT. GUIDELINE)	DESCRIPTION of CRIME	DATE**	MINIMUM TERM
2 USC §192 (§§2J1.1, 2J1.5)	refusing to testify before Congress	1857	1 month
2 USC §390 (§§2J1.1, 2J1.5)	failure to appear, testify, or produce documents	1969	1 month or fine*
7 USC §13a (§2J1.1)	disobeying cease and desist order	1922	6 months or fine or both*
7 USC §13b (refer to guideline for underlying offense)	disobeying cease and desist order	1922	6 months or fine or both*
7 USC §195 (§2N2.1)	violation of court order	1921	6 months or fine or both*
7 USC §2024 (§2F1.1)	second illegal food stamp activity; value of $100 or more	1981	6 months
12 USC §617 (§2R1.1)	commodities price fixing	1913	1 year or fine or both*
12 USC §630 (§§2B1.1, 2F1.1)	embezzlement, fraud, or false entries by banking officer	1913	2 years
15 USC §8 (§2R1.1)	trust in restraint of import trade	1894	3 months
15 USC §1245	possession, manufacture, sale, or import of ballistic knives	1986	5 years or fine or both*

15 USC §1825(a)(2)(C) (§2A1.1)	first degree murder of horse official		1970	life
16 USC §414 [petty offense]	trespassing on federal land for hunting or shooting			1897
5 days or fine or both*	18 USC §115	(§2A1.1)	first degree murder of federal official's family member	1984
life	18 USC §225 (§§2B1.1, 2B4.1, 2F1.1)		organizing, managing, or supervising a continuing financial crimes enterprise	1990
10 years	18 USC §351	(§2A1.1)	first degree murder of congress, cabinet, or supreme court member	1971
life	18 USC §844(h)	(§2K1.7)	second offense, use of fire or explosives to commit a felony, penalty	1970

			enhancement provision	
10 year determinate enhancement	18 USC §844(h)	(§2K1.7)		first offense, use of fire or explosives to commit a felony, penalty enhancement provision
1970	5 year determinate enhancement		18 USC §924(c)(1) (§2K2.4)	second offense, using or carrying a machine gun, silencer, or destructive device during a crime of violence or drug trafficking crime
1986	life		18 USC §924(c)(1) (§2K2.4)	first offense, using or carrying a machine gun, silencer, or destructive device during a crime of violence or drug trafficking crime
1986	30 year determinate enhancement		18 USC §924(c)(1) (§2K2.4)	second and all subsequent offenses, using or carrying a firearm during a crime of violence or drug trafficking crime
1968	20 years determinate enhancement		18 USC §924(c)(1) (§2K2.4)	
first offense, using or carrying a firearm during a crime of violence or drug trafficking crime, penalty enhancement provision	1968		5 year determinate enhancement	18 USC §924(e)(1) (§4B1.4)
possession of a firearm or ammunition by a fugitive or addict who has three convictions for violent felonies or drug offenses	1986			
15 years				

18 USC §929(a)(1) (§2K2.4)	carrying firearm and armor piercing ammunition during crime of violence or drug trafficking crime, penalty enhancement provision	1984	enhancement of not less than 5 years
18 USC §1091 (§2H1.3)	killing a group member	1988	life
18 USC §1111 (§2A1.1)	first degree murder	1790	life
18 USC §1114 (§2A1.1)	first degree murder of federal officers	1934	life
18 USC §1116 (§2A1.1)	first degree murder of foreign officials	1972	life
18 USC §1651	piracy	1790	life
18 USC §1652	piracy by US citizen	1790	life
18 USC §1653	piracy by alien	1790	life
18 USC §1655	piracy by seaman	1790	life
18 USC §1658	prevention of escape from a vessel or causing vessel to run aground by use of false light	1790	10 years
18 USC §1661	robbery by pirates	1790	life
18 USC §1751 (§2A1.1)	first degree murder of president or staff	1965	life
18 USC §1917	interference with civil service examinations	1966	10 days or fine or both*
18 USC §2113(e) (§§2A1.1, 2B3.1)	homicide or kidnapping during bank robbery or larceny	1934	10 years
18 USC §2251(d) (§§2G2.1, 2G2.2)	second offense of sexual exploitation of children	1978	5 years

18 USC §2251A (§2G2.3)	sale or transfer of custody of minor, knowing minor will be sexually exploited		1988	20 years
18 USC §2252 (§§2G2.2, 2G2.4)	second offense, distribution or receipt of visual depictions of minors engaging in sexually explicit conduct		1978	5 years
18 USC §2252(a)(3) (§2G2.2)	second offense, distributing or possessing with intent to distribute child pornography		1990	5 years
18 USC §2252(a)(4) (§2G2.2)	second offense, possessing three or more pieces of child pornography		1990	5 years
18 USC §2257(f) (§2G2.5)	second offense, failure to maintain records, falsifying records, or distributing materials not mentioning the records of sexually explicit performers		1990	
2 years	18 USC §2381	(§2M1.1)	treason and sedition	1948
5 years	18 USC §3561 (§5B1.2)		probation provision for felonies	1984
minimum term of probation is 1 year	19 USC §283	(§2T3.1)	failure to report seaboard saloon purchases to customers	1886
3 months	21 USC §212 [petty offense]		practice of pharmacy and sale of poisons in China	1915
1 month or fine*	21 USC §622	(§2C1.1)	bribery of	1907

		inspectors and acceptance of bribes	
1 year			
21 USC §841(b)(1)(A) (§2D1.1)	third offense, manufacturing, distributing, or possessing with intent to distribute	1986	life
21 USC §841(b)(1)(A) (§2D1.1)	second offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results from the use	1986	life
21 USC §841(b)(1)(A) (§2D1.1)	second offense, manufacturing, distributing, or possessing with intent to distribute, no death or serious bodily injury	1986	20 years
21 USC §841(b)(1)(A) (§2D1.1)	first offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results from the use	1986	20 years
21 USC §841(b)(1)(A) (§2D1.1)	first offense, manufacturing, distributing, or possessing with intent to distribute, no death or serious bodily injury	1986	10 years
21 USC §841(b)(1)(B) (§2D1.1)	second or any subsequent offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1984	life
21 USC §841(b)(1)(B) (§2D1.1)	first offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1984	20 years
21 USC §841(b)(1)(B) (§2D1.1)	second and all subsequent offenses, manufacture, distribution, or possession with intent to distribute, no death or serious bodily injury results	1984	10 years
21 USC §841(b)(1)(B) (§2D1.1)	first offense, manufacture, distribution, or possession with intent to distribute, no death or serious bodily injury results	1984	5 years

21 USC §841(b)(1)(C) (§2D1.1)	second or any subsequent offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1986	life
21 USC §841(b)(1)(C) (§2D1.1)	first offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	1986	20 years
21 USC §844(a) (§2D2.1)	first offense, simple possession of a controlled substance, substance contains cocaine base and weighs more than 5 grams	1988	5 years
21 USC §844(a) (§2D2.1)	second offense, simple possession, substance contains cocaine base and weighs more than 3 grams	1988	5 years
21 USC §844(a) (§2D2.1)	third and all subsequent offenses, simple possession, substance contains cocaine base and weighs more than 1 gram	1988	5 years
21 USC §844(a) (§2D2.1)	third and all subsequent offenses, simple possession, all substances other than those containing cocaine base and those containing cocaine base but weighing 1 gram or less	1986	

90 days	21 USC §844(a)	(§2D2.1)	second offense, simple possession, all substances other than those containing cocaine base and those containing cocaine base but weighing three

			grams or less	
1986		15 days	21 USC §848(a) (§2D1.5)	second and all subsequent offenses, continuing criminal enterprise
1970		30 years	21 USC §848(a) (§2D1.5)	first offense, continuing criminal enterprise
1970		20 years	21 USC §848(b) (§2D1.5)	first offense, qualifying kingpins
1986 life				
21 USC §859(a) (§2D1.2)		first offense, distribution to persons under age 21	1986	1 year or the applicable minimum from 841(b), whichever is the greater
21 USC §859(b) (§2D1.2)		second offense, distribution to persons under age 21	1986	1 year or the applicable minimum from 841(b), whichever is the greater
21 USC §859(b) (§2D1.2)		third offense, distribution to persons under age 21	1988	life
21 USC §860(a)	(§2D1.2)	first offense, distribution of a controlled substance near a school or similar facility	1986	1 year or the applicable minimum from 841(b), whichever is the greater
21 USC §860(b)	(§2D1.2)	second offense, distribution of a controlled substance near a school or similar facility	1984	3 years or the applicable mandatory minimum from 841(b), whichever is greater
21 USC §860(b)	(§2D1.2)	third offense, distribution of a controlled substance near a school or	1988	life

		similar facility		
21 USC §861(b)	(§2D1.2)	first offense, employing, etc., a person underage 18 to engage in a controlled substance offense	1986	1 year or other applicable minimum, whichever is the greater
21 USC §861(c)	(§2D1.2)	second offense, employing, etc., a person underage 18 to engage in a controlled substance offense	1986	1 year or other applicable minimum, whichever is the greater
21 USC §861(c)	(§2D1.2)	third offense, employing, etc., a person underage 18 to engage in a controlled substance offense	1988	life
21 USC §960(b)(1)	(§2D1.1)	second or any subsequent offense, unlawful import or export, death or serious bodily injury results	1986	life
21 USC §960(b)(1)	(§2D1.1)	second or any subsequent offense, unlawful import or export, no death or serious bodily injury results	1986	20 years
21 USC §960(b)(1)	(§2D1.1)	first offense, unlawful import or export, death or serious bodily injury results	1986	20 years
21 USC §960(b)(1)	(§2D1.1)	first offense, unlawful import or export, no death or serious bodily injury results	1986	10 years
21 USC §960(b)(2)	(§2D1.1)	second or any subsequent offense, unlawful import or export, death or serious bodily injury results	1986	life

21 USC §960(b)(2) (§2D1.1)		first offense, unlawful import or export, death or serious bodily injury results	1986	20 years
21 USC §960(b)(2) (§2D1.1)		second and all subsequent offenses, no death or serious bodily injury results	1986	10 years
21 USC §960(b)(2) (§2D1.1)		first offense, unlawful import or export, no death or serious bodily injury results	1986	5 years
21 USC §960(b)(3) (§2D1.1)		second or any subsequent offense, unlawful import or export, death or serious bodily injury results	1986	life
21 USC §960(b)(3) (§2D1.1)		first offense, unlawful import or export, death or serious bodily injury results	1986	20 years
22 USC §4221 (§2B5.2)		forgery of US seal	1906	1 year
33 USC §410		navigable water regulation violation	1900	30 days or fine or both*
33 USC §411	(§2Q1.3)	deposit of refuse or obstruction of navigable waterway	1899	30 days or fine or both*
33 USC §441		New York and Baltimore harbors, deposit of refuse	1888	30 days or fine or both*
33 USC §447		bribery of inspector of Baltimore or New York harbors	1888	6 months
45 USC §83		refusing to use and operate railroads and telegraph lines	1864	"may be imprisoned not less than 6 months"*
46 USCAppx §1228 (refer to guideline for underlying offense)		violation of merchant marine act	1936	1 year or fine or both*
47 USC §13		refusal to operate railroad or telegraph lines	1888	"may be imprisoned not less than 6 months"*
47 USC §220(e) (§2F1.1)		altering or destroying books or accounts of common carrier	1934	1 year or fine or both*

49 USC §11911(a) (§2F1.1)	securities violation relating to transfer or issuance	1887	1 year*
49 USC §11911(b) (§2F1.2)	securities violation under 11322 relating to restrictions on officers and directors	1887	1 year*
49 USCAppx §1472(n) (§2A5.1)	commits a defined offense aboard an aircraft outside US jurisdiction, no death results	1974	20 years
49 USCAppx §1472(n) (§2A5.1)	commits a defined offense aboard an aircraft outside US jurisdiction, death results	1974	life

* These statutes require a minimum period of imprisonment only when the court imposes a term of imprisonment.

** Year during which mandatory minimum first enacted with respect to the substantive offense proscribed by the relevant statute.

Appendix B
Pending Mandatory Minimum Legislation
(As of the Submission of this Report)

A review of recent legislative proposals and Executive Branch statements[160] indicates that Congress and the Executive Branch continue to view mandatory minimum sentencing provisions favorably.[161] Indeed, the Violent Crime Control Act of 1991, which passed the Senate on July 11,

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[160] See, e.g., Message to the Congress Transmitting the Proposed Comprehensive Violent Crime Control Act of 1991, 27 Weekly Comp. Pres. Doc., 289-290 (March 11, 1991).

[161] It should be noted that the nature and depth of this support is to some degree unclear. During consideration of recent crime bills, statements of some supporters of increased mandatory minimum penalties, as well as some of the legislative proposals themselves, indicate apparent confusion as to how sentencing operates today. For example, it appears that it may not be well understood that sentences imposed under the new system of federal sentencing guidelines are not subject to parole. See, e.g., 135 Cong. Rec. S.9042 (June 28, 1990) (floor statement to the effect that a sentence required by the guidelines is subject to a reduction for parole). See also S.1241, 102d Cong., 1st Sess., sections 1641, 2509 (providing that a sentence imposed pursuant to these sections shall not be "suspended"; federal law no longer allows suspended sentences), and sections 1213, 1641 (providing that a defendant sentenced under

1991, constitutes the most sweeping proposed increase to mandatory minimums that Congress has ever contemplated. Not counting new federal capital offenses (for which death or life imprisonment is mandated), the 1991 crime bill contains approximately two dozen new mandatory minimum penalty provisions and increases the minimum penalty required by others.

In brief, the following general observations regarding the 1991 crime bill's treatment of mandatory minimums can be made:

- *A focus on drugs and guns*: Although a number of the crime bill's mandatory minimum provisions relate generally to what are broadly defined as "crimes of violence," most are targeted at specific offenses involving weapons and the distribution of controlled substances.[162]

- *The impact of these provisions on federal sentencing will likely vary from little to substantial*: Some mandatory minimum provisions in the crime bill appear likely to see little usage. For example, section 2509 of the bill, requiring a life sentence if a defendant receives a second conviction for drug distribution to a minor, should, based on past practice, be rarely used.[163] In contrast, other provisions such as section 1213 which federalizes nearly all crimes committed in the United States during which a gun is possessed, could have a potentially enormous impact. As discussed in Chapters 4 and 5 of this Report, the actual impact of mandatory minimum provisions depends in part on how frequently prosecutors choose to charge them.

- *The scope of conduct covered by a number of the proposed provisions is exceptionally broad*: Several of the crime bill's mandatory minimum provisions would sweep broadly in terms of the offenses they would cover. Section 2508, for example, requires a mandatory

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these provisions shall not be eligible for parole). Since, as is discussed in detail in Chapters 3, 4, and 7 of this Report, the sentencing guidelines system provides an alternative mechanism through which Congress may satisfy many of the policy objectives of mandatory minimums, it may be that as an understanding of that system increases, support for mandatory minimums will diminish.

One provision would mandate an "environmental audit" for all violations involving broad categories of environmental offenses committed by organizations. See S. 1241 sec. 4501.

Related provisions contained in 21 U.S.C. § 859 are infrequently used. This trend appears especially likely to continue given the lengthy mandatory minimum sentences that today must be served for a qualifying first offense under the bill.

life sentence for an offender who has already been convicted of two or more "crimes of violence." The term "crime of violence" is defined sufficiently broadly to cover conduct ranging from such serious crimes as murder or rape, to conduct that is significantly less serious, such as stealing a car radio on federal property or, apparently, opening another person's mail.[164] Similarly, section 1213 would provide a ten-year minimum add-on for possessing a gun during a state law "drug trafficking crime." This term is defined to cover the most serious drug distribution offenses but would also cover simple possession of any quantity of any drug if the state where the offense occurred authorizes a possible sentence of more than a year for drug possession.

- *Expansive use of mandatory minimums that are triggered by specific offense characteristics*: In addition to establishing mandatory penalties for various new offenses, the bill provides enhancements for a number of specific offense characteristics. For example, drug offenses would be sanctioned more heavily when committed near a public housing facility (section 4902), in the vicinity of a truck stop (section 1641), or when the drugs were either purchased from or sold to a person under 18 years old (section 2509). Further, many personal and property crimes would receive enhanced penalties if the victim was 65 years or older (section 4001).

- *Some penalty increases provided for are substantial*: Several provisions calling for increases in minimum penalties provide for very substantial increases. For example, both first and second-offense violations of 21 U.S.C. §§ 859 and 861 currently require a minimum one-year term. However, an offender convicted of a second violation of these provisions under the bill (section 2509) would face mandatory life imprisonment.

Beyond the comprehensive crime bill that passed the Senate and counterparts pending in the House of Representatives,[165] approximately 30 bills containing provisions that either establish new or expand existing mandatory minimums are now pending before Congress. Set out below is a brief description of the relevant penalty provisions of these additional, miscellaneous bills.[166]

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[164] See also section 4001, providing minimum penalties when the victim of a "crime of violence" is age 65 or older.

[165] See H.R. 1400 and House Crime and Criminal Justice Subcommittee "Committee Print." These bills contain fewer mandatory-minimum-related provisions than the Senate version.

[166] Several of these bills contain provisions that are comparable to provisions contained in the comprehensive Senate crime bill, S.1241.

HOUSE OF REPRESENTATIVES

H.R. 3052 -- Coal Field Water Protection and Replacement Act

Sec. 8 Penalty for Failure of Representative of Secretary or State Regulatory Authority to Carry out Certain Duties

Section 1268(j) is added to title 30 to provide imprisonment for less than five years but more than one year for failure to report a violation that can reasonably be expected to cause substantial injury or death, and one year or less but more than six months imprisonment for failure to report a violation that can reasonably be expected to cause significant environmental harm to land, air, or water resources.

H.R. 3043 -- Gun Violence Act of 1991

Sec. 2 Theft of Firearms or Explosives from Licensee

Section 924(i) is added to title 18 to provide a fine in accordance with this title, imprisonment not less than five and not more than ten years, or both, for whoever steals any firearm from a licensed collector.

Section 844(k) is added to title 18 to provide for imprisonment of not less than five and not more than ten years for whoever steals any explosive material from a licensed manufacturer.

Sec. 3 Increased Penalties for Possession of a Firearm in a Crime of Violence or Drug Trafficking Crime

18 U.S.C. § 924(c)(1) is amended to provide for imprisonment of not less than five and not more than ten years for possession of a firearm during and in relation to any crime of violence or drug trafficking crime (second or subsequent conviction, 20 years imprisonment), imprisonment not less than ten and not more than 15 years if the firearm possessed is an assault weapon, a short-barreled rifle, or a short-barreled shotgun (second or subsequent conviction, life imprisonment), and imprisonment for 30 years for possession of a machine gun, a destructive device, or a firearm equipped with a firearm silencer or firearm muffler.

Sec. 4 Mandatory Prison Terms for Possession of a Firearm or Destructive Device

During a State Crime of Violence or State Drug Trafficking Crime

Sections 924(c)(4)(A) and (B) are added to title 18 to provide for imprisonment of not less than ten years for possession of a firearm during and in relation to a State crime of violence or drug trafficking crime (second conviction, not less than 20 years), imprisonment not less than 20 years for discharge of a firearm with intent to injure (second conviction, not less than 30 years), and imprisonment for 30 years for possession of a machine gun, a destructive device, or a firearm equipped with a firearm silencer or firearm muffler (second conviction, life imprisonment). All convictions after the second one shall be life imprisonment.[167]

H.R. 2904 -- Three-Time Loser Drug Act of 1991

Sec. 2 Life Imprisonment without Release for Criminals Convicted a Third Time

21 U.S.C. § 841(b) is amended by providing not less than a mandatory term of life imprisonment if any person commits a crime of violence after two or more prior convictions for a felony drug offense or crime of violence or any combination thereof have become final.

H.R. 2903 -- Juveniles in Drug Crime Prevention Act of 1991

Sec. 2 Longer Prison Sentences for Those Who Sell Illegal Drugs to Minors in Drug Trafficking Activities

21 U.S.C. § 859 (Distribution to persons under age twenty-one) is amended to increase the minimum penalty from not less than one year to not less than ten years (second offense, increase from not less than one year to mandatory term of imprisonment for life).

21 U.S.C. § 861 (Employment of persons under eighteen years of age) is amended to increase the minimum penalty from not less than one year to not less than ten years (second offense, increase from not less than one year to mandatory term of imprisonment for life).[168]

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[167]The bill also requires that the sentence not be "suspended."

[168]The bill also requires that the sentence not be "suspended."

H.R. 2892 -- Terrorist Alien Removal Act

Sec. 4 Additional Amendments

Section 1326(c) is added to title 8 to provide imprisonment for ten years to run consecutive to any other sentence imposed for any alien who has been excluded or removed from the United States pursuant to specific provisions and then enters the United States without permission from the Attorney General.

H.R. 2858 -- Crimes and Criminal Procedure, Title 18 U.S.C., Amendment

Section 924(i)(1)(A) is added to title 18 to federalize possession or use of a firearm or a destructive device during conduct constituting a crime of violence or a drug trafficking crime under State law (where federal jurisdictional requirements are met). Enhanced mandatory terms of imprisonment include not less than 10 years for possession (second conviction, not less than 20 years), not less than 20 years for discharging the firearm with intent to injure (second conviction, not less than 30 years), imprisonment for 30 years for possession of a firearm that is a machine gun or destructive device or is equipped with a firearm silencer or muffler (second conviction, life imprisonment). Third and subsequent convictions shall result in life imprisonment.[169]

H.R. 2814 -- Combatting of Crime, Provision

Sec. 1 Increased Penalties for Drug-Dealing in "Drug-Free" Zones

21 U.S.C. § 860 (Distribution or manufacturing in or near schools and colleges) is amended to increase the term of imprisonment from not less than one year to not less than three years for a violation (second offense, increased from not less than three years to not less than five years).

Sec. 3 Mandatory Minimum Sentence for Person Convicted of a Drive-By-Shooting

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The bill also requires that the sentence not be "suspended."

This section mandates a term of imprisonment not less than 15 years to run consecutive to any other term of imprisonment imposed on the person for conviction of a drive-by-shooting.

Sec. 5 Drug-Free Public Housing

21 U.S.C. § 860 (Distribution or manufacturing in or near schools and colleges) is amended to prohibit the proscribed conduct near public housing.

H.R. 2442 -- Federal Firearms Dealers and Owner Protection Act of 1991

Sec. 201 Bank Robbery Related Firearm Violence

18 U.S.C. § 2113(d) is amended to add that if the dangerous weapon or device used is a firearm, the term of imprisonment shall not be less than five years.

H.R. 2352 -- Motor Carrier Safety Assistance Program Reauthorization Act of 1991

Sec. 9 Drug Free Truck Stops

A new section is added after 21 U.S.C. § 848 to provide a term of imprisonment, or fine, or both, up to twice that authorized by 21 U.S.C. § 841(b) (Penalties) and at least twice any term of supervised release authorized by 21 U.S.C. § 841(b) for a first offense, for violation of 21 U.S.C. §§ 841(a)(1) (Unlawful acts) and 856 (Establishment of manufacturing operations) by distributing or possessing with intent to distribute a controlled substance in or on, or within one thousand feet of, a truck stop or safety rest area. A term of imprisonment shall be not less than 1 year (does not apply to offenses involving 5 grams or less of marijuana). For a subsequent violation, punishment is the greater of "(A) a term of imprisonment of not less than three years and not more than life imprisonment or (B) a term of imprisonment of up to three times that authorized by section [841(b)] of this title for a first offense, or a fine up to three times that authorized by section [841(b)] of this title for a first offense, or both; and" at least three times any term of supervised release authorized by section [841(b)] of this title for a first offense.[170]

[170]The bill also requires that the sentence not be "suspended" and that convicted offenders not be eligible for parole during the minimum term.

H.R. 2090 -- Money Laundering Act of 1991

Section 1956A is added to title 18 to provide a fine under this title and mandatory life imprisonment for an officer or employee of a depository institution that conducts or attempts to conduct transaction(s) to launder drug money.

H.R. 1719 -- Crimes and Criminal Procedure, Title 18 U.S.C., Amendment

Sec. 1 Mandatory Minimum Sentence for Unlawful Possession of a Firearm by Convicted Felon, Fugitive from Justice, Addict or Unlawful User of Controlled Substance, or Transferor or Receiver of Stolen Firearm

This section provides that whoever violates 18 U.S.C. §§ 922(g)(1), (2), (3), (i) or (j) shall be imprisoned not less than 5 years and shall not be eligible for parole during the first five years of any term of imprisonment imposed under this section.

Sec. 3 Increase in Enhanced Penalties for Possession of Firearm in Connection with Crime of Violence or Drug Trafficking Crime

18 U.S.C. § 924(c)(1) is amended to provide imprisonment of 10 years for a first violation of this section to be served consecutive to any punishment for the underlying crime of violence or drug trafficking crime, and 30 years imprisonment for a second or subsequent offense.

H.R. 1551 -- Drug Free Truck Stop Act of 1991 (related bill S. 631)

Sec. 3 Increased Penalties for Distribution of Controlled Substances at Truck Stop and Rest Areas

A new section is added after 21 U.S.C. § 848 to provide a term of imprisonment, or fine, or both, up to twice that authorized by 21 U.S.C. § 841(b) (Penalties) and at least twice any term of supervised release authorized by 21 U.S.C. § 841(b) for a first offense, for violation of 21 U.S.C. §§ 841(a)(1) (Unlawful acts) and 856 (Establishment of manufacturing operations) by distributing or possessing with intent to distribute a controlled substance in or on, or within one thousand feet of, a truck stop or safety rest area. A term of imprisonment shall be not less than 1 year. For a subsequent violation, punishment is the greater of "(A) a term of imprisonment of not less than three years and not more than

life imprisonment or (B) a term of imprisonment of up to three times thatauthorized by section [841(b)] of this title for a first offense, or a fine up to three times that authorized by section [841(b)] of this title for a first offense, or both; and" at least three times any term of supervised release authorized by section [841(b)] of this title for a first offense.[171]

H.R. 1502 -- Violence Against Women Act of 1991; Safe Streets for Women Act of 1991; Safe Homes for Women Act of 1991; Safe Campuses for Women Act of 1991; Equal Justice for Women in the Courts Act (related bill S. 15)

Sec. 201, 211 Safe Homes for Women Act of 1990

Section 2261 is added to title 18 to provide for a fine of not more than $1,000, or imprisonment for not more than 5 years but not less than 3 months, or both, in addition to any fine or term of imprisonment provided under State law for any person who travels or causes another to travel across state lines or in interstate commerce with the intent to injure a spouse or intimate partner and who, during the course of such travel, injures his spouse or intimate partner in violation of a criminal law of the state where the violation occurs.

Section 2262 is added to title 18 to provide that any person against whom a valid protection order has been entered travels or causes another to travel across State lines or in interstate commerce with the intent to injure a spouse or intimate partner when the offender has previously violated any prior protection order issued for the protection of the same victim, shall be fined under this title or imprisoned for not more than 5 years and not less than 6 months, or both.

H.R. 1133 -- Crimes and Criminal Procedure, Title 18, U.S.C., Amendment

Sec. 2 Enhanced Penalties for Possession of a Firearm During a Drug Crime

Section 924(i) is added to title 18 to provide in addition to the punishment provided for an underlying drug crime, imprisonment not less than 15 days and not more than 2 years and a fine not less than $2,500 and not more than $10,000 for whoever, during and in relation to such drug crime (including a drug crime which provides for an enhanced punishment if committed by the use of adeadly or dangerous weapon or device),

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The bill also requires that the sentence not be "suspended" and that convicted offenders not be eligible for parole during the minimum term.

possesses a firearm. If the firearm is a machine gun, or is equipped with a firearm silencer or muffler, imprisonment shall be for 15 years (30 years for subsequent conviction).

H.R. 912 -- Federal Deposit Insurance Reform Act

Sec. 5 Criminal Penalty for Fraudulent Attempts to Obtain Deposit Insurance in Excess of the Limitation

Violation of this section requires a fine: (1) not less than the amount by which certain deposit insurance coverage exceeds the limitation contained in section 2(a) of the bill, and (2) not more than $100,000.

H.R. 629 -- Mandatory Sentences for Persons Committing Violent Felonies on Persons Aged 65 or Older, Provision

Section 3581 is added to title 18 to provide that a defendant convicted of a "crime of violence" against an individual 65 years of age or older shall be sentenced: "(1) for a term of not less than one-half of the maximum term of imprisonment provided for such crime under this title, in the case of a first offense to which this section is applicable; and (2) for a term not less than three-fourths of the maximum term of imprisonment provided for such crime under this title, in the case of a second or subsequent offense to which this section is applicable."[172]

H.R. 436 -- Violent Crime Prevention Act

Sec. 6 Penalty For Possession of .25 or .32 Caliber Ammunition During Crime of Violence or Drug Trafficking Crime

This bill adds possession of .25 or .32 caliber ammunition to a statutory provision (18 U.S.C. § 929(a)(1) and (b)) that requires a 5-year mandatory minimum sentence for the use of restricted ammunition during a crime of violence or drug trafficking crime. The punishment provided for is consecutive to any penalty imposed for the underlying crime of violence or drug trafficking crime.

The bill also requires that courts not "suspend" the sentence and provides that convicted offenders shall not be eligible for parole during the minimum term.

H.R. 282 -- Handgun Registration Act of 1991

Sec. 3 Federal Handgun Registration System

The bill establishes a Federal handgun registration system. This section provides that an individual who owns, possesses, or controls a handgun and fails to register the handgun in compliance with the registration system shall be fined not more than $250,000, imprisoned not less than 15 years, or both.[173]

H.R. 218 -- Sweatshops Prevention Act of 1989

Sec. 5 Criminal Penalties

29 U.S.C. § 216(a) (criminal penalties) is amended to provide for "a fine in accordance with title 18, United States Code, or imprisonment for at least six months and not more than one year."

SENATE

S. 1575 -- Drug Supply Reduction Act of 1991

Sec. 515 Conforming Amendment to Provision Punishing a Second Offense of Distributing Drugs to a Minor

21 U.S.C. § 859(b) (Distribution to persons under age twenty-one) is amended to increase the minimum penalty from not less than one year to not less than three years for the second offense.

S. 1454 -- Penalties Against Gang Violence Act of 1991

[173]The bill also provides that courts may not "suspend" the required sentence.

Sec. 102 Penalties for Criminal Gang Activity

Section 22 (Criminal Gang Activity) is added to title 18 to provide imprisonment not less than one and not more than three years for a person who willfully promotes, furthers, or assists in any felonious criminal conduct by the members of a criminal gang, with knowledge that its members engage, or have engaged in a pattern of criminal gang activity.

A term of imprisonment not less than three and not more than seven years (if serious bodily injury results, not less than seven and not more than 12 years) shall be imposed consecutively and in addition to anyterm of imprisonment imposed for the offense if the offense is committed knowingly for the benefit of, at the direction of, or in association with a criminal gang.

S. 1337 -- Anti-Gang Violence Act of 1991

Sec. 105 Criminal Penalties for Gang Violence

18 U.S.C. § 924(c)(1) (including mandatory penalty scheme) is amended to include possession of a gun.

S. 1335 -- Strategy to Eliminate Crime in the Urban and Rural Environment Act of 1991

Sec. 201 Violent Felonies Against the Elderly

Section 3581 (Mandatory sentence for felony against individual of age sixty-five or over) is added to title 18 to provide: "(a) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of a defendant of a crime of violence under this title, if any victim of such crime is an individual who had attained age sixty-five on or before the date that the offense was committed, the court shall sentence the defendant to imprisonment -- (1) for a term of not less than one-half of the maximum term of imprisonment provided for such crime under this title, in the case of a first offense to which this section is applicable; and (2) for a term of not less than three-fourths of the maximum term of imprisonment provided for such crime under this title, in the case of a second or subsequent offense to which this section is applicable. (b) Notwithstanding any other provision of law, with respect to a sentence imposed under subsection (a) of this section -- (1) the court shall not suspend such sentence; (2) the court shall not give the defendant a probationary sentence; (3) no defendant shall be eligible for release on parole before the end of such sentence; (4) such sentence shall be served consecutively to any other sentence imposed under this title; and the court shall reject any plea agreement which would result in the imposition of a term of imprisonment less than that which would have been imposed under subsection (a) of this section in connection with any charged offense."

Sec. 303 Drug Distribution to Pregnant Women

21 U.S.C. § 859 (Distribution to persons under age twenty-one) is amended to include within its coverage distribution to a pregnant woman. The applicable penalty provision provides for twice the maximum punishment authorized by 21 U.S.C. § 841(b) and at least twice any term of supervised release authorized by 21 U.S.C. § 841(b) for a first offense involving the same controlled substance and schedule. Except to the extent that a greater minimum sentence is otherwise provided, a term of imprisonment shall not be less than one year (does not apply to offense involving five grams or less of marijuana).

Sec. 801 Increased Mandatory Minimum Sentences without Release for Criminals Using Firearms and Other Violent Criminals

This section adds possession of a firearm to 18 U.S.C. § 924(c) and increases the minimum required imprisonment term to not less than 10 years for an offender who uses, carries, or otherwise possesses a firearm during a crime of violence or drug trafficking crime (second conviction, not less than 20 years), not less than 20 years for an offender who discharges a firearm with intent to injure during a crime of violence or drug trafficking crime (second conviction, not less than 30 years), and imprisonment for 30 years if the firearm is a machine gun or is equipped with a firearm silencer or muffler (second conviction, life imprisonment). Any conviction after the second shall be life imprisonment.

Sec. 802 Longer Prison Sentences for Those Who Sell Illegal Drugs to Minors or for Use of Minors in Drug Trafficking Activities

21 U.S.C. § 845 [now § 859] (Distribution to persons under age twenty-one) is amended to raise the minimum sentence of imprisonment to ten years without release (not less than twenty years without release for a second offense).

21 U.S.C. § 861 (Employment of persons under 18 years of age) is amended to raise the minimum sentence of imprisonment to ten years without release (not less than twenty years without release for a second offense).

Sec. 803 Longer Prison Sentences for Drug Trafficking

Penalty provision 21 U.S.C. § 841(b)(1)(C) is amended by requiring a mandatory minimum of not less than five years without release nor more than 20 years in the case of a controlled substance in schedule I or II, and a mandatory minimum of not less than ten years without release nor more than 30 years for a second violation.

Penalty provision 21 U.S.C. § 841(b)(1)(D) is amended by requiring a mandatory minimum of not less than five years without release for schedule III controlled substances or less than 50 kilograms of marijuana, and a mandatory minimum of not less than ten years without release for a second violation.

Penalty provision 21 U.S.C. § 841(b)(2) is amended by requiring a mandatory minimum of not less than five years without release for a scheduled IV controlled substance, and not less than ten years without release for a second violation.

Penalty provision 21 U.S.C. § 841(b)(3) is amended by requiring a mandatory minimum sentence of not less than five years without release for a scheduled V controlled substance, and not less than ten years for a second violation.

Sec. 804 Mandatory Penalties for Illegal Drug Use in Federal Prisons

21 U.S.C. § 841(b)(7)(A) is created to provide in addition to any other sentence imposed for the possession itself, a term of imprisonment not less than one year without release for possession of a controlled substance within a Federal prison or Federal detention facility.

Sec. 805 Deportation of Criminal Aliens

8 U.S.C. § 1326(b)(2) is amended to provide a fine under this title and imprisonment not less than 20 years without release for reentry by an alien who was deported subsequent to a conviction for a drug trafficking crime, a crime of violence, or an aggravated felony (life imprisonment without release for a second violation).

Sec. 806 Encouragement to States to Adopt Mandatory Minimum Prison Sentences

Two years after enactment of this Act, a request for Federal drug law enforcement assistance funds from the Bureau of Justice Assistance Grant Programs by a State whose law provides for mandatory minimum sentences equal to or greater than the sentences authorized in sections 801, 802, 803, 804, and 805 of the bill for the commission of crimes against the State that are equivalent to the Federal crimes punished in those sections, shall receive priority over a request by a State whose law does not so provide.

Sec. 908 Imprisonment of Drug Traffickers and Violent Criminals

From the date of enactment of this Act until five years later, and notwithstanding any other law, every person who is convicted in a Federal court of committing a crime of violence or a drug trafficking crime, shall be sentenced to and shall serve a full term of no less than five years imprisonment, and no such person shall be released from custody for any reason or for any period of time prior to completion of the sentence imposed by the court unless the sentence imposed is greater than five years and is not a mandatory minimum sentence without release.

S. 1313 -- Ice Enforcement Act of 1991

Sec. 302 Strengthening Federal Penalties

Subsection 841(b)(1)(A)(ix) is added to title 21 to include within the controlled substances covered by § 841(b)(1)(A) "25 grams or more of methamphetamine, its salts, isomers, and salts of its isomers, that is 80 percent pure and crystalline in form." The applicable penalty provision provides a term of imprisonment not less than ten years or more than life, and not less than 20 years or more than life if death or serious bodily injury results from use of such substance, or if the violation is committed after a prior conviction for such offense. If the violation is after a first conviction for such offense and death or serious bodily injury results from use of such substance, then a sentence of life imprisonment shall be imposed.

Subsection 841(b)(1)(B)(ix) is added to title 21 to include within the controlled substances covered by § 841(b)(1)(B) "5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers, that is 80 percent pure and crystalline in form." The applicable penalty provision provides a term of imprisonment not less than 5 years and not more than 40 years, and not less than 20 years or more than life if death or serious bodily injury results from the use of such substance.

S. 1303 -- Outlaw Gang Control Act of 1991

Sec. 105 Theft of Firearm or Explosive Material

18 U.S.C. § 924(i) is added to provide imprisonment not less than five years or more than ten years, or both, for stealing a firearm that is moving as, or is a part of, or that has moved in, interstate or foreign commerce.

18 U.S.C. § 844(k) is added to provide imprisonment not less than five years or more than ten years, or both, for stealing a firearm that is moving as, or is a part of, or that has moved in, interstate or foreign commerce.

Sec. 106 Possession of Firearm During Commission of a Crime of Violence or Drug Trafficking Crime

18 U.S.C. § 924(c) (including mandatory penalty scheme) is amended to apply to possession of a firearm.

S. 861 -- Murder of United States National Act of 1991

Sec. 2 Foreign Murder of United States Nationals

18 U.S.C. § 1118 is added to provide punishment pursuant to 18 U.S.C. §§ 1111 (life imprisonment or death for first degree murder, any term of years or life for second degree murder), 1112 (not more than 10 years for voluntary manslaughter, fine not more than $1,000 or imprisoned not more than 3 years, or both, for involuntary manslaughter), and 1113 (not more than 20 years or fine under this title, or both for attempted murder, not more than 3 years or fine under this title, or both, for attempted manslaughter) for killing or attempting to kill a national of the United States while such national is outside of the United States.

S. 631 -- Motor Carrier Safety Assistance Program Reauthorization Act of 1991

Sec. 9 Drug Free Truck Stops

A new section is added after 21 U.S.C. § 848 to provide a term of imprisonment, or fine, or both, up to twice that authorized by 21 U.S.C. § 841(b) (Penalties) and at least twice any term of supervised release authorized by 21 U.S.C. § 841(b) for a first offense, for violation of 21 U.S.C. §§ 841(a)(1) (Unlawful acts) and 856 (Establishment of manufacturing operations) by distributing or possessing with intent to distribute a controlled substance in or on, or within one thousand feet of, a truck stop or safety rest area. A term of imprisonment shall be not less than 1 year (does not apply to offenses involving 5 grams or less of marijuana). For a subsequent conviction, punishment is the greater of "(A) a term of imprisonment of not less than three years and not more than life imprisonment or (B) a term of imprisonment of up to three times that authorized by section [841(b)] of this title for a first offense, or a fine up to three times that authorized by section [841(b)] of this title for a first offense, or both; and" at least three times any term of supervised release authorized by section [841(b)] of this title for a first offense.[174]

The bill also requires that the sentence not be "suspended" and that convicted offenders not be eligible for parole during the minimum term.

S. 339 -- Outlaw Street and Motorcycle Gang Control Act of 1991 (related bill H.R. 100)

Sec. 105 Theft of Firearm or Explosive Material

(a) Firearms

18 U.S.C. § 924 (penalties) is amended by adding subsection (i) which provides that "whoever steals a firearm that is moving as, or is a part of, or that has moved in, interstate or foreign commerce shall be fined under this title and imprisoned for not less than 5 years or more than 10 years, or both."

(b) Explosives

18 U.S.C. § 924 (penalties) is amended by adding subsection (k) which provides that whoever steals explosive material that is moving as, or is a part of, or that has moved in, interstate or foreign commerce shall be fined under this title and imprisoned for not less than 5 years or more than 10 years, or both."

S. 15 -- Violence Against Women Act of 1991

Sec. 201, 211 Safe Homes for Women Act of 1990

Section 2261 is added to title 18 to provide for a fine not more than $1,000 or imprisonment for not more than 5 years but not less than 3 months, or both, in addition to any fine or term of imprisonment provided under State law for any person who travels or causes another to travel across state lines or in interstate commerce with the intent to injure a spouse or intimate partner and who, during the course of such travel injures his spouse or intimate partner in violation of a criminal law of the state where the violation occurs.

Section 2262 is added to title 18 to provide that any person against whom a valid protection order has been entered travels or causes another to travel across State lines or in interstate commerce with the intent to injure a spouse or intimate partner and the offender has previously violated any prior protection order issued for the protection of the same victim, shall be fined under this title or imprisoned for not more than 5 years and not less than 6 months, or both.

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Appendix D
Technical Appendix to the Empirical Study

This appendix provides a description of the three main data sources used in the empirical analysis discussed in Chapter 5. Each data set will be described in turn, listing and discussing its source, available information, the research questions addressed, known problems and caveats, and analyses used.

A. Federal Probation Sentencing and Supervision Information System (FPSSIS) 1984 - 1990

The FPSSIS data base exists under the authority of the Administrative Office of the U.S. Courts. The sentencing portion of this data collection system was in operation from January, 1984 to September, 1990. Sentencing records in this system are based on Probation Form 3W, "Report of Federal Sentence," which is completed by federal probation officers. In virtually all cases, FPSSIS sentencing records are generated for cases in which a presentence report has been prepared.

FPSSIS data utilized in the mandatory minimums project were compiled from historical FPSSIS information provided by the Administrative Office of the U.S. Courts and were employed in two sets of statistical analyses. Data files were organized by sentencing dates into time periods from January 1984 through August 1990. Sentencing records for corporate defendants and those with solely petty offense convictions were eliminated for purposes of this study.

Federal Judicial Center Analysis of FPSSIS Data

The entire FPSSIS data base of 267,178 cases between January 1, 1984 and June 30, 1990 is included. The time dimension in the analysis shifts from "semester" (January 1 - June 30; July 1- December 31) to "year" (January 1 - December 31), depending on the number of cases available. Offenses are classified as to whether the underlying conduct appears to have involved mandatory minimum behavior. The data used to classify cases are the total pure drug amount and presence of a weapon, as coded by probation officers from their presentence reports. (For example, if the amount of heroin recorded in a case is above 100 grams, it is included in the analysis as a "mandatory minimum behavior" pursuant to 21 U.S.C. § 841(b)(1)(B)(i)). The measure, used only for behaviors that presently carry mandatory minimum terms, presents the proportion of defendants sentenced at or above the minimum term prescribed by statute, including a description of the relationship between various offense and offender characteristics and sentence over time.

Several data cautions are relevant to these analyses. First, FPSSIS information, prepared by the probation officer, reflects the officer's - and not necessarily the court's - interpretation of offense behavior. Second, drug amounts, defined statutorily as pure or mixture in activating a mandatory minimum provision, are reported in FPSSIS at 100 percent purity, thereby underclassifying the number of possible defendants for some drug types (i.e., opiates and cocaine). On the other hand, by listing aggregated drug amounts, which often would not be applicable under statute, FPSSIS might overcount "mandatory minimum behavior." Overcounting also might have occurred by including defendants with a weapon "present" based on FPSSIS criteria, which are not as strict as the statutory requirement for an 18 U.S.C. § 924(c) conviction.

While mandatory minimums exist for other controlled substances, the analysis reports only on marijuana, opiates, and cocaine. In FPSSIS, the drug category "cocaine" does not differentiate between the drug in its powder and base forms. Mandatory minimum terms for cocaine base defendants are triggered at significantly lower amounts of the drug than for cocaine powder defendants, resulting in underestimation of defendants.

Mandatory minimum terms quoted in the findings are based only on drug amount and, if applicable, on the presence of a weapon. FPSSIS data were insufficient to determine whether there was any drug-related victim injury and whether the defendant had any prior felony drug convictions, thereby underestimating applicable minimum terms. Finally, the sentences analyzed were imposed both under pre- and post-Sentencing Reform Act provisions, translating into radically different "time served" due to availability of parole (for non-mandatory defendants) and revised "good time" calculations for all defendants.

Figures 1, 4, and 6 to 10 present the results of the FJC analysis. The validity of these findings is affected by the accuracy in defining "mandatory minimum behaviors." A separate report on longitudinal sentencing practices using these data is being prepared by the FJC.

U.S. Sentencing Commission Analysis of FPSSIS Data

The first analysis undertaken by the U.S. Sentencing Commission is statute based and includes only cases (nearly 60,000 over the seven years available) in which the primary or secondary charge of conviction was pursuant to a statute with mandatory minimum provisions. The analysis attempts to assess conviction-based historical trends between 1984 and 1990 by presenting the frequency with which the relevant statutes were applied to defendants. The analysis cannot separate defendants convicted under mandatory minimum provisions from all defendants convicted under non-mandatory provisions of the same statutes. Table 1 of this Report presents findings from this analysis.

A second analysis utilizes the same selection criteria as the FJC analyses to identify cases for which underlying conduct involved mandatory minimum behavior. The distribution of sentences, including means and medians, are presented as box and whisker plots from 1984 to 1990. Mean sentences are calculated using zero for cases receiving no prison terms and truncated higher terms (including life) at 360 months.

It should be noted when reviewing sentencing trends in the historical analysis that, quite apart from the impact of mandatory minimum legislation, other historical changes have affected the meaning of sentence length with respect to "time served." For example, the 1984 Sentencing Reform Act abolished parole and redefined "good time," thereby modifying (and increasing) the actual length of time served independent of sentence length.

In addition, from 1984 to 1990 a number of statutes, specifically those governing controlled substance and firearms violations, have been amended and their mandatory provisions enacted or increased. Factoring these changes into the findings, and allowing for the necessary "lag time" between enactment and application, should be considered when reading these tables.

Figures 2 and 3 of this Report present findings from this analysis.

B. U.S. Sentencing Commission Monitoring Data

By statute, information on each case sentenced pursuant to the Sentencing Reform Act of 1984 is submitted to the U.S. Sentencing Commission. This information consists of five documents, including the presentence report, judgment of conviction order, report on the sentencing hearing, any written plea agreement, and guideline worksheets. As documentation is received, information on the defendant, charges of conviction, and guideline and sentencing factors are entered into the Sentencing Commission's Monitoring data system. Until August 31, 1990 when a match was made for a case with the FPSSIS data file, variables from that file were also imported to supplement the Monitoring data base. (From September 1, 1990 forward, the Sentencing Commission began collecting some of the information no longer available from FPSSIS.)

This report is based on the Sentencing Commission's Monitoring data set for fiscal year 1990 (MONFY90), with 29,011 cases sentenced between October 1, 1989 and September 30, 1990. It incorporates information from four of its data collection modules: Receipt Control, Basic Sentencing Information, and Guideline Application for 100 percent of cases received and Departures for a 25 percent random sample of cases. Cases with missing information for one or more of the variables in any given analysis were excluded from that analysis. Tables present the adjusted numbers and percentages.

Due to the specific purpose of this project, substantial verification was performed to determine the mandatory minimum status of cases convicted under relevant statutes. As a result, from the USSC data (unlike the FPSSIS data) it was possible to distinguish not only defendants convicted under any of the relevant statutes, but the ones actually convicted under one or more of the mandatory minimum provisions of these statutes.

The statutory minimum variable codes the length of the mandatory prison term applicable including terms under statutes for which the enhancement is consecutive to any other sentence. Information on departure status and reasons was available for a random 25 percent sample of the FY90 population.

The purpose of the analysis in this section is to portray more accurately the application of mandatory minimum provisions as statutes of conviction. A profile of mandatory minimum guideline defendants along with a profile of all federal guideline defendants are provided. In addition, a comparison between FY90 controlled substance defendants convicted and not convicted of mandatory minimum provisions is presented in Appendix E. The validity of the conclusions is dependent on the presence and accuracy of a defendant's mandatory minimum status as recorded in the presentence report.

Tables 2 to 5 and E-1 to E-3 present findings for this section.

