



Mandatory Minimum Sentencing for Federal Sex Offenses: An Abridged Overview

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Summary

Sex offenses are usually state crimes. Federal law, however, outlaws sex offenses when they occur on federal lands or in federal prisons, when they involve interstate or foreign travel, or when they involve child pornography whose production or distribution is associated in some way with interstate or foreign commerce. Mandatory minimum terms of imprisonment attend conviction for any of several of these federal sex crimes.

The most severe mandatory minimum sentences have been reserved for aggravated sexual assaults committed in federal enclaves or federal prisons, for sex offenses resulting in death, and for sex crimes committed against children by repeat offenders.

Two-thirds of the federal trial judges responding to a U.S. Sentencing Commission survey questioned the severity of the mandatory minimum penalties required for receipt of child pornography (5 years; 15 years for repeat offenders). The Commission's report suggested that as a preliminary matter the perception may lead to inconsistent sentencing in child pornography cases. It explained that more study would be required before it could make any specific recommendations concerning mandatory minimum sentencing in sex offenses.

The constitutional authority to enact federal sex offense punishable by mandatory minimum terms of imprisonment is not unlimited. The ex post facto and double jeopardy clauses; the Fifth Amendment's equal protection component; the Eighth Amendment's cruel and unusual punishment clause; the separation of powers and the reservation of powers principles—all establish boundaries that must be honored. Nevertheless, few defendants have successfully challenged the constitutionality of a mandatory minimum term of imprisonment imposed following their conviction for a federal sex offense.

This report is an abridged version of CRS Report R42386, *Mandatory Minimum Sentencing for Federal Sex Offenses: An Overview*, without the footnotes or citations to authority found here.

Contents

Introduction.....	1
Federal Enclaves and Prisons	3
Travel and Commerce.....	6
Child Pornography.....	8

Tables

Table 1. Federal Sex Offenses: Mandatory Minimum Terms of Imprisonment	15
--	----

Contacts

Author Contact Information.....	16
---------------------------------	----

Introduction

A mandatory minimum sentencing statute is a law that requires a judge to impose a statutorily prescribed sentence. It is most commonly understood to mean a statute that requires imposition of a specific minimum term of imprisonment. The statutes that outlaw most federal crimes do not call for a mandatory minimum sentence. However, several statutes that outlaw federal sex offenses insist upon a minimum sentence. Mandatory minimum sentences have been with us since the dawn of the Republic. Yet, with the exception of rape, federal sex crimes and the mandatory minimum terms of imprisonment that accompany some of them are relatively recent arrivals. This is a brief overview of those provisions.

In a United States Sentencing Commission survey which addressed mandatory minimum sentences in child pornography cases but not other sex offense cases, a majority of the judges responding thought that the mandatory minimum sentences for production and distribution of child pornography and other child exploitation offenses were generally appropriate. Well over two-thirds, however, considered those for receipt of child pornography too high.

The Commission's report on mandatory minimum sentencing statutes noted that its "review of available sentencing data [relating to sex offenses] indicates that further study of these penalties is needed before it can offer specific recommendations in this area." It concluded preliminarily, however, that "the mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently."

Constitutional Considerations: Defendants sentenced to mandatory minimum terms of imprisonment have challenged them on a number of constitutional grounds ranging from Congress' legislative authority, to cruel and unusual punishment, through ex post facto and double jeopardy, to equal protection and due process. Each constