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Federal Mandatory Minimum Sentencing Statutes: Legislative Proposals in the 108th 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. Mandatory minimum sentences are not unconstitutional per se, although on rare occasions individual sentences may violate the Eighth Amendment proscription on grossly disproportionate punishments. The 108th Congress appeared to overcome recent past reluctance and enacted a flurry of new or enhanced mandatory minimum sentencing provisions. The PROTECT Act (sometimes known as the Amber Alert Act), P.L. 108-21, (a) contains a two strike law that subjects certain repeat offenders of crimes against children to life imprisonment, (b) increases the mandatory minimums application to various federal child offenses, and (c) applies the mandatory minimums covering child pornography to obscene visual representations of the sexual abuse of children. The Unborn Victims of Violence Act establishes a separate crime for harming an unborn child during the course the commission of various federal crimes against the child's mother (some which carry mandatory minimums) and subjects offenders to the same penalties as the underlying offense against the mother, 18 U.S.C. 1841. The Identity Theft Penalty Enhancement Act established an aggravated identity theft offense with mandatory minimum terms of imprisonment for identity theft committed in furtherance of various terrorist and non-terrorist federal crimes, 18 U.S.C. 1028A. The Intelligence Reform and Terrorism Prevention Act creates three new crimes relating to weapons of mass destruction, each of which carries a series of mandatory minimum penalties, 18 U.S.C. 175c (smallpox virus offenses), 2332g (anti-aircraft missile offenses), 2332h (radiological dispersal device offenses). The Act annexed a comparable series of mandatory minimum penalties for violation of pre-existing atomic weapons prohibitions, 42 U.S.C. 2272. Other proposals concerned drug abuse (H.R.

345, H.R. 404, H.R. 1435, H.R. 4547, H.R. 5103, S. 390, S. 2444); firearms (H.R. 2946, H.R. 1330, H.R. 124); terrorism (S. 746, H.R. 2376); fraud (S. 1286, H.R. 2971); sex abuse (H.R. 3913, H.R. 4489); and smuggling aliens (S. 2871).

Related reports include CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*; CRS Report RS21347, *Federal Mandatory Minimum Sentencing Statutes: An Overview of Legislation in 107th Congress*; CRS Report RS20307, *Federal Mandatory Minimum Sentencing Statutes: An Overview of Legislation in 106th Congress*; and CRS Report RS21346, *Mandatory Minimum Sentences: Three Strikes in the Supreme Court*.

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 an underlying statute which in some instances calls for a mandatory minimum.³

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 found 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 of “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”).

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, *Ewing v. California*, 538 U.S. 11 (2003); *United States v. Bajakajian*, 524 U.S. 321 (1998). Otherwise, the enactment of mandatory minimums is a matter of policy rather than constitutional prerogative.

Activity in the 108th Congress

The mandatory minimum proposals offered in the 108th Congress involve terrorism, drugs, firearms, maritime crimes, identify theft, fraud, crimes against unborn children, and sex offenses or other crimes against children. The proposals relating to sex offense and crimes against children culminated in enactment of the Protect Act, sometimes known as the Amber Alert Act, P.L. 108-21, 117 Stat. 650 (2003). Among other things, the Protect Act:

- creates a two strike provision requiring a sentence of life imprisonment for anyone convicted of violating –
 - 18 U.S.C. 2241 (aggravated sexual assault),
 - 18 U.S.C. 2242 (sexual abuse),
 - 18 U.S.C. 2244(a)(1)(aggravated abusive sexual contact),
 - 18 U.S.C. 2245 (sexual abuse resulting in death),
 - 18 U.S.C. 2251 (sexual exploitation of children),
 - 18 U.S.C. 2251A (buying or selling children),
 - 18 U.S.C. 2422(b)(coercing or enticing children to engage in prostitution),or
 - 18 U.S.C. 2443(a)(transporting a child for sexual purposes) –

having been convicted previously of a similar federal or state equivalent offense, if the victims of both offenses were children, 18 U.S.C. 3559(e);

- establishes or increases mandatory minimum terms of imprisonment for violations of:
 - 18 U.S.C. 1201 (kidnaping a child other than by a family member)(not less than 20 years),
 - 18 U.S.C. 2251 (sexual exploitation of a child)(increases from not less than 10 to not less than 15 years (from not less than 15 to not less than 25 years for repeat offenders)),
 - 18 U.S.C. 2251A (buying or selling a child)(increases for not less than 20 to not less than 30 years),
 - 18 U.S.C. 2252 (crimes related to sexual exploitation of children)(not less than 5 years (increases the minimum for recidivists from not less than 2 to not less than 10 years)),
 - 18 U.S.C. 2252A (crimes related to child pornography)(not less than 5 years (increases the minimum for recidivists from not less than 5 to not less than 15 years or in the case of successive possession convictions from not less than 2 to not more than 10 years)),