C. U.S. Sentencing Commission Sample Data Source

While the previously enumerated data sources provide important information on the application of mandatory minimums, a more inclusive perspective on their potential applicability at the behavioral or real offense level and their utilization by government at the charging level was sought. For that purpose, a special Sentencing Commission study was designed and undertaken to review a sample of case files from U.S. Sentencing Commission Monitoring data for fiscal year 1990.

To reflect public and congressional concern, as well as relative frequency of occurrence in the court system, it was decided to concentrate on controlled substance offenses and firearms violations. To make the task empirically manageable, a 12.5 percent random sample was selected from the data base of 29,011 cases. Initial computer screening identified 2,210 relevant sample cases, qualifying due to the presence of drugs in the offense, drugs and weapons, or robbery with weapons.

An analysis of the relevant substantive and penalty statutes identified the elements of offense behavior indicating case eligibility for mandatory minimum charges; e.g., the amount of drug by type sufficient to invoke a 21 U.S.C. § 841(b)(1)(A) or requirements satisfying the "using or carrying" firearm provision for an 18 U.S.C. § 924(c).

A coding instrument was developed incorporating these statutory elements, and all sample cases were carefully reviewed and coded. A conservative interpretation of the legal criteria was chosen in order to minimize the chance of inclusion for cases not clearly mandatory in their offense behavior. Drug amounts were based on a single drug distribution or trafficking transaction when the amount for that drug type was statutorily sufficient to warrant a mandatory charge. Drug amounts were not aggregated across drug types and separate events. Cases involving attempts and conspiracies were excluded if there was no indication of one clear, continuous plan, or if the conspiracy ended prior to November 18, 1988. Mandatory applications based on the provisions of 21 U.S.C. § 845 were made only when the documents clearly indicated distribution to a minor, employing a minor, or occurrence within 1,000 feet of a school. Once a basic qualifying amount was established, evidence for enhancing factors was reviewed. The defendant's criminal history was reviewed, and priors counted only when they were clearly for adult felonious drug convictions, or for felony crimes of violence in the case of 18 U.S.C. §§ 922(g) and 924(e) charges. Firearms charges were viewed as applicable when the defendant carried or used the firearm; had it within reach (for example, in the car), or in close proximity to the drugs; or was part of a drug conspiracy in which a co-conspirator was indicted of weapon possession.

Case review of all sample cases was conducted by professional Sentencing Commission personnel, including its research staff, legal staff, and probation officers. Legal staff were continuously consulted for resolution of the more complex cases, and quality control was performed on 100 percent of the cases.

Case review decisions were guided by a criterion of "reasonableness," rather than "beyond a reasonable doubt," in the search for indications of mandatory minimum behavior. The presentence report, which served as the primary data source, collects information for the sentencing phase, and therefore does not necessarily provide a thorough analysis on the adequacy of evidence for purposes of conviction. Cases were included in the sample if the behavioral "facts" (as available and presented in the files) showed clear and reasonable indication of drugs or weapon-related behavior sufficient to warrant application of a mandatory minimum provision.

The screening process yielded a sample of 1,165 cases, representing defendants for whom the offense behavior indicated the appropriateness of a mandatory minimum penalty. The mandatory minimum level was determined based on applicable drug amount, firearms, victim components, and qualifying priors, and was expressed as "indicated mandatory minimum sentence" in terms of months. An assumption of concurrent sentencing was used in arriving at this figure for multiple mandatory counts, except in cases when the mandatory enhancement was consecutive by statute.

For the 1,165 defendants, information was recorded on real offense components, indictment history, mode of conviction, convicted charges, and sentence imposed, as well as plea agreements, stipulations, and guideline factors.

At the first level of analysis, findings explored the relationship between the proportion of cases to be sentenced at or above indicated mandatory minimums and a series of independent variables characterizing each case, such as circuit, offense, and defendant factors. These findings were further pursued for defendants at the 60-month and 120-month indicated mandatory minimum levels by assessing the relationship between significant factors and outcomes at other stages of processing (e.g., indictment, departure). The composite tables (for example, Table 12) provide a series of bivariate analyses that provide easier tracking of the handling of mandatory minimum behavior from potential to indicted to convicted. Each bivariate table includes a slightly different number of cases (due to variations in missing information) on which the 100 percent is computed. Utilizing chi square, tests of significance are calculated for all analyses, assuming a null hypothesis of no relationship between the variables. Relationships significant at the .05 or .01 level are reported in the table footnotes.

Some of the relationships were further analyzed utilizing multivariate probit analysis to determine the simultaneous effect of various factors on whether a defendant was convicted and sentenced at the appropriately indicated level of mandatory sentence. This analysis is discussed in Appendix F.
A number of caveats are in order for this section. First, as with the FPSSIS data, the main source of information was the presentence report with its version of the real offense components. Whenever possible, it was supplemented and verified by other sources, such as the written plea agreement and the report on the sentencing hearing. Second, in interpreting real offense behavior as indicating a mandatory minimum penalty, undoubtedly some potential cases were excluded, underestimating the incidence of this offense behavior and, ultimately, its reduction in the system. Third, the Sentencing Commission's monitoring data do not include any direct documentation from the assistant U.S. attorney, and charges of indictment (original, superseding, or an information) had to be ascertained indirectly from the presentence report. In some cases, it was impossible to know whether the indictment recorded was an inducement to or a result of plea negotiations. Finally, while the sample study is probably representative of controlled substance cases, and to a lesser degree of firearms violations, it is silent on the issue of applying mandatory minimum penalties to other offense types in the federal system.

In summary, the purpose of the sample study was to supplement the FPSSIS and Sentencing Commission data with pertinent pre-conviction information, and to allow for a procedural tracking of cases and application of mandatory minimum provisions at the various stages of the criminal justice process.

Tables 11 to 27 and Figure 5 present findings for this section.

Appendix E
Mandatory Minimum Defendant Profiles for Similar Controlled Substance Offenses

The following analysis provides profiles of three populations of controlled substance defendants sentenced in fiscalyear 1990. Profiles of offense characteristics, system and processing characteristics, and offender characteristics are provided for controlled substance defendants sentenced under 1) mandatory minimum provisions that did not include weapons enhancement penalties, 2) mandatory minimum provisions that did include weapons enhancement penalties, and 3) statutory provisions containing no mandatory minimum provisions.

Table E-1 provides offense profiles for defendants within the three populations. Over 95 percent of defendants sentenced under drug mandatory minimums (no weapons convictions) involved drug levels above those sufficient to invoke most mandatory minimum penalties. The remaining five percent were likely to have triggered a mandatory minimum for simple possession or distribution near a school. Cases involving weapons charges were less likely and non-mandatory minimum cases were least likely to involve higher amounts of drugs.

Under the guidelines system, defendants with minor or minimal roles receive sentence reductions, while defendants involved as supervisors, managers, and leaders receive sentence enhancements.[175] Table E-1 reveals that over 70 percent of defendants in each population received no enhancements or reductions for role in the offense. Additionally, the table indicates that cases involving any mandatory minimums were more likely to receive guideline role enhancements (15.6% and 17.0% compared to 7.2% for non-mandatory minimum defendants), and defendants with weapons convictions were extremely unlikely to be considered minor or minimal participants.

By definition, all defendants convicted under weapons provisions should receive statutory penalty enhancements. However, it is interesting to note that of those with no weapons conviction, 11.5 percent of drug mandatory minimum defendants and 7.8 percent of drug defendants with no minimums also received guideline enhancements for weapon involvement. The reason for this is that the sentencing guidelines (as explained more fully in Chapter 4) use a modified real offense approach to sentencing that makes certain facts relevant to the determination of the sentence regardless of the particular charges. For example, the use of a gun in a drug offense leads to a higher guideline sentence regardless of whether the 18 U.S.C. § 924(c) gun enhancement statute (containing a mandatory minimum) has been charged.[176] While 696 defendants received statutory weapons enhancements, an additional 1028 drug defendants who did not receive statutory enhancements did receive guideline enhancements. table 1While previous comparisons between mandatory minimum defendants and the total population showed no difference in prior criminal record (see discussion of Table 4 in Chapter 5), Table E-1 indicates that a slightly higher proportion of drug defendants with weapons convictions (74.9%) have a prior criminal history than do drug defendants with no weapons convictions.

Table E-2 further develops the defendants' statistical profile by reviewing judicial circuit, mode of conviction, length of sentence, and departure status. While the Fifth Circuit accounts for almost one-quarter of the federal non-mandatory minimum drug cases, the Sixth Circuit generates the greatest proportion of mandatory minimum drug cases involving weapons convictions, and the Eleventh Circuit is most highly represented in drug mandatory minimum cases with no weapons convictions.

See Chapter 4, Section B of this Report.

See U.S.S.G. §2D1.1(b).

More extreme variations between the drug populations are found when examined by mode of conviction. Over 90 percent of controlled substance defendants with no mandatory minimums applied are convicted pursuant to a guilty plea. Comparatively, only 72.4 percent of drug minimum defendants (no weapons convictions) and, at the extreme, approximately 60 percent of drug minimum defendants with weapons enhancements are convicted as a result of guilty pleas.

As would be expected from previous findings, sentences were higher for defendants sentenced pursuant to mandatory minimum provisions. Controlled substance defendants with weapons convictions were most likely to receive sentences at the highest ranges, a finding resulting from a weapons sentence being both mandatory and consecutive by statute. Reviewing both mean and median sentence lengths, Table E-2 shows that average sentences for drug minimum defendants are generally three times higher and weapons minimum defendants four times higher than sentences for non-minimum drug defendants.

While drug cases, as a group, represent both the highest number and the highest rates of departure from the guidelines over time, comparisons on Table E-2 indicate that drug defendants with mandatory minimums and no weapons convictions are slightly more likely to receive downward departures for substantial assistance (14.4% compared to 10.6%). Defendants with weapons convictions and defendants with no applicable mandatory minimums are equally likely to receive such adjustments.

The final comparisons between the three groups of controlled substance defendants involve offender characteristics. Drug defendants with weapons convictions are more likely to be male, most likely to be Black (48.9%), and least likely Hispanic (14.2%). Defendants with no minimums applied are most likely to be White (46.2%). No difference between the three populations in distribution by age was found. (See Table E-3.)
Insert Table 2Table 3
Appendix F
Technical Discussion of the Probit Analysis

The multivariate analysis in this appendix is used to investigate the apparent gender and race effects suggested in Tables 19 and 22 of Chapter 5. The analyses in Chapter 5 indicate that males and non-whites appear more likely than females and whites to be sentenced at or above the mandatory minimum. In contrast to these bivariate analyses, multivariate analyses allow for the study of simultaneous effects for many different factors. By so doing, the unique, independent contribution of each factor can be determined. In particular, this allows the researcher to unravel the effects of the variables of concern, such as demographic characteristics, criminal history, and offense behavior.

The technique used here, a probit analysis, is closely related to linear regression. The dependent variable is represented as either 0 or 1; 0 in this application denotes a defendant sentenced to less than the mandatory minimum and 1 denotes a defendant sentenced to at least the mandatory minimum. This is represented in the model as a linear function of explanatory variables, such as demographic, offense behavior, and criminal history variables. The model can be represented as

$$Y_i = \beta_0 + \sum \beta_j X_{ij} + u_i$$

where X_{ij} is the value of the *jth* explanatory variable for the *ith* individual, β_j is the "regression coefficient" for the *jth* variable, Y_i, the dependent variable, indicates whether the *ith* individual received a sentence greater than or equal to the mandatory minimum, and u_i is an error term. The key mathematical assumption in probit analysis is the probability that the dependent variable assumes a value of 1 and follows a normal distribution.[177] The probit coefficients, (β), are estimated using such an assumption about the data.

Explanatory variables used in the analysis are the defendant's race, sex, modified role, modified base offense level, and prior drug convictions. Race has three categories, Black, Hispanic and White; sex is coded as Male or Female; and role represents a) Low level carrier, unloader, enabler or go-between, b) Street dealer, c) Dealer above street level, or d) High level manufacturer, importer, financier. Modified base offense level represents the amount of drugs greater than the amount necessary to trigger the applicable mandatory minimum drug statute. Prior convictions are coded as 0, 1, or 2 where 2 represents 2 or more prior drug convictions.[178]

The analysis utilizes 907 defendants from the sample study data base described in Chapter 5. The number of defendants in the multivariate analyses is generally smaller than most of the other analyses in this Report because these analyses require that the values of the variables in the model must be non-missing for all individuals in the sample. For example, a case with race missing but sex present can be used in a bivariate table, but it cannot be used in a multivariate analysis which requires non-missing values for both race and sex.

See Maddala, *Limited-dependent and qualitative variables in Econometrics* (1983) for description of this technique.

The multivariate analysis examined a number of additional variables that were not included in the final analysis either because they were highly correlated with other variables in the model or they were not significant. Drug type and plea or trial convictions were highly correlated with the statute of conviction and the outcome variable, respectively. Presence and use of a firearm, citizenship, scope of activity, and number of co-defendants were found to be insignificant and, thus, eliminated from the final model.

Four probit models were run. All models used modified role and modified base offense level as explanatory variables. Model 1 added race and sex, and Model 2 added race, sex, and prior drug convictions. The remaining two models eliminated both race and sex variables and replaced them with a race*sex interaction variable which has six values (White male, White female, Black male, Black female, Hispanic male, and Hispanic female). The purpose of this variable was to further identify any differential effects occurring within the race and sex breakdown. Model 3 used the race*sex interaction instead of race and sex, while Model 4 added prior drug convictions to the race*sex interaction. The analyses were conducted using PROC PROBIT in the SAS software package. The results are provided in Table F-1.

The general format of the table is that *p-values* are given for the type of variables. These are followed by the probit coefficients. For example, using Model 1, the race variable has a *p-value* of .047 while the sex variable has a *p-value* of .234.[179] The probit coefficients are interpreted as probabilities compared to a base or reference level for that variable. The base levels are White for race, White-male for race crossed with sex, female for sex, street dealer for modified role, and 1 for number of prior drug convictions. Modified base offense level is a continuous variable ranging from -26 to +43 and the reference level is 0.

Four models are presented. The dependent variable is the proportion of cases that receive at or greater than the mandatory minimum sentence. This was achieved by 536 of the 907 defendants in the sample (59%). In terms of the overall fit of the models to the data, Models 2 and 4 fit better than 1 and 3 and Model 4 fits slightly better than the other three models.[180] The coefficients are generally fairly stable across the different models, suggesting that these explanatory variables are somewhat independent of each other.

Table F-1
Results of Probit Analyses

Coefficient	Model 1	Model 2	Model 3	Model 4

The convention is to regard *p-values* < 0.05 as statistically significant.

The log of the likelihood function in Model 1 was -585.6 as compared with Model 3 of -584.7 signifying that the extra 3 degrees of freedom spent to create the race*sex interaction does not improve the fit. On the other hand, bringing in prior drug convictions is an improvement, resulting in the largest log likelihood value of -572.6.

INTERCEPT	-.02	-.40	.11	-.23
RACE	(p = .047)	(p = .028)		
Black	.25	.29		
Hispanic	.19	.16		
SEX	(p = .234)	(p = .138)		
Male	.15	.19		
RACE*SEX			(p = .086)	(p = .035)
Black Fem			-.06	-.09
Black Male			.29	.33
Hisp Fem			.24	.21
Hisp Male			.17	.14
White Fem			-.11	-.15
MOD ROLE	(p = .015)	(p = .003)	(p = .019)	(p = .004)
Low (1-6)	-.39	-.42	-.38	-.41
Sells (8)	-.06	-.03	-.05	-.02
Finance(> 8)	-.15	-.10	-.13	-.07
MOD OFF LEVEL	(p < .001)	(p < .001)	(p < .001)	(p < .001)
Per Unit	.05	.05	.05	.05
PRI CONVICT		(p < .001)		(p < .001)
None		.41		.42
2 or more		-.47		-.47

The results in Table F-1 indicate that sex is not a statistically significant variable, while race, role in the offense, prior drug felony convictions, and adjusted base offense level are significant. For race crossed with sex, Black and Hispanic males and Hispanic females are more likely to receive greater sentences when compared to White males. Black and White females are less likely to receive sentences above the mandatory sentences than other categories.

As noted above, the probit coefficients can be interpreted as proportional to probabilities. Scanning the table shows that for the race variable, Blacks and Hispanics are more likely to receive sentences greater than the mandatory minimum than are Whites. This conclusion is derived from the coefficients (.25 and .19) for Blacks and Hispanics, respectively, in Model 1 and (.29 and .16) for Blacks and Hispanics for Model 2. The interpretation is that a Black offender has a probability of receiving a sentence somewhat greater than a White offender with otherwise identical characteristics. The *p-values* show these coefficients to be statistically significant.

