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Federal Mandatory Minimum Sentencing Statutes: An Overview of Legislation in the 106th Congress

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Summary

Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction. They cover drug dealing, murdering federal officials, and using a gun to commit a federal crime. They circumscribe judicial sentencing discretion. They have been criticized as unthinkingly harsh and incompatible with a rational sentencing guideline system; yet they have also been embraced as hallmarks of truth in sentence and a certain means of incapacitating the criminally dangerous. Among the bills introduced in the 106th Congress, some would have created new mandatory minimums, several would have enlarged existing mandatory minimums, others would have eliminated existing mandatory minimums, and some would have adjusted existing mandatory minimums in other ways. The only proposed mandatory minimum enacted came in the form of a piggyback statute which extended, to overseas misconduct by military dependents and contractors, the pre-existing mandatory minimums applicable in the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 3261.

Types of Mandatory Minimums

Mandatory minimum statutes come in many stripes, including some whose status might be disputed. The most widely recognized are those that demand that offenders be sentenced to imprisonment for “not less than” a designated term of imprisonment. Some, like the drug trafficking mandatory minimums, are triggered by the nature of the offense; others, like the three strikes provisions, by the criminal record of the offender. A few members of this category are somewhat less mandatory than others. Several of the drug-related mandatory minimums in this category, for instance, are subject to a “safety valve” that may make their minimum penalties less than mandatory for small time, nonviolent, first time offenders.

A second generally recognized category of mandatory minimums consists of the flat or single sentence statutes.¹ Closely related are the capital punishment statutes that require imposition of either the death penalty or imprisonment for life.² The “piggyback” statutes make up a third class. The piggyback statutes are not themselves mandatory minimums but sentence offenders by reference to underlying statute with mandatory minimums or otherwise.³

The final and least obvious group is comprised of statutes whose violation results in the imposition of a mandatory minimum term of imprisonment by operation of law, or more precisely by operation of the Sentencing Reform Act and the sentencing guidelines issued in its name. This category includes many felonies punishable by “imprisonment for not more than 5 years”; and most felonies with maximum penalties in excess of 5 years. We have omitted discussion of the proposals in this category in the interest of brevity.

Constitutional Boundaries

The Constitution precludes mandatory capital punishment statutes, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and sentences that are grossly disproportionate to the crimes for which they are imposed, *Harmelin v. Michigan*, 501 U.S. 957 (1992); *United States v. Bajakajian*, 524 U.S. 321 (1998). Otherwise, the enactment of mandatory minimums is a matter of policy rather than constitutional prerogative.

Proposals in the 106th Congress

The Military Extraterritorial Jurisdiction Act of 2000, Pub.L. 106-523, appears to be the only mandatory minimum sentencing proposal enacted in the 106th Congress. It extended the proscriptions covering murder, kidnaping, assault and other common law crimes committed within the special maritime and territorial jurisdiction of the United States (including the mandatory minimums) to comparable misconduct when committed

¹ E.g., 18 U.S.C. 1651 (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or fond in the United States *shall be imprisoned for life*”)(emphasis added).

² E.g., 18 U.S.C. 1201(a)(“Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . if death of any person results, shall be punished by death or life imprisonment”).

Most observers would include within this category capital crimes made punishable by death, life imprisonment, *or imprisonment for any term of years*, the suggestion that a sentence of imprisonment for zero years is a sentence “any term of years” being inconsistent with the intent of Congress given the seriousness of the offense to which the sentence attaches. On the other hand, most probably would not characterize as a mandatory minimum any capital or flat sentence statute that permitted imposition of a fine as an alternative sentence, *see e.g.*, 18 U.S.C. 1589 (emphasis added) (“ . . . If death results from a violation of this section . . . the defendant shall be fined under this title *or* imprisoned for any term of years or life. . . .”).