- 18 U.S.C. 2422, 2423 (transporting, coercing, or enticing a child to engage in sexual activity within a federal enclave, or through the use of the mails or a facility of interstate commerce)(not less than 5years); and

- makes violations of the newly created 18 U.S.C. 1466A (obscene visual representations of the sexual abuse of children) subject to the same penalties (including mandatory minimums) that accompany violation of 18 U.S.C. 2252A (crimes relating to child pornography).⁴

The Unborn Victims of Violence Act outlaws causing the death or bodily injury of an unborn child as a consequence of the commission of various federal crimes against the child's mother.⁵ Under its provisions, offenders face the same penalties including mandatory minimums as those provided for the underlying crime against the child's mother, 18 U.S.C. 1841.⁶

The Identity Theft Penalty Enhancement Act calls for a flat 2 year term of imprisonment for aggravated identity theft committed in furtherance of a range of federal predicate offenses⁷ and a flat 5 year term when such theft is committed in furtherance of a federal crime of terrorism (as defined in 18 U.S.C. 2332b(b)(5)(B)), 18 U.S.C. 1028A.⁸

⁴ The Act initially passed the two Houses as S. 151 (Hatch) and H.R. 1104 (Sensenbrenner); as finally enacted it contains mandatory minimum components reminiscent of several other proposals *e.g.*, H.R. 293 (Kelly), H.R. 456 (Green), H.R. 1161(Smith (Tex.)), H.R. 1706 (Simmons), S. 644 (Hatch), S. 885 (Kennedy), S. 1123 (Boxer)/H.R. 2539 (Millender-McDonald).

⁵ The Act, Pub.L.108-212 (2004), was introduced as H.R. 1997 (Hart); related proposals included S. 146 (DeWine), S. 1019 (DeWine) and S. 2219 (Feinstein).

⁶ The underlying offenses with mandatory minimums include certain violations of 18 U.S.C. 115 (intimidation or retaliation against federal officials or members of their families), 229(chemical weapons offenses), 844(explosives offenses), 930(possession of a dangerous weapon in a federal building), 1111 (murder within a federal enclave), 1114(murder of a federal employee), 1116(murder of a foreign dignitary), 1118(murder by a federal prisoner), 1119(overseas murder by an American), 1120 (murder by escaped prisoners), 1121(killing those aiding a federal investigation or a state correctional officer), 1201 (kidnaping), 1203 (taking hostages), 1503 (obstruction of justice), 1751(crimes against the President),1958(use of interstate commerce facilities in the commission of a murder-for-hire), 1959(violence in aid of racketeering), 1992(train wrecking), 2113(bank robbery); or violations of 21 U.S.C. 848(drug kingpin offenses); and 42 U.S.C. 2283 (murder).

⁷ The 2 year sentence applies to thefts committed in furtherance of a felony violation of 18 U.S.C. 641 (theft of federal property), 656 (bank embezzlement), 911 (false claim of citizenship), 922(a)(6) (false statements to acquire a firearm), ch. 47 (fraud or false statements generally), ch.63 (mail, wire and bank fraud), ch.69 (nationality and citizenship), ch. 75 (passports and visas); 15 U.S.C. 6823 (obtain financial institution information by false pretenses); 8 U.S.C. 1253 (failing to leave the U.S. after deportation), 1306 (counterfeit alien registration cards), ch. 8 (immigration offenses); 42 U.S.C. 408 (false statements under the Social Security Act), 1011 (same), 1307(b)(same), 1320a-7b(a)(same).

⁸ The Act was introduced as H.R. 1731 (Carter); related bills include S. 153 (Feinstein), H.R. 858 (Tanner), and S. 1088 (Boxer).

The Intelligence Reform and Terrorism Prevention Act authorizes a series of mandatory minimum penalties for three new crimes and one pre-existing offense.⁹ The Act proscribes unlawful possession or use of anti-aircraft missiles, 18 U.S.C. 2332g; of radiological dispersal devices, 18 U.S.C. 2332h; or of smallpox virus, 18 U.S.C. 175c. Those who use or attempt to use the proscribed weapons are punishable by imprisonment for not less than 30 years or for life; where death results, the offender is punishable by life imprisonment; all other violators are punishable by imprisonment for not less than 25 years or to imprisonment for life. The Act brings the same sentencing scheme to similar offenses involving atomic weapons, 42 U.S.C. 2272.