The table shows that role is also statistically significant. All coefficients in the four models have a negative sign indicating that the three categories (Low level dealer, Seller above street level, and High level financier, manufacturer, etc.) have a *lesser* chance of receiving mandatory minimum sentences than do street dealers.

Finally, in Models 2 and 4, prior drug conviction shows an inverse relationship with what might be expected. Individuals with no prior drug felony convictions are *more* likely (.45 in both models) to get a sentence greater than the mandatory minimum than those with 1 (the reference level) or 2 or more.

In summary, the findings suggest that race appears to significantly affect the probability that an individual receives at least the mandatory minimum. Whites are least likely to be so sentenced followed by Hispanics and, finally, Blacks who are most likely to receive at least a mandatory minimum sentence. Sex is not significant and the race*sex interaction is significant in one model and not significant in the other. Role is significant with low level individuals least likely to be sentenced at or above and street dealers most likely to be so sentenced. Modified base offense level and prior drug convictions are significant in all four models.

Appendix G
Resolutions of the Judicial Conference and the
Twelve Circuit Courts of Appeals

Judicial Conference Resolution

As adopted by the Judicial Conference and reported in the *Report of the Proceedings of the Judicial Conference of the United States*, March 13, 1990:

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

MANDATORY MINIMUM SENTENCES

Observing that the Third, Eighth, Ninth, and Tenth Circuits had passed resolutions in opposition to mandatory minimum sentences, the Judicial Conference voted to urge the Congress to reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statues so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act (Title II of the Comprehensive Crime Control Act of 1984, Public Law 98-473).

.Appendix H
Brief Review of the Case Law
Relating to Mandatory Minimum Sentences

Mandatory minimum sentences have generated extensive, albeit largely unsuccessful litigation, especially in recent years as Congress has increased the severity of mandatory penalties for drug and firearm offenses. Among the principal challenges to this type of sentencing legislation have been contentions that it offends the eighth amendment and the due process clause of the fifth amendment. Criminal defendants have also challenged mandatory minimum sentencing schemes on equal protection, double jeopardy, and separation of powers grounds. This survey of the challenges to mandatory minimums is not intended to be exhaustive, but is illustrative of the most frequently raised objections.

Many courts have expressed their unhappiness with the harsh results that mandatory minimums are perceived to work in particular cases. For example, in a recent Second Circuit case, the defendant was faced with a mandatory minimum sentence of five years for growing marijuana plants, although his otherwise applicable guideline range was 15 to 21 months.[181] In Madkour, the defendant did not challenge the constitutionality of his sentence, but at sentencing the district court commented:

> This type of statute [§841(b)(1)(B)(vii)] does not render justice. This type of statute denies the judges of this court, and of all courts, the right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just. It violates the rights of the judiciary and of the defendants, and jeopardizes the judicial system. In effect, what it does is it gives not only Congress, but also the prosecutor, the right to do the sentencing, which I believe is unconstitutional. Unfortunately, the higher courts have ruled it to be constitutional . . .. This case graphically illustrates the failure of the justice system . . . . But for the mandatory sentence, I would have sentenced defendant to the (guideline) minimum of 15 months.[182]

In affirming the sentence on appeal, the court of appeals stated:

> The irony of a mandated sentence, in the face of our long tradition that trumpets the importance of judicial discretion in sentencing, is not lost on us. The district judge was troubled by the harsh sentence that he was compelled to impose on Madkour, following a process that, in his words, "makes a judge a computer, automatically imposing sentences without regard to what is right and

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[181] See United States v. Madkour, 930 F.2d 234 (2d Cir. 1991). The guidelines provide, however, that if a statutory minimum sentence is greater than the maximum of the otherwise applicable guideline range, the mandatory minimum shall be the guidelines sentence. U.S.S.G. §5G1.1(b).

[182] Id. at 236.

> just." We too are troubled, but unfortunately, have no power to disregard the clear mandate of congress, however ill-advised we might think it to be.[183]

However "ill-advised" some courts believe mandatory minimum sentences to be, constitutional challenges to these statutes are very rarely successful. As will be seen, mandatory minimum sentences are not per se unconstitutional. In only a few exceptional cases has a court found that imposition of a mandatory minimum sentence, as applied in the particular case, would violate a defendant's rights.

EIGHTH AMENDMENT

In its most recent term, the United States Supreme Court had occasion to address and rejected an Eighth Amendment challenge to a mandatory minimum term of life imprisonment (without parole) under Michigan law for a first offense simple possession of more than 650 grams of cocaine.[184] Before discussing this case and its implications for Eighth Amendment challenges to mandatory sentencing statutes, it is useful to describe the pre-Harmelin evolution of jurisprudence in this area.

In Weems v. United States,[185] the Supreme Court established that in non-capital cases the eighth amendment prohibition against cruel and unusual punishment could be violated if the punishment was disproportionate to the crime.[186] In that case, Weems was convicted of falsifying a public document with the intent "to deceive and defraud

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[183]Id. at 239-40.

[184]See Harmelin v. United States, ___ U.S. ___, 111 S. Ct. 2680 (1991).

[185]217 U.S. 349 (1910).

[186]But see Harmelin v. Michigan, supra note 4 and text discussion infra, pp. 7-10.

the United States Government of the Philippine Islands . . . .".[187] As a result of this conviction Weems was sentenced to:

> confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist . . . hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission . . . He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing.[188]

Tracing the history of the "cruel and unusual" clause from its origins in the English Bill of Rights in 1688, the court concluded that while the phrase may have originally been intended to prohibit the worst excesses of the Stuart monarchy, it has not been read so narrowly by the United States courts. The court relied in part on O'Neil v. Vermont,[189] in which Justice Field (dissenting) expressed the opinion (joined by Justice Harlan and Justice Brewer) that the prohibition against cruel and unusual punishments was directed "`against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."'[190] The court noted, additionally, that in McDonald v. Commonwealth[191] the court "conceded the possibility `that imprisonment in the

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[187]217 U.S. at 357.

[188]Id. at 366.

[189]144 U.S. 323 (1891)

[190]217 U.S. at 371.

[191]173 Mass. 322.

State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment.'"[192]

The Weems court then went on to compare the sentence received in the Weems case with the possible sentences for more serious crimes (e.g., homicide and misprision of treason) and found that many more serious crimes were not punished nearly so severely. Finding that the sentence imposed on Weems was disproportionate to his offense, the court held that Weems' sentence violated the eighth amendment prohibition against cruel and unusual punishment.[193]

In more recent times, the Supreme Court has had the opportunity to consider the application of the eighth amendment to mandatory sentencing in Rummel v. Estell[194] and Solem v. Helm.[195] Both of these cases involved mandatory life sentences for repeat offenders; the court upheld the Texas statute in Rummel and held invalid the South Dakota statute in Solem. The only significant difference between the two was that the Texas statute allowed for parole, while South Dakota required life imprisonment without parole.

Rummel was convicted of obtaining $120.75 through false pretenses. Because he had been previously convicted of two felonies (an $80.00 credit card fraud and forging a check in the amount of $28.36) he was subject to the Texas recidivist statute which mandated a sentence of life imprisonment.[196] Although the court stated that it could be argued "that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of

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[192]217 U.S. at 368.

[193]217 U.S. at 382.

[194]445 U.S. 263 (1980).

[195]463 U.S. 277 (1983).

[196]445 U.S. at 265-66.

legislative prerogative,"[197] it also noted that a proportionality principle would come into play in an extreme case.[198] At least in part because Rummel would be eligible for parole in 12 years, the court found that this was not an extreme case and that the punishment was not so disproportionate as to be prohibited by the eighth amendment.

Three years later, in Solem, the court found that the mandatory imposition of a life sentence without parole upon a seventh conviction of a relatively minor felony offense was an extreme case violating the proscription against cruel and unusual punishment.[199] In so deciding, the court clarified the standard of deference that the courts must give to legislative sentencing decisions, stating that:

> a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional.[200]

The court then set forth a three-part proportionality analysis which courts should use to consider eighth amendment claims. First, the court should consider "the gravity of the offense and the harshness of the penalty."[201] Next, the court should compare the sentences imposed on other criminals in the same jurisdiction to determine whether more serious crimes are subject to the same or lesser penalties.[202] Finally, the court should "compare the sentences

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[197] 445 U.S. at 274.

[198] Id., n.11.

[199] 463 U.S. at 303.

[200] Id. at 290 (footnote omitted).

[201] Id. at 290-91.

[202] Id. at 291.

imposed for commission of the same crime in other jurisdictions."[203] Thus, the court attempted to balance the substantial deference to legislatures that Rummel deemed necessary[204] with the court's responsibility to ensure that fundamental rights are not violated.

Since Solem, the courts of appeals have used this same three-part analysis in deciding whether mandatory minimum penalties are constitutional on their face and as applied.[205] Employing the Solem analysis, the courts have made short shrift of arguments that mandatory minimum penalties are facially invalid.[206]

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[203]Id. at 291-92.

[204]See 445 U.S. at 275 ("the basic line-drawing process . . . is pre-eminently the province of the legislature when it makes an act criminal . . . .").

[205]See, e.g., United States v. Hoyt, 879 F.2d 505, 512-13 (9th Cir. 1989).

[206]This case law summary focuses on challenges to the mandatory minimum penalties that are provided in 18 U.S.C. § 924 (c) and (e) and in 21 U.S.C. § 841(b) because it is with respect to these provisions that challenges to mandatory minimums have most frequently arisen. See, e.g., United States v. Hatch, 925 F.2d 362, 363 (10th Cir. 1991) (five-year mandatory consecutive penalty for use of a firearm during a bank robbery not disproportionate); United States v. Klein, 860 F.2d 1489, 1496 (9th Cir. 1988) ("The mandatory minimum sentences in 21 U.S.C. § 841(b)(1)(B) . . . clearly reflect Congress' conclusion that possession of a sizable quantity of one of these `controlled substances' with the intent to distribute is a grave offense.") (emphasis in the original); and United States v. Holmes, 838 F.2d 1175, 1178-79 (11th Cir., cert. denied, 486 U.S. 1058 (1988)) (Under Solem, the penalties in 21 U.S.C. § 841 are not disproportionate to the offense.).

However, because no penalty is per se constitutional,[207] the courts have had to determine whether the penalty as applied in a particular case is so disproportionate to the offense as to constitute cruel and unusual punishment. Most often the answer is no.[208]

In rare cases, however, a district court has refused to impose an applicable mandatory minimum on the ground that the sentence would violate the eighth amendment. For example, the mandatory minimum penalties were not applied in United States v. Martinez, CR-89-432-AAM, (E.D.Wash. November 8, 1990), because the court found, using the Solem analysis, that the mandatory penalties were disproportionate to the offense.

In Martinez, the defendant was facing a mandatory minimum sentence of 40 years: five years for possession with intent to deliver over 500 grams of cocaine; five years for the use of a 9 millimeter semiautomatic pistol during a drug felony; and 30 years for the use of a machine gun during a drug felony. The guns were found in the defendant's home at the same time that a kilogram of cocaine was found there. It was the defendant's first offense.

Although agreeing that the offense was a serious one, the court found that the harshness of the penalty greatly outweighed the severity of the offense, especially when compared to sentences imposed for other crimes in the same jurisdiction. The court further reviewed the penalties for the same offense in other jurisdictions (in this case Washington state) and found that the penalties called for in this case were far more severe than what would be required in the state court. For example, state law provided an enhancement of up to 12 months imprisonment for the use of any firearm in connection with a drug transaction; the federal statute required a minimum of 35 years.

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[207] See Solem, 463 U.S. at 290.

[208] See, e.g., United States v. Gonzalez, 922 F.2d 1044, 1053 (2d Cir. 1991) ("A sentence of life without parole for a drug dealer and killer, even a first-time offender, is not so disproportionate to the offense that it shocks the public's conscience."); United States v. Dumas, 921 F.2d 650, 653 (6th Cir. 1990), cert. denied, 111 S. Ct. 2034 (1991) (a sentence of six years for two felonies, one of which involved a firearm, was not cruel and unusual punishment); and United States v. Mendes, 912 F.2d 434, 439 (10th Cir. 1990) (ten-year mandatory minimum sentence for defendant who possessed 800 grams of 92% pure cocaine and 124 grams of 47% pure heroin and has a prior felony drug conviction is not disproportionate to his offense).

In its analysis, the court also compared the sentence required for Martinez with other sentences that had been imposed in similar cases in that district. The court found that in the five recent cases that it used for comparison, each involving drug distribution and firearms, the sentences ranged from 15 months to 12 years.[209] The court pointed out that an important difference (perhaps the most significant difference) between those cases and the present case was the fact that in the other cases the government had chosen not to charge the firearm violations which would have carried substantial sentencing enhancements. The court concluded that the eighth amendment does not permit this type of sentencing disparity, and sentenced the defendant to a total of 10 years imprisonment.

With Rummel and Solem as guideposts, most American courts have upheld mandatory minimum sentences when presented with eighth amendment challenges to these statutes. The Supreme Court of Canada, however, has ruled that a mandatory minimum sentence of seven years imprisonment for the importation of narcotics constituted cruel and unusual punishment in violation of section 12 of the Canadian Charter of Rights and Freedoms.[210] The mandatory minimum sentencing provision was held to be invalid on its face, even though the court seemed to agree that seven years was not excessive in the case at hand.[211]

The Canadian proscription against cruel and unusual punishment, like the American provision, was adopted from the English Bill of Rights.[212] Although the court found reference to American law on the subject not entirely relevant because of the many differences between the American Constitution and the Canadian Charter of Rights and Freedoms, the court did find the Solem three-part analysis useful.[213]

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[209]The case in which the 12-year sentence was imposed involved an extensive, sophisticated drug ring which existed over a period of three years, and there was evidence that the firearms involved had been fired during the course of the conspiracy. In the present case the guns were present in the defendant's home, but there was no evidence that the guns had been used.

[210]See Smith v. The Queen, 34 C.C.C. (3d) 97 (1987).

[211]Id. at 146.

[212]Id. at 129.

[213]Id. at 140-41.

Ultimately, the court was persuaded by the fact that the statute required a minimum of seven years imprisonment without regard to the amount of drugs being imported or to any individual characteristics of the offender. According to Justice Lamer, the Canadian mandatory minimum sentence "inserts into the system a reluctance to convict and thus results in acquittals for picayune reasons of accused who do not deserve a seven-year sentence, and it gives the Crown an unfair advantage in plea bargaining as an accused will be more likely to plead guilty to a lesser or included offence."[214]

The Solem analysis has been recently called into question by the latest Supreme Court decision considering the application of the eighth amendment in a non-capital, mandatory sentence case, Harmelin v. Michigan.[215] The petitioner in Harmelin was convicted under Michigan state law, of simple possession[216] of more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without possibility of parole. It was his first offense. The Supreme Court (in a 5-4 plurality decision) rejected Harmelin's claim that this sentence violated his eighth amendment rights in that it was disproportionate to his crime and denied him individualized sentencing.

Justices Scalia, Rehnquist, Kennedy, O'Connor, and Souter agreed that the requirement of individualized sentencing in capital cases does not extend to cases in which the penalty is life without parole. As to the proportionality argument, however, there was no majority. Justice Scalia, joined by Chief Justice Rehnquist, concluded that the eighth amendment does not require a proportionality analysis. After a review of English history leading to the adoption of the prohibition against cruel and unusual punishment in the English Declaration of Rights of 1689, and of American history before and after the adoption of the Bill of Rights, Justice Scalia reasoned that there was no support for the idea that the eighth amendment guarantee protected against disproportionate punishments.

According to Justice Scalia, the cruel and unusual clause in the English Declaration of Rights prohibited only those punishments that were both cruel and not provided for by law. In other words, the provision forbade courts from

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[214]Id. at 145.

[215]See supra note 4.