³ E.g., 18 U.S.C. 2 (“Whoever commit an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal”).

overseas by members of the armed forces or those accompanying or employed by the armed forces.⁴

Most of the proposals in the 106th Congress involved firearms or drugs or both. Several appeared in the juvenile justice bills passed by House (H.R. 1501) and Senate (S. 254). H.R. 1501, for instance, would have established a mandatory minimum of imprisonment for 3 years for any adult who transferred a handgun or semiautomatic assault weapon to a juvenile with the knowledge the juvenile intended to take the firearm into a school zone and a minimum of 10 years if the adult knew the juvenile intended to use the firearm to commit a serious violent felony, proposed 18 U.S.C. 924(a)(6). It also created a 10 year mandatory minimum for the knowing discharge of a firearm within a school zone (with a mandatory minimum of 15 years if serious injury resulted, and the offense was punishable by death or life imprisonment if the death resulted), 18 U.S.C. 924(a)(4).

S. 254, similarly, would have created a 10 year mandatory minimum for any adult who transferred a handgun or semiautomatic assault weapon to a juvenile with the knowledge the juvenile intended to use the firearm to commit a crime of violence. It also provided a general 1 year mandatory minimum for the unlawful transfer of handgun or semiautomatic assault weapon to a juvenile by an adult, 18 U.S.C. 924(a)(6).

H.R. 1501 and S. 254 had several common provisions including those that would have established or increased mandatory minimums for:

- making a false statement to a firearms dealer in order to acquire a firearm for a juvenile (imprisonment for not less than 10 years), 18 U.S.C. 924(a)(7);
- using a minor to distribute illicit drugs (increasing the mandatory minimum to imprisonment for not less than 3 years (not less than 5 years for a second or subsequent conviction)), 21 U.S.C. 861(b),(c);
- distributing illicit drugs to a minor (increasing the mandatory minimum to imprisonment for not less than 3 years (not less than 5 years for a second or subsequent conviction)), 21 U.S.C. 859(a),(b);
- distributing illicit drugs near school, playground or similar protected location (increasing the mandatory minimum to imprisonment for not less than 3 years (not less than 5 years for a second or subsequent conviction)), 21 U.S.C. 860; and
- recruiting criminal street gang members (imprisonment for not less than 1 year (not less than 4 years if the require is a minor), 18 U.S.C. 222.

Numbered among the other gun-related mandatory minimums were:

⁴ 18 U.S.C. 3261(a) (“Who ever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States – (1) while employed by . . . the Armed Forces of the United States . . . shall be punished as provided for that offense “).

H.R. 51 (Kelly): outlawing child hostage taking to evade arrest or obstruct justice (imprisonment for not less than 10 nor more than 25 years; not less than 20 nor more than 35 years if injury results; and death or life imprisonment if death of a child results), 18 U.S.C. 1205.

H.R. 3057 (Blagojevich et al.): proscribing large-scale interstate gun running with imprisonment for not less than 3, 5, 10, 15 or 25 years depending upon the number of guns involved, the defendant's criminal record, and whether the guns were used to kill or injure, 18 U.S.C. 922(z), 924(p).

S. 420 (Snowe): prohibiting the use of a firearm to commit a state crimes (imprisonment for not less than 10 years (20 years for a second conviction); not less than 20 years (30 years for a second conviction) if the firearm is discharged with the intent to injure; not less than 30 years (life for a second conviction) if the firearm is a machinegun or equipped with as silencer; for life in the case of third conviction, proposed 18 U.S.C. 924(c).

H.R. 1330 (Kelly): increasing [doubling] the firearms-in-crimes-of-violence-or- drug-trafficking mandatory minimum penalties from not less than 5 to not less than 10 years for possession; from not less than 7 to not less than 15 years for brandishing; and from not less than 10 to not less than 20 years for discharging the firearm, 18 U.S.C. 924(c).

S. 994 (Ashcroft): increasing the firearms-in-crimes-of-violence-or- drug-trafficking mandatory minimum penalties from not less than 7 to not less than 10 years for brandishing; from not less than 10 to not less than 12 years for discharging the firearm (not less than 15 years if another injured); and establishing a 5 year mandatory minimum supply such a firearm, 18 U.S.C. 924(c), (h).