Several of the past drug-related proposals address the impact of existing mandatory minimums by adjusting either the crack cocaine sentencing ratio or the safety valve. Under present law, trafficking in either 5000 grams or more of powder cocaine or 50 grams of 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 of 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. The pattern continued in the 108th Congress. *H.R. 345 (Bartlett)* eliminates the distinction by applying to all forms of cocaine the *lower* mandatory minimum triggers now applicable to crack (50, 5, 3, and 1 gram). *H.R. 1435(Rangel)* eliminates the distinction by applying to all forms of cocaine including crack the *higher* mandatory minimum triggers now applicable to powder cocaine (5000 and 500 grams with no mandatory minimum for simple possession).

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. *S. 390 (Levin)* makes the safety valve available retroactively to cases arising prior to its enactment. An unrelated, drug mandatory minimum proposal, *H.R. 404 (Andrews)*, adds a 5 year flat term of imprisonment to the punishment for federal controlled substance offenses committed in an open air drug market. Another, *H.R. 5103 (Waters)* eliminates mandatory minimum sentences for controlled substance violations other than those involved with drug kingpin offenses (21 U.S.C. 848). A third, *S. 2444 (Schumer)* reduces from 500 to 50 grams the amount of a mixture containing a detectable amount of methamphetamine needed to trigger a 10 year mandatory minimum (20 years for repeat offenders or if death or serious injury results), and from 50 to 5 grams the amount needed to trigger a 5 year mandatory minimum (20 years if death or serious injury results), 21 U.S.C. 841. Finally, *H.R. 4547 (Sensenbrenner)* increases the mandatory maximum

⁹ The Act was introduced as S. 2845 (Collins); related bills included H.R. 10 (Hastert), H.R. 1678 (Smith (Tex.)), H.R. 2934 (Carter), H.R. 2939 (Forbes), H.R. 4008 (Shays), H.R. 5066 (Sessions), H.R. 5150 (Shays), H.R. 5238(Shadegg), S. 1604 (Specter), S. 1608 (Sessions), S. 2204 (Hatch), S. 2665 (Cornyn), S. 2679 (Kyl), and S. 2840 (Collins).

sentences set for the distribution of controlled substances to children (from 1 to 5 years for 1st time offenders and from 1 to 10 years for repeat offenders, 21 U.S.C. 859) , or using children to distribute controlled substances (from 1 to 5 years for 1st time offenders and from 1 to 10 years for repeat offenders, 21 U.S.C. 861), or distributing controlled substances near schools and certain other places frequented by children (from 1 to 5 years for 1st time offenders and from 3 to 10 years for repeat offenders, 21 U.S.C. 860).

In the case of firearms offenses, *H.R. 1330 (Kelly)*, increases [doubles] 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). Instead of this increase to 10-15-20, *H.R. 2946 (King)* increases the firearms-in-crimes-of-violence-or-drug-trafficking mandatory minimum penalties from 5-7-10 years to 7-9-12 years. And *H.R. 124 (Holt)* establishes a regulatory scheme for handgun possession under which unlicensed possession is punishable by imprisonment for not less than 15 years, 18 U.S.C. 931(a), 924(a)(7).

The Anti-Terrorism and Port Security Act of 2003, *S. 746 (Feinstein)/H.R. 2376 (Millender-McDonald)*, modifies existing mandatory minimums in a number of respects. First, it rewrites the piracy chapter of the United States Code which now features several mandatory minimums; piracy remains punishable by imprisonment for life, but in the other mandatory minimums are dropped in favor of a term of imprisonment for not more than 20 years, 18 U.S.C. ch. 81. Second, it sets imprisonment for any term of years or life as the penalty for (a) placing substances or devices in U.S. waters with the intent to damage or destroy shipping, 18 U.S.C. 2280A; (b) using a dangerous weapon aboard a passenger vessel, 18 U.S.C. 832; or (c) endangering human life by the malicious ocean dumping, 18 U.S.C. 2282. Finally, it makes destruction of a vessel carrying high-level radioactive waste or spent nuclear fuel punishable by imprisonment for not less than 30 years, 18 U.S.C. 1372.

In other proposals, fraud supplies the basis for mandatory minimum proposals in a few contexts: *S. 1286 (Leahy)*(mail fraud or wire fraud that result in a death are punishable by imprisonment for any term of years or life), and *H.R. 2971 (Shaw)*(the fraudulent sale of social security numbers by Social Security Administration employees carries mandatory minimums of 1 year, 5 years or 10 years depending on the number of cards involved). *H.R. 3913 (Emanuel)* establishes a mandatory term of life imprisonment for kingpins of child sex slave trafficking enterprises. *H.R. 4489 (Graves)* sets a mandatory minimum of life imprisonment for repeat sex offenders. And *S. 2871 (Graham)* increases the mandatory minimum sentences for certain alien smuggling offenses (from 3 to 5 years for smuggling for financial gain or with the knowledge the alien intends to commit a felony).

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