[216]The term "simple possession" is used to distinguish cases involving possession with intent to distribute.

imposing punishments which were not provided for by the legislature or familiar in the common law; "unusual", Justice Scalia found, was synonymous with illegal.[217]

Justice Scalia did not ascribe this meaning to the word "unusual" in the eighth amendment, however. Rather, he concluded that when this language was adopted in the United States Constitution, it was not intended to have the same meaning.[218] Since there were no common law punishments in the federal system, the provision was meant by the framers of the Constitution to be a check on the legislature rather than on judges. "Unusual" carries its dictionary meaning of "`such as [does not] occur in ordinary practice,'[219] "such as is [not] in common use,' Webster's 2d International."[220] Thus, Justice Scalia concluded, the eighth amendment prohibits only "particular forms or `modes' of punishment -- specifically, cruel methods of punishment that are not regularly or customarily employed."[221]

Having settled on the meaning of "cruel and unusual," Justice Scalia proceeded to the question of whether the

> `cruelty and unusualness' are to be determined not solely with reference to the punishment at issue (`Is life imprisonment a cruel and unusual punishment?') but with reference to the crime for which

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[217]See 111 S.Ct. at 2688 (1991).

[218]See id. at 2691.

[219]Webster's 1828 edition.

[220]Id. at 2691.

[221]Id. at 2691. Justice Scalia appears to be of the view that the cruel and unusual clause must be read in the conjunctive, although previously it has been typically interpreted to prohibit punishments that were either cruel or unusual. In other words, he would not find any constitutional infirmity in a punishment, no matter how cruel, if it were commonly employed.

it is imposed as well (`Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?').[222]

Justice Scalia concluded that the answer to this question is no. If the Framers had intended that the eighth amendment be read as requiring that punishments be proportionate to their crimes, Justice Scalia reasoned, they would have said so specifically, not with oblique references to "cruel and unusual" punishments. Finding that a proportionality analysis is not required by the eighth amendment, Justice Scalia and Chief Justice Rehnquist voted to overturn the Solem case.

Justices O'Connor and Souter joined in Justice Kennedy's opinion disagreeing with Justice Scalia's conclusion regarding proportionality. While not taking sides in the historical argument between Justice Scalia and the dissenters, Justice Kennedy concluded that *stare decisis* requires "adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."[223] Justice Kennedy determined, however, that the proportionality test set forth in Solem should be interpreted more narrowly than it has been.

Justice Kennedy identified four principles which, he reasoned, "give content to the uses and limits of proportionality review."[224] These principles are: (1) that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts"; (2) that the eighth amendment does not mandate adoption of any one penological theory; (3) that marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure; and (4) that proportionality review by federal courts should be informed by "objective factors to the maximum possible extent," and the most prominent objective factor is the type of punishment

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[222] 111 S. Ct. at 2691.

[223] 111 S. Ct. at 2702.

[224] Id. at 2703.

imposed.[225] These four principles "inform the final one: the Eighth Amendment does not require strict proportionality between crime and sentence, Rather, it forbids only extreme sentences that are `grossly disproportionate' to the crime."[226]

In application of the Solem three-part test, however, Justice Kennedy parted company with the dissent (especially Justice White, who authored the Solem opinion). Justice Kennedy found that the Solem test is not a "rigid three-part test."[227] Agreeing with Solem that "no one factor will be dispositive in a given case," Justice Kennedy nevertheless concluded that "one factor may be sufficient to determine the constitutionality of a particular sentence."[228] Solem, he wrote, "is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review."[229] "[I]ntra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[230] "The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime."[231]

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[225] Id. at 2705.

[226] Id. at 2705.

[227] Id. at 2707.

[228] Id.

[229] Id.

[230] Id.

[231] Id.

Justice White, in his dissent, took issue both with Justice Scalia's interpretation of history and with Justice Kennedy's narrow reading of the Solem test.[232] Justice White, with whom Justices Blackmun and Stevens joined,[233] argued that Justice Kennedy's reading of the Solem test reduces the test from three factors to one, asserting that "Justice Kennedy's abandonment of the second and third factors set forth in Solem makes any attempt at an objective proportionality analysis futile."[234] The first prong of Solem requires that a court consider both the gravity of the offense and the severity of the punishment. Under the first prong:

> A court is not expected to consider the interaction of these two elements and determine whether `the sentence imposed was grossly excessive punishment of the crime committed.' . . . . Were a court to attempt such an assessment, it would have no basis for its determination that a sentence was -- or was not -- disproportionate, other than the `subjective views of individual [judges],' . . . which is the very sort of analysis our eighth amendment jurisprudence has shunned.[235]

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[232]See id. at 2708.

[233]Justice Marshall wrote separately, saying that he agreed with Justice White's dissenting opinion, "except insofar as it asserts that the Eighth Amendment's Cruel and Unusual Punishments Clause does not proscribe the death penalty." 111 S. Ct. at 2719.

Justice Stevens also wrote separately, joined by Justice Blackmun, asserting that a sentence of life imprisonment without parole "does not even purport to serve a rehabilitative function, [and so] the sentence must rest on a rational determination that the punished `criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any consideration of reform or rehabilitation of the perpetrator.'" Id. at 2719 (citations omitted). Conceding that the defendant's crime was serious, Justice Stevens nonetheless believes that "it is irrational to conclude that every similar offender is wholly incorrigible. Id. at 2719.

[234]Id. at 2714.

[235]Id. at 2714.

Analyzing the sentence imposed on the defendant in the case, Justice White concluded the punishment is cruel and unusual.

Thus, Harmelin does not overrule Solem, nor is it clear that there is a majority that would read the test as narrowly as Justice Kennedy has. Pending further pronouncements from the Supreme Court, however, courts of appeals will undoubtedly be applying the Solem test more narrowly in the future.

DUE PROCESS

Due process challenges to mandatory minimum sentences take different forms. Most often defendants assert that mandatory minimum penalties deprive them of the right to individualized sentencing. Other common challenges include the argument that mandatory sentences transfer sentencing discretion from the court to the prosecutor, thus violating the separation of powers doctrine.

It is well settled that in non-capital cases defendants do not have a constitutional right to individualized sentencing.[236] Congress has the power to fix the sentence for a federal crime and may control the scope of judicial discretion with respect to sentencing.[237] Consequently, challenges to mandatory minimum penalties on the ground that they deny the defendant the right to individualized sentencing have not succeeded.[238]

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[236]See, e.g., Harmelin v. United States, supra note 4; United States v. Dumas, supra note 28; United States v. Grinnell, 915 F.2d 667 (11th Cir. 1990); and United States v. Brownlie, 915 F.2d 527 (9th Cir. 1990).

[237]Mistretta v. United States, 488 U.S. 361, 364 (1989).

[238]At least one court has noted that 21 U.S.C. § 841(b)(1)(B) permits some individualization of the sentence even though it provides for a mandatory minimum sentence. "Sentencing under this statute is individualized according to quantity and variety of the narcotic possessed. Sentences are further individualized by judicial discretion beyond the mandatory minimum." United States v. Klein, 860 F.2d 1489, 1501 (9th Cir. 1988). Furthermore, although it is true that lack of a prior criminal record is not relevant when a defendant is subject to a mandatory minimum sentence, 21 U.S.C. § 841 (b) does provide for increased mandatory minimums when the

Courts appear to be more troubled by the fact that mandatory minimum sentencing schemes are perceived to transfer sentencing discretion from the courts to the prosecutors. This transfer in authority, however, does not typically give rise to a Constitutional violation.

The Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."[239] "[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements."[240] "The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the equal protection or due process clause."[241]

In Batchelder, the defendant was convicted of violating 18 U.S.C. § 922(h) (receipt of a firearm in interstate commerce by a previously convicted felon), and was sentenced to the maximum term of five years.[242] The court of appeals reversed the sentence holding that, insofar as the substantive elements of § 922(h) and 18 U.S.C. App. § 1202(a) are identical, the court should have sentenced the defendant under § 1202 because that statute provides for only a two-year maximum.[243] The court of appeals found that the conflict between the two statutes should be

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defendant has been previously convicted of a felony drug offense. See United States v. Broxton, 926 F.2d 1180 (D.C. Circuit 1991).

United States v. Batchelder , 442 U.S. 114, 123-24 (1979) (citations omitted).

[240]Id. at 125.

[241]Id.

[242]442 U.S. at 116.

Id. at 116-17.

resolved in the defendant's favor, and noted that the "`prosecutor's power to select one of two statutes that are identical except for their penalty provisions' implicated `important constitutional protections.'"[244]

The Supreme Court rejected the court of appeals' suggestion "that the statutes might impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties."[245] The Court held that:

> the provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty."[246]

Batchelder has not put an end, however, to the debate over the discretion vested in prosecutors by mandatory minimum sentencing schemes. As the Supreme Court has pointed out:

> There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.[247] Cases still arise, therefore, in which defendants allege that the prosecutor(s) in their cases have gone beyond constitutional limits. In those cases, courts evaluate a defendant's specific claims, and have, on rare occasion, agreed with the defendant that the prosecutor has abused his largely unfettered discretion to choose which charges to bring and where.

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[244] Id. at 117.

[245] Id. at 125.

[246] Id. at 126.

[247] Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

For example, in United States v. Redondo-Lemos[248] the district court refused to sentence the defendant to the mandatory minimum sentence of five years because the judge believed that prosecutors in that district were abusing their charging discretion by arbitrarily choosing to allow some defendants to plead guilty to lesser offenses carrying no mandatory sentence and refusing to do so for others.[249]

Redondo-Lemos was arrested as he entered the United States from Mexico driving a van containing 278 kilograms of marijuana.[250] Upon his arrest, Redondo-Lemos told the arresting agents everything that he knew about the offense.[251] He claimed he had been in Mexico for the weekend and had been approached by a man named Juan (last name unknown) and asked if he wanted some work.[252] Thereupon, he said he was offered a sum of money to drive a vehicle across the border and leave it in a shopping center parking lot; he further stated he did not know who would be picking up the drugs on the American side of the border. The agents chose not to make a controlled delivery to the parking lot.[253]

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[248]754 F.Supp. 1401 (D.Ariz. 1990).

[249]754 F.Supp. at 1406, 1409.

[250]Id. at 1402.

[251]Id. at 1402-03.

[252]Id.

[253]Id. at 1403.

Redondo-Lemos had no prior convictions.[254] He was married, had a four-year-old child, and had worked at various jobs.[255] At the time his presentence report was prepared he was earning $300.00 per week as a truck driver.[256] His liabilities exceeded his net worth by $10,000.00; his expenses exceeded his income by $400.00 per month.[257] He became involved in the offense because he was desperate for money as bill collectors were calling him.[258]

The sentencing judge indicated that the scenario presented in Redondo-Lemos is quite common in his district,[259] and reviewed several cases with virtually identical facts.[260] Sentences in these cases ranged from three years (for 307 pounds of marijuana) to 27 months probation (for 502 pounds of marijuana).[261] In fact, in one case, the defendants had led the agents on a high speed chase before being arrested and were found to be carrying 1,149 pounds of marijuana.[262] The two defendants in that case were allowed to plead guilty to charges that did not carry a mandatory minimum sentence and received sentences of 18 months.[263] The judge concluded that there was no

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[254]Id.

[255]Id.

[256]Id.

[257]Id.

[258]Id.

[259]Id. at 1402.

[260]See id. at 1404-09.

[261]Id. at 1404-05.

[262]Id.

[263]Id.

rational distinction to be made between Redondo-Lemos and the other defendants who had come before him and sentenced Redondo-Lemos to 18 months imprisonment, rather than the mandatory minimum of five years.[264]

A similar argument was raised in United States v. Williams.[265] There the defendants were a 19- and a 20-year-old who were convicted of possession with intent to distribute and distribution of "crack" cocaine.[266] The charges carried a mandatory minimum of 10 years, and the sentencing guideline ranges were 188-235 months for defendant Williams and 151-188 months for defendant Patt.[267] The defendants argued for a departure below the mandatory minimum on the ground "that their Constitutional rights to due process of law were violated by the manner in which they were singled out for federal prosecution as opposed to state prosecution . . . ."[268] The court agreed that the defendants' due process rights were violated and ruled that the sentences would be imposed irrespective of the federal mandatory minimum statutes and the federal sentencing guidelines.[269]
Defendants Williams and Patt were arrested through the efforts of a strike force that was made up of state, local and federal law enforcement personnel.[270] The strike force determined which cases would be referred to the United

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[264]The court also expressed concerns over what appeared to be blatant gender bias in the application of the mandatory minimum penalties in his district. This issue is addressed in the section of this summary that discusses equal protection violations, infra, at p 19. Id. at 1402.

[265]746 F. Supp. 1076 (D. Utah 1990).

[266]Id. at 1077, 1079 n.3.

[267]Id. at 1078.

[268]Id.

[269]The sentencing was then set for a date in the future. The actual sentences imposed are not contained in this or any other reported decision. Id. at 1083.

[270]Id. at 1078.

States Attorney's office for federal prosecution and which would be prosecuted by the local authorities.[271] According to the court, if Williams and Patt had been prosecuted by the state rather than federally, they would have been facing indeterminate sentences of 1-15 years.[272] Under the sentencing matrix promulgated by the Utah Board of Pardons and used by Utah district courts, defendant Williams would have served 18 months and Patt would have served 18 or 21 months (depending on his criminal history).[273]

Because of the substantial difference in the sentences for the defendants resulting from the decision to prosecute them in federal court, the court decided that the referral decision was one which involves liberty interests of the highest kind and that procedural due process protections are required in that decisionmaking process.[274] The court found that the strike force exercised unfettered and unchecked discretion as to which cases to refer to which prosecuting agency, and concluded that "[b]ecause of [the] direct impact on the defendants' potential sentences, the wide deference typically afforded to executive branch law enforcement practices is not appropriate to the Strike Force referral decision."[275] The court expressed its concern that

> Congress, through the minimum mandatory sentencing statutes and the sentencing guidelines, has severely curtailed the discretion of the court at sentencing, but no similar limitation has been placed on the exercise of discretion of police officers or prosecutors. This situation results in de facto sentencing by police and prosecutors.[276]

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[271] Id. at 1078-79.

[272] Id. at 1079.

[273] Id.

[274] Id. at 1080.

[275] Id. at 1081.

[276] Id. at 1082.

The defendants had suggested several impermissible grounds for which they may have been singled out for federal prosecution: because they are black, because they are from California, or even because somebody needed the statistic for a promotion.[277] It was also suggested that the threat of federal charges is often made to induce a defendant to enter a guilty plea in state court.[278] The court noted that this "is an evil that could easily flow from the present lack of any objective factors or policy statement regarding what cases shall be referred to federal authorities."[279] The court analogized this case to the line of cases that has held that statutes and regulations violate due process if they are so vague as to give police and other governmental officials too much discretion in enforcement.[280]

With no articulated policy guiding the decision to refer these case for federal prosecution, the court could not say with certainty that the decision had been made entirely on permissible grounds.[281] Consequently, it ruled that the defendants were denied their right to due process when the decision to refer their case for federal prosecution was made.[282]

It is apparent, then, that even though there is no per se constitutional violation in transferring the sentencing power to the prosecutors, the courts are still engaged in a case-by-case analysis to determine whether there has been an abuse of discretion in a particular case.

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[277] Id. at 1080, n6.

[278] Id.

[279] Id.

[280] Id. at 1082 (citing Kolender v. Lawson, 461 U.S. 352 (1983) (loitering statute); Smith v. Goguen, 415 U.S. 566 (1974) (flag desecration statute); Marcus v. Search Warrant of Property, 367 U.S. 717 (1961) (obscenity statute); Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), cert. denied, 419 U.S. 1121 (1975) (police discipline policy)).

[281] Id. at 1083.

[282] Id.

EQUAL PROTECTION

A number of defendants have also argued that the mandatory minimum drug penalties violate the Constitution's equal protection guarantee by establishing classifications that are not rationally related to the ends that Congress was seeking to achieve. The gist of this argument is that the mandatory drug penalties were intended to punish "drug kingpins," but the establishment of penalties by quantity without regard to drug purity defeats this purpose, and may in fact work in quite the opposite way.[283] For example, under the penalty provisions of 21 U.S.C. § 841 a street dealer who possesses a large amount of a drug of very low purity would be required to receive a mandatory minimum sentence, whereas a high-level dealer who possesses a small amount of a drug in its pure form would not.