S. 1080 (Torricelli): establishing mandatory minimums for multiple interstate sales of firearms where neither the seller nor purchaser are licensed dealers (in cases involving 5 to 50 firearms — imprisonment for not less than 3 years (not less than 5 years for a second offense and not less than 10 years if a victim is subsequently injured or killed by someone using one of the firearms); in cases involving more than 50 firearms — imprisonment for not less than 15 years (not less than 25 years if a victim is subsequently injured or killed by someone using one of the firearms), 18 U.S.C. 922(z), 924(p).

H.R. 735 (Ney): proscribing taking a firearm from a federal law enforcement officer or federal employee, punishable by imprisonment for not less than 10 nor more than 15 years (not less than 5 nor more than 10 years for attempt), 18 U.S.C. 117.

Several of the drug-related proposals would have mitigated the impact of existing mandatory minimums either by adjusting the crack cocaine sentencing ratio or the safety valve. Trafficking in either 5000 grams or more of powder cocaine or 50 grams crack is punishable by imprisonment for not less than 10 years (not less than 20 years for a second offense or if death or serious injury results), 21 U.S.C. 841(b)(1)(A). This 100 to 1 ratio also applies to trafficking in 500 to 5000 grams of powder or 5 to 50 grams of crack, either of which are punishable by imprisonment for not less than 5 years (not less 10 years for a second conviction and not less than 20 years if death or serious injuries result), 21 U.S.C. 841(b)(1)(B). Simple possession of 3 grams or more crack is punishable by imprisonment for not less than 5 years if the offender has a prior conviction (1 gram or

more if the offender has 2 or more prior convictions); there is no mandatory minimum for simple possession of powder cocaine, 21 U.S.C. 844.

S. 146 (Abraham) would have reduced the amount of powder cocaine required to trigger the mandatory minimum penalties for drug trafficking (from 5000 grams to 500 grams for large scale trafficking and from 500 grams to 50 grams for trafficking on a smaller scale) so that 100 to 1 sentencing ratio that now exists between crack cocaine and cocaine powder would have been reduced to a ratio of 10 to 1.

H.R. 939 (Rangel) and H.R. 1241 (Waters) would have eliminated the crack cocaine-specific mandatory minimum penalties for trafficking and possession so that the mandatory minimum penalties for powder cocaine applied to crack as well.

The “safety valve” of 18 U.S.C. 3553(f) allows a court to sentence a low level, nonviolent, first time offender strictly under the sentencing guidelines notwithstanding otherwise applicable drug-related mandatory minimums. The safety valve is only available to offenders convicted of offenses occurring prior to enactment.

H.R. 913 (Frank) would have made the safety valve available retroactively to cases arising prior to its enactment.

The remaining mandatory minimum proposals were designed to emphasize the seriousness of the crimes to which they are attached:

H.R. 1989 (Green): the “two strikes and you’re out child protection act” would have increased existing mandatory minimums of varying lengths (depending upon the offense) to a uniform mandatory life imprisonment for repeated sex offenses against juveniles, 18 U.S.C. 3559(e).

H.R. 1888 (Goodling): would have created a mandatory minimum penalty of imprisonment for not less than 6 months for wiretap violations committed by federal officers or employees, 18 U.S.C. 2511.

H.R. 238 (Rogan): would have established mandatory minimum penalties for existing offenses involving bringing in and harboring certain aliens, 8 U.S.C. 1324(a)(1)(B), of not less 1 year for transporting or harboring illegal aliens; not less than 2 years for transporting or harboring for profit; not less than 5 years if a life were jeopardized or injuries occurred; death or imprisonment for life or any terms of years (but not less than 20 years) if death resulted; twice the otherwise applicable mandatory minimum in the case of a second conviction; and five times the otherwise applicable mandatory minimum in the case of a third offense.

H.R. 4076 (Franks et al.)/S. 2280 (McConnell): would have set a 5 year mandatory minimum for interstate transportation for purposes of engaging in criminal sexual activity with a juvenile, 18 U.S.C. 2423.