The courts have pointed out that this sentencing scheme is not necessarily irrational. For example, in Savinovich the court explained that

> Congress was well aware that its punishment scheme did not focus on `the number of doses of the drug that might be present in a given sample.' . . . Instead, Congress chose a `market-oriented' approach to focus on those who are responsible for creating and delivering very large quantities of drugs, including the `managers of the retail level traffic' selling `substantial street quantities.' Congress clearly thought that dealers who possessed substantial street quantities of drugs deserved severe punishment. The classification scheme's focus on quantity is thus directly related to Congress' desire to prevent both wholesale and retail distribution of illegal drugs. A classification scheme, therefore, of mandatory punishments for possessors of more than 500 grams of cocaine is not unreasonable or irrational.[284]

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[283] See, e.g., United States v. Mendes, 912 F.2d 434 (10th Cir. 1990); United States v. Whitehead, 849 F.2d 849 (4th Cir., cert. denied, 488 U.S. 983 (1988); United States v. Savinovich, 845 F.2d 834 (9th Cir., cert. denied, 488 U.S. 943 (1988); and United States v. Holmes, 838 F.2d 1175 (11th Cir., cert. denied, 486 U.S. 1058 (1988).

[284] 845 F.2d 834, 839.

The court in United States v. Holmes was more blunt. Faced with an identical challenge, that court asserted, "These claims are meritless: where a statute does not discriminate on racial grounds or against a suspect class, Congress' judgment will be sustained in the absence of persuasive evidence that Congress had no reasonable basis for drawing the lines that it did."[285]

More recently, in Chapman v. United States,[286] the United States Supreme Court rejected an equal protection challenge to including the weight of the LSD carrier medium in the weight of LSD mixture or substance that determines whether a mandatory minimum sentence under 21 U.S.C. § 841 applies. The Court, with Chief Justice Rehnquist writing for a 7-2 majority, held that the penalty scheme embodied in the Anti-Drug Abuse Act of 1986 was a rational penalty scheme devised by Congress "to punish severely large-volume drug traffickers at any level . . . regardless of [drug] purity."[287] Because blotter paper makes LSD "easier to transport, store, conceal, and sell,"; because it is a "tool of the trade for those who traffick in the drug,"; and because Congress wanted "to avoid arguments about the accurate weight of pure drugs which might have been extracted from blotter paper had it chosen to calibrate sentences according to that weight," it was both rational and justifiable for Congress to set mandatory penalties based on inclusion of any carrier medium weight.[288]

Recently, objections have been raised in several federal district courts that the mandatory minimum penalties for "crack" cocaine discriminate on racial grounds. Although the drug laws are racially neutral on their face, critics of the "crack" provisions contend that the statutes have a racially discriminatory effect. They allege that blacks are more often prosecuted and serve longer sentences than whites because "crack" is punished more harshly than cocaine hydrochloride (powder)and blacks are the primary users of "crack" while whites tend to prefer cocaine

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[285]838 F.2d 1175, 1177.

[286]___ U.S. ___, 111 S. Ct. 1919 (1991),

[287]Id. at 1927.

[288]Id. at 1928.

powder. This differentiation between the classification of cocaine powder and "crack" cocaine, the argument goes, is irrational and, therefore, the discriminatory effect of the legislation is unconstitutional.

In a related development, a county district judge in Minneapolis, Minnesota, recently dismissed possession of crack charges against five defendants, holding that the Minnesota crack statute[289] had a racially disparate impact and, therefore, violated the defendants' rights to equal protection.[290] The court found that the effect of the statute was clear:

> The subject case . . . involves actions against an entire race of people who are repeatedly charged under a statute which results in greater penalties than other persons in possession of cocaine. This is not an isolated violation of the law but it shows a pattern of conduct which continues to adversely affect an entire group. This is a matter of great concern particularly when there is no real justification for the treatment.[291]

The defendants in Russell produced evidence demonstrating that in 1988, 92.3 percent of all persons convicted of possession of crack were black, while 85.1 percent of all persons convicted of possessing cocaine powder were white.[292] Even the numbers submitted by the attorney for the county showed that between August 1989 and August

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[289]Minnesota Statute section 152.023 provides that possession of three grams of crack is punishable by up to 20 years in prison; the state sentencing guidelines presume a term of four years for a first offender. In contrast, section 152.025 provides a maximum of five years in prison for possession of three grams of cocaine powder, and the guidelines presume a first offender sentence of probation. An individual must possess 10 grams of cocaine powder to trigger the presumptive four-year term.

[290]See State v. Russell, Nos. 89067067, etc., (Hennepin County (Minn.) Dist. Ct., filed Dec. 27, 1990). This case has been certified to the Minnesota Supreme Court for prompt review.

[291]Id., slip op. at 9.

[292]Id. at 6-7.

1990, there were 32 cases which involved presumptive prison sentences for possession of at least 3 grams of cocaine base: 31 of those cases involved black defendants and only 1 involved a white defendant.[293]

Having shown the disparate impact of the statute, the defendants were still required to prove that there was no rational basis for the legislature's different treatment of "crack" and cocaine powder. The court noted that in order for the disparate treatment to pass constitutional muster, "[t]he classification `must rest upon some ground of difference of having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[294]

The evidence adduced both by the defendants and the county led the court to conclude that there is no rational basis for distinguishing between "crack" cocaine and cocaine powder. Experts for both the defendants and the county agreed that 10 grams of "crack" is virtually the same as 10 grams of any other pure form of cocaine. The defense expert testified that if 10 grams of 70% pure cocaine hydrochloride is converted to "crack," the yield is seven grams. The county's expert testified that if 10 grams of 75% pure cocaine hydrochloride is converted to cocaine base, it might yield 7.3 grams. Furthermore, both experts testified that crack is not now a pure form of cocaine, if it ever was. The court cited a study by the Chemical Dependency Division of the Minneapolis Department of Human Service in which it was reported "that purity levels of crack have decreased significantly throughout 1990 and that 42% of the crack samples tested had a purity level of less than 60%."[295]

While it is true that crack gets into the bloodstream, and therefor the brain, faster than snorting cocaine powder, the county expert admitted that cocaine users have been known to liquefy the powder form of the drug and inject

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[293]See Respondents' Brief p.2, State of Minnesota v. Russell, et al., C3-91-22, C7-91-203 (filed with the Minnesota Supreme Court on March 1, 1991).

[294]State v. Russell, supra note 110, slip op. at 3 (sic) (citation omitted).

[295]Id. at 14.

it hypodermically with much the same effect as if it were smoked.[296] Thus, it was claimed, there may be little if any real difference between the two forms of the drug in terms of effects as well.

The court concluded that there was no rational justification for the different treatment of "crack" and cocaine powder. Consequently, the statute was ruled unconstitutional.

The Minnesota case challenging that state's legislative decision to treat "crack" differently from cocaine powder may signal similar equal protection challenges in federal courts. Indeed, a similar challenge was made to the federal "crack" statutes in United States v. Jesse James Galloway.[297] In that case, the district court judge apparently denied defense motions alleging that the "crack" statutes were unconstitutional. The court found that there was a rational basis for distinguishing between "crack" cocaine and cocaine powder.[298] The case is currently pending before the Fifth Circuit Court of Appeals.

There are no reported cases of a male defendant objecting that the application of the mandatory minimum penalty violates his due process and equal protection rights. Data analyzed by the Sentencing Commission did indicate, however, a correlation between gender and application of mandatory minimum sentencing provisions, with males being more likely than females to be sentenced under such provisions.[299]

In United States v. Redondo-Lemos, supra, the court, after reviewing several other drug cases with similar facts, expressed the concern that:

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[296]Id. at 15.

[297]Dist. Ct. No. 366-1 (S.D.Tex.).

[298]This information is based on telephone conversations with the Assistant United States Attorney, who handled the case for the government.

[299]See Chapter 5, supra.

> the manner in which the mandatory statutes are being applied by the government violates males' due process and equal protection rights, because similarly situated female defendants are consistently permitted to plead to lesser included offenses which do not expose them to minimum mandatory sentences.[300]

The court discussed six cases that had been sentenced in that district within the last twelve months and found that all but one of the male defendants had been sentenced to prison (13 out or 14).[301] With the exception of one case, the female defendants in the cases surveyed received probation or the charges against them were dropped.[302]

Although defendants have not yet objected to the disparate treatment of men in the application of the mandatory minimums, these challenges may become more common as defendants seek to compile the data necessary to substantiate such charges.

DOUBLE JEOPARDY

Defendants have challenged the mandatory consecutive sentences provided for in 18 U.S.C. § 924(c) on the ground that they violate the fifth amendment's proscription against double jeopardy. The Supreme Court initially held that the punishment under the predecessor to that provision could not be imposed consecutively when the defendant

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[300] 754 F. Supp. at 1406.

[301] See id. at 1406-09. The one male who did not go to prison received probation in exchange for his cooperation.

[302] Id. In the one case in which a female received a prison sentence, the female, Laura Lorena Ortiz-Villareal, negotiated the sale of several kilos of cocaine with undercover agents. She and two other female defendants delivered one kilo of cocaine to the agents and were arrested. The males were arrested when they arrived at the scene to meet the women. Charges were dropped against a fourth woman and one of the men. The remaining male defendant was sentenced to 240 months. Ortiz-Villareal was allowed to plead to a lesser-included conspiracy charge and received a sentence of 63 months. The other two women received 18 months and 181 days, respectively. See 754 F. Supp. at 1407-08.

had been convicted of armed bank robbery because it was not clear that Congress intended for this double punishment to occur.[303] Since then, however, the statute was amended to provide for a consecutive sentence any time a firearm is used in "any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) . . . ."[304] As a result, it is now clear that Congress intends for the punishment for a violation of 924(c) to run consecutively to the punishment imposed for an armed bank robbery.

While the Supreme Court has not had an opportunity to rule on the constitutionality of this provision, the courts of appeals, relying on the Supreme Court's holding in Albernaz v. United States,[305] have rejected defendants' double jeopardy challenges to consecutive sentences for violations of 18 U.S.C. §§ 2113 and 924(c).[306]

In Albernaz the Supreme Court was asked to decide whether consecutive sentences for convictions of a conspiracy to import marijuana and a conspiracy to distribute marijuana violated double jeopardy when the conspiracies involved the same shipment of marijuana. The court found that under the test set forth in Blockburger v. United States,[307] the two conspiracies did not constitute the same offense in that each required proof of a fact which the other did not.[308] Consequently, consecutive sentences could be imposed. The court did not end its analysis there, however. Instead, it went on to hold that:

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[303] See Simpson v. United States, 435 U.S. 6 (1978).

[304] 18 U.S.C. § 924(c) (1984 amendments) (emphasis added).

[305] 450 U.S. 333 (1981)

[306] See, e.g., United States v Browne, 829 F.2d 760 (9th Cir.), cert denied, 485 U.S. 991 (1987); and United States v. Shavers, 820 F.2d 1375 (4th Cir. 1987).

[307] 284 U.S. 299 (1932)

[308] 450 U.S. at 339.

> the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.[309]

This language has been interpreted by the courts of appeals as allowing Congress to fix mandatory consecutive penalties for separate offenses in cases where such sentences would have otherwise offended the double jeopardy clause. There is no constitutional bar, therefore, to the mandatory, consecutive penalties that attach upon a violation of section 924(c).

CONCLUSION

Mandatory minimum sentencing statutes have generated substantial litigation. Although mandatory minimum penalties have been held not to be facially unconstitutional, the courts continue to evaluate "as applied" constitutional challenges on a case-by-case basis. Few such challenges have ultimately been accepted by federal appellate courts, however. Recent allegations of racial and gender discrimination vis-a-vis the application of mandatory minimum sentencing provisions are just beginning to work their way through the federal court system.

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[309] Id. at 344 (footnote omitted). Justices Stewart, Marshall, and Stevens concurred in the judgment in Albernaz, but were critical of this part of the court's opinion. In their view:

> [n]o matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of Blockburger v. United States, 284 U.S. 299.

Id. at 345 (Stewart, J., concurring).

A. Judges' Views on the Impact of Mandatory Minimums

RESP #	Favorable	Unfavorable	Neutral
02-001		Prison Overcrowding Worse than Guidelines	
02-002		Prison Overcrowding	Hard to Distinguish
03-003		More Trials Longer Trials	
03-004		More Trials Prison Overcrowding Increase Recidivism	Hard to Distinguish
03-005		Too Harsh Increase Recidivism Eliminate Discretion	
03-006	Ignore Prior Record	More Trials Eliminate Discretion	
03-007		Too Harsh for Minimal Participants	
03-008		More Trials	
03-009		More Trials Too Harsh Prison Overcrowding	Hard to Distinguish
04-010			Encourage Pleas
04-011		Eliminate Discretion	
04-012		Too Harsh More Trials	Hard to Distinguish Unsure of Deterrence

RESP #	Favorable	Unfavorable	Neutral
04-013		More Trials Longer Trials Too Harsh Force Pleas Unfairly	
04-014		More Trials Eliminate Discretion	Unsure of Deterrence
04-015		Eliminate Discretion Unfairly Consider Prior Record	
04-016		Unfairly Consider Prior Record More Trials Too Harsh	
05-017			No Opinion
05-018			No Opinion
05-019	Generally Appropriate	Do Not Eliminate Disparity	Guidelines Higher
05-020			Not Asked
06-021		Eliminate Discretion Too Harsh	
06-022		Eliminate Discretion	
06-023		Prison Overcrowding Increase Recidivism	
07-024		More Trials Too Harsh for Minimal Participants	
07-025		Too Harsh	
07-026		Too Harsh	Same Number Trials More Prosecution

RESP #	Favorable	Unfavorable	Neutral
08-027	Encourage Cooperation	Prison Overcrowding	
08-028		Eliminate Discretion	Prison Use Increased
09-029			Unsure If More Trials
09-030	Appropriate for Drugs	Too Harsh for Minimal Participants	
09-031		Increase Recidivism Eliminate Discretion	
10-032		Eliminate Discretion	
10-033			Guidelines Higher
10-034	Promote Deterrence Promote Respect for Law	Too Harsh for Minimal Participants Eliminate Discretion	
10-035			Hard to Distinguish
10-036			Guidelines Higher
10-037	Promote Deterrence		
10-038			More Prosecutions
11-039		Too Harsh Eliminate Discretion Unnecessary with Guidelines	Public Wants
11-040		Unnecessary with Guidelines Eliminate Discretion Too Harsh Racially Discriminatory Prison Overcrowding No Deterrence Increase Disparity	
11-041		Too Harsh for Minimal Participants	Same Number Trials

RESP #	Favorable	Unfavorable	Neutral
11-042		Generally Inappropriate	
11-043		Too Harsh More Trials	
12-044		Eliminate Discretion	
12-045			Same Number Trials
12-046	Easy to Sentence	Too Harsh Eliminate Discretion	
12-047		Unnecessary with Guidelines	
12-048		Too Harsh	
13-049	Appropriate for Weapons		

B. ASSISTANT U.S. ATTORNEYS' VIEWS ON THE IMPACT OF MANDATORY MINIMUMS

RESP #	Favorable	Unfavorable	Neutral
02-050	Reduce Disparity		
02-051	Reduce Disparity	More Trials Eliminate Discretion	Guidelines Lower
02-052			No Opinion
02-053		More Trials	
02-054			More Prosecutions Hard to Distinguish
03-055	Encourage Cooperation Encourage Pleas Reduce Disparity	More Trials Encourage Manipulation	

RESP #	Favorable	Unfavorable	Neutral
03-056		Prison Overcrowding More Trials	Guidelines Broader
03-057	Protect Public Encourage Pleas Encourage Cooperation	Racially Discriminatory Too Harsh for First Offenders	Hard to Distinguish
03-058	Longer Sentences Fewer Appeals		
03-059	Generally Appropriate Raise Guideline Levels		
03-060	Encourage Cooperation	More Trials	Hard to Distinguish
03-061	Fewer Appeals	More Trials	
03-062	Generally Appropriate		Hard to Distinguish Guidelines Higher
03-063	Incapacitate Serious Offender Reduce Disparity	More Trials	
03-064	Encourage Pleas		
04-065		More Trials	
04-066		More Trials Encourage Manipulation	Guidelines Lower
04-067			No Opinion
04-068	More Trials		
04-069			Not Asked
04-070	Encourage Cooperation		

RESP #	Favorable	Unfavorable	Neutral
04-071		More Trials Increase Disparity	
04-072	Encourage Pleas Promote Certainty		Same Number Trials
05-073	Generally Appropriate		Guidelines Higher
05-074		More Trials Encourage Manipulation	Guidelines Lower
05-075		Prison Overcrowding	
05-076		More Trials	
05-077		Reduce Prosecutorial Discretion	
05-078	Promote Deterrence More Prosecutions	Too Harsh for Minimal Participants	
06-079		Increase Recidivism	
06-080			Guidelines Higher
06-081			Guidelines Higher
06-082	Generally Appropriate		
06-083	Promote Deterrence		
07-084			Guidelines Higher
07-085	Encourage Cooperation		Same Number Trials
07-086	Encourage Cooperation		
07-087	Encourage Pleas Encourage Cooperation		
07-088	Generally Appropriate		

RESP #	Favorable	Unfavorable	Neutral
07-089	Generally Appropriate		
07-090		More Trials	Guidelines Higher
07-091			No Opinion
08-092	Reduce Disparity	Too Harsh for Minimal Participants	
08-093	Generally Appropriate		Same Number Trials
09-094	Reduce Disparity		
09-095	Generally Appropriate		
09-096		More Trials	
09-097	Generally Appropriate	Too Harsh for Marijuana Plants	
09-098			Hard to Distinguish
09-099		More Trials	
10-100	Generally Appropriate		
10-101			Guidelines Higher
10-102	Generally Appropriate Reduce Disparity		
10-103		More Trials	
10-104		Unnecessary with Guidelines	
11-105		More Trials	
11-106	Promote Certainty		Same Number Trials Prison Use Increased
11-107		More Trials	

RESP #	Favorable	Unfavorable	Neutral
11-108	Generally Appropriate Protect Public	Too Harsh for Minimal Participants	
11-109	Generally Appropriate Promote Deterrence Reduce Disparity		Same Number Trials
11-110		More Trials	
11-111	Generally Appropriate Promote Deterrence		
12-112		More Trials	
12-113	Promote Deterrence		
12-114		Difficult Plea Process	
12-115	Generally Appropriate	More Trials Increase Appeals Too Harsh for Minimal Participants	Guidelines Lower
12-116		Inconsistent with Guidelines Reduce Prosecutorial Discretion Encourage Manipulation	
12-117			Guidelines Higher
12-118			Not Asked
13-119	Generally Appropriate		Same Number Trials
13-120		More Trials	Longer Sentences
13-121		More Trials	
13-122			No Opinion
13-123	Reduce Disparity		

C. FEDERAL DEFENDERS' VIEWS ON THE IMPACT OF MANDATORY MINIMUMS

RESP #	Favorable	Unfavorable	Neutral
03-124		Too Harsh More Trials	Hard to Distinguish
03-125		Too Harsh for First Offenders More Trials Create Disparity	
04-126	Encourage Cooperation	Create Unfairness	
04-127		Eliminate Discretion Create Disparity	
04-128		More Trials	
04-129		Too Harsh for Minimal Participants	
06-130		Too Harsh for Weapons Eliminate Discretion Generally Inappropriate	
06-131		Prison Overcrowding Eliminate Discretion	
07-132			Hard to Distinguish
07-133		Too Harsh	Hard to Distinguish
09-134		Eliminate Discretion More Trials Prison Overcrowding Too Harsh for First Offenders Too Harsh for Minimal Participants	

RESP #	Favorable	Unfavorable	Neutral
09-135		Unnecessary With Guidelines Prison Overcrowding More Trials Encourage Manipulation Too Harsh	
09-136		Too Harsh Difficult Plea Process	
11-137		Prison Overcrowding Generally Inappropriate	Hard to Distinguish
11-138		Too Harsh Prison Overcrowding	
11-139		More Trials	Hard to Distinguish
11-140		Eliminate Discretion Too Harsh for First Offenders Engender Public Disrespect	Hard to Distinguish

D. PROBATION OFFICERS' VIEWS ON THE IMPACT OF MANDATORY MINIMUMS

RESP #	Favorable	Unfavorable	Neutral
02-179		Too Harsh Eliminate Discretion	
02-180			Not Asked
02-181		Too Harsh for Minimal Participants No Deterrence	
02-182		Too Harsh for Minimal Participants	Hard to Distinguish

RESP #	Favorable	Unfavorable	Neutral
03-183		Prison Overcrowding	Guidelines Higher No Probation
03-184			Not Asked
03-185		Encourage Manipulation Prison Overcrowding	Guidelines Higher
03-186	Promote Deterrence	Encourage Manipulation Too Harsh for Drugs	Hard to Distinguish
03-187		Encourage Manipulation Prison Overcrowding	
03-188	Generally Appropriate	Encourage Manipulation	
03-189		Encourage Manipulation	Guidelines Higher
04-190		Create Disparity	
04-191	Protect Public	Prison Overcrowding	Unsure of Deterrence
04-192			No Opinion
04-193		Create Disparity Unnecessary with Guidelines More Trials	
04-194			Hard to Distinguish
04-195		Prison Overcrowding Too Harsh	
04-196		Eliminate Discretion More Trials	
04-197		Too Harsh for Drugs More Trials	

RESP #	Favorable	Unfavorable	Neutral
05-198		Too Harsh for Drugs Unnecessary with Guidelines	
05-199			Hard to Distinguish
05-200			Hard to Distinguish
05-201		Too Harsh for Young Offenders	Guidelines Higher
05-202		Create Disparity Unnecessary with Guidelines	
06-203		Too Harsh Eliminate Discretion	
06-204		Unnecessary with Guidelines Too Harsh	
06-205		Too Harsh	
06-206		Too Harsh Create Disparity	
07-207		Eliminate Discretion Unnecessary with Guidelines	
07-208		Difficult Plea Process	
07-209		Prison Overcrowding	
07-210	Encourage Cooperation	Prison Overcrowding	
07-211			No Opinion
08-212	Promote Certainty		
08-213	Reduce Disparity		Eliminate Discretion
08-214		Unnecessary with Guidelines	

RESP #	Favorable	Unfavorable	Neutral
08-215		Encourage Manipulation	
08-216		No Deterrence	
08-217		Encourage Manipulation	
09-218		Prison Overcrowding Increase Prison Violence Increase Welfare Costs	
09-219		Prison Overcrowding	
09-220		Eliminate Discretion Prison Overcrowding	
09-221	Reduce Disparity	Eliminate Discretion	
09-222			Longer Sentences Older Offender Population
09-223			Longer Sentences
10-224			No Opinion
10-225	Promote Deterrence		
10-226			No Opinion
10-227			Hard to Distinguish
10-228		Eliminate Discretion	
10-229		Too Harsh for Young Offenders	
11-230		Racially Discriminatory	
11-231		Too Harsh for Drugs Prison Overcrowding Eliminate Discretion	

RESP #	Favorable	Unfavorable	Neutral
11-232		Too Harsh Eliminate Discretion Create Disparity	
11-233		Create Disparity Too Harsh for Drugs	
12-234		Unnecessary with Guidelines	
12-235			Encourage Pleas
12-236		Eliminate Discretion	
12-237		Prison Overcrowding Eliminate Discretion	
12-238		Unnecessary with Guidelines Create Disparity	
13-239			Hard to Distinguish Older Offender Population
13-240		Prison Overcrowding	
13-241	Promote Deterrence		
13-242		More Trials Eliminate Discretion	
13-243			No Opinion
13-244			Hard to Distinguish
13-245			No Opinion
13-246	Generally Appropriate		

Appendix J
General and Specific Directives to the
United States Sentencing Commission

A. General and Specific Dirctives Enacted Subsequent to the Sentencing Reform Act of 1984

Sexual Crimes Against Children; Amendment of Sentencing Guidelines. Pub.L. 101-647, Title III, § 321, Nov. 29, 1990, 104 Stat. 4817, provided that: "The United States Sentencing Commission shall amend existing guidelines for sentences involving sexual crimes against children, including offenses contained in chapter 109A of title 18 [chapter 109A of Title 18, Crimes and Criminal Procedure], so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate."

Sentencing Guidelines Increased Penalties in Major Bank Crimes Cases. Pub.L. 101-647, Title XXV, § 2507, Nov. 29, 1990, 104 Stat. 4862, provided that:

"**(a) Increased Penalties.**-Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987 [Pub.L. 100-182, § 21], the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide that a defendant convicted of violating, or conspiring to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18, United States Code [sections 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of Title 18, Crimes and Criminal Procedure], or section 1341 or 1343 [section 1341 or 1343 of Title 18] affecting a financial institution (as defined in section 20 of title 18, United States Code) [section 20 of Title 18] shall be assigned not less than offense level 24 under chapter 2 of the sentencing guidelines if the defendant derives more than $1,000,000 in gross receipts from the offense.

"**(b) Amendments to Sentencing Guidelines.**-If the sentencing guidelines are amended after the effective date of this section, the Sentencing Commission shall implement the instruction set forth in subsection (a) so as to achieve a comparable result.

Sentencing Guidelines Relating to Methamphetamine Offenses. Pub.L. 101-647, Title XXVII, § 2701, Nov. 29, 1990, 104 Stat. 4912, provided that: "The United States Sentencing Commission is instructed to amend the existing guidelines for offenses involving smokable crystal methamphetamine under section 401(b) of the Controlled Substances Act (21 U.S.C. § 841(b)) [section 841(b) of Title 21, Food and Drugs] so that convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above that which would have been assigned to the same offense involving other forms of methamphetamine."

Special Rule for Certain Offenses Involving Children. Pub.L. 101-647, Title IV, § 401, Nov. 29, 1990, 104 Stat 4819, amended 18 U.S.C. § 1201 by adding the following new subsection:

"**(g) Special Rule for Certain Offenses Involving Children.**-

"(1) To Whom Applicable.-If-

"(A) the victim of an offense under this section has not attained the age of eighteen years; and

"(B) the offender-

"(i) has attained such age; and

"(ii) is not-

"(I) a parent;

"(II) a grandparent;

"(III) a brother;

"(IV) a sister;

"(V) an aunt;

"(VI) an uncle; or

"(VII) an individual having legal custody of the victim;

the sentence under this section for such offense shall be subject to paragraph (2) of this subsection.

"(2) Guidelines.-The United States Sentencing Commission is directed to amended the existing guidelines for the offense of `kidnapping, abduction, or unlawful restraint,' by including the following additional specific offense characteristics: If the victim was intentionally maltreated (i.e., denied either food or medical care) to a life-threatening degree, increase by 4 levels; if the victim was sexually exploited (i.e., abused, used involuntarily for pornographic purposes) increase by 3 levels; if the victim was placed in the care or custody of another person who does not have a legal right to such care or custody of the child either in exchange for money or other consideration, increase by 3 levels; if the defendant allowed the child to be subjected to any of the conduct specified in this section by another person, then increase by 2 levels."

Sentencing Guidelines for Crimes Involving Federally Insured Financial Institutions. Pub.L. 101-73, Title IX, § 961(m), Aug. 9, 1989, 103 Stat. 501, provided that:

"Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987 [Pub.L. 100-182, § 21], the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code [section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of Title 18, Crimes and Criminal Procedure], that substantially jeopardizes the safety and soundness of a federally insured financial institution."

Major Fraud; Promulgation of Sentencing Guidelines. Pub.L. 100-700, Chapter 47, § 2(b), Nov. 19, 1988, 102 Stat. 4632, provided that:

"Pursuant to its authority under section 994(p) of title 28, United States Code and section 21 of the Sentencing Act of 1987 [Pub.L. 100-182, § 21], the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide for appropriate penalty enhancements, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred. The Commission shall consider the appropriateness of assigning to such a defendant an offense level under Chapter Two of the sentencing guidelines that is at least two levels greater than the level that would have been assigned had conscious or reckless risk of serious personal injury not resulted from the fraud."

Penalties For Importation of Controlled Substances by Aircraft and Other Vessels; Promulgation of Sentencing Guidelines. Section 6453 of Pub.L. 100-690 provided that:

"(a) In general.)Pursuant to its authority under section 994(p) of title 28, United States Code, and section 21 of the Sentencing Act of 1987 [section 21 of Pub.L. 100-182], the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide that a defendant convicted of violating section 1010(a) of the Controlled Substances Import and Export Act (21 U.S.C. 960(a)) [section 960(a) of Title 21, Food and Drugs] under circumstances in which)

"(1) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance; or

"(2) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft of vessel carrying a controlled substance.

shall be assigned an offense level under chapter 2 of the sentencing guidelines that is)

"(A) two levels greater than the level that would have been assigned had the offense not been committed under circumstances set forth in (A) or (B) above; and

"(B) in no event less than level 26.

"(b) Effect of amendment.)If the sentencing guidelines are amended after the effective date of this section [probably means date of enactment of this section, Nov. 18, 1988], the Sentencing Commission shall implement the instruction set forth in subsection (a) so as to achieve a comparable result."

Enhanced Penalties For Offenses Involving Children; Promulgation of Sentencing Guidelines. Section 6454 of Pub.L. 100-690 provided that:

"(a) In general.)Pursuant to its authority under section 994(p) of title 28, United States Code, and section 21 of the Sentencing Act of 1987 [section 21 of Pub.L. 100-182], the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide that a defendant convicted of violating sections 405, 405A, or 405B of the Controlled Substances Act (21 U.S.C. 845, 845a or 845b) [sections 845, 845a, and 845b of Title 21, Food and Drugs] involving a person under 18 years of age shall be assigned an offense level under chapter 2 of the sentencing guidelines that is)

"(1) two levels greater than the level that would have been assigned for the underlying controlled substance offense; and

"(2) in no event less than level 26.

"(b) Effects of amendment.)If the sentencing guidelines are amended after the effective date of this section [probably means date of enactment of this section, Nov. 18, 1988], the Sentencing Commission shall implement the instruction set forth in subsection (a) so as to achieve a comparable result.

"(c) Multiple enhancements.)The guidelines referred to in subsection (a), as promulgated or amended under such subsection, shall provide that an offense that could be subject to multiple enhancements pursuant to such subsection is subject to not more than one such enhancement."

Drug Offenses Within Federal Prisons; Promulgation of Sentencing Guidelines. Section 6468(c) and (d) of Pub.L. 100-690 provided that:

"(c) Pursuant to its authority under section 994(p) of title 28, United States Code, and section 21 of the Sentencing Act of 1987 [section 21 of Pub.L. 100-182], the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide that a defendant convicted of violating section 1791(a)(1) of title 18, United States Code [section 1791(a)(1) of Title 18, Crimes and Criminal Procedure], and punishable under section 1791(b)(1) of that title [section 1791(b)(1) of Title 18] as so redesignated, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is)

"(1) two levels greater than the level that would have been assigned had the offense not been committed in prison; and

"(2) in no event less than level 26.

"(d) If the sentencing guidelines are amended after the effective date of this section [probably means the date of enactment of this section, Nov. 18, 1988], the Sentencing Commission shall implement the instruction set forth in subsection (c) so as to achieve a comparable result."

Common Carrier Operation Under Influence of Alcohol or Drugs; Promulgation of Sentencing Guidelines. Section 6482(c) of Pub.L. 100-690 provided that:

"(1) Pursuant to its authority under section 994(p) of title 28, United States Code, and section 21 of the Sentencing Act of 1987 [section 21 of Pub.L. 100-182], the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide that)

"(A) a defendant convicted of violating section 342 of title 18, United States Code [section 342 of Title 18, Crimes and Criminal Procedure], under circumstances in which death results, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is not less than level 26; and

"(B) a defendant convicted of violating section 342 of title 18, United States Code, under circumstances in which serious bodily injury results, shall be assigned an offense level under chapter 2 of the sentencing guidelines that is not less than level 21.

"(2) If the sentencing guidelines are amended after the effective date of this section [probably means date of enactment of this section, Nov. 18, 1988], the Sentencing Commission shall implement the instruction set forth in paragraph (1) so as to achieve a comparable result."

B. General and Specific Directives Enacted in the Sentencing Reform Act of 1984

Title 28

JUDICIARY AND JUDICIAL PROCEDURE

))

CHAPTER 58)UNITED STATES SENTENCING COMMISSION

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System)

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including)

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of)

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) 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); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(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.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance)

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

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[1]So in original. Probably should be "incidence".

(4) the community view of the gravity of the offense;
(5) the public concern generated by the offense;
(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[2] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance)

(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.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

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[2]So in original. Probably should be "incidence".

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and)

(1) has been convicted of a felony that is)

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is)

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant)

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect)

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of)

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentenced that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later that the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including)

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in)

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2019, and amended Pub.L. 99-217, § 3, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99-363, § 2, July 11, 1986, 100 Stat. 770; Pub.L. 99-570, Title I, §§ 1006(b), 1008, Oct. 27, 1986, 100 Stat. 3214; Pub.L. 99-646, §§ 6(b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub.L. 100-182, §§ 16(b), 23, Dec. 7, 1987, 101 Stat. 1269, 1271; Pub.L. 100-690, Title VII, §§ 7083, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4418, 4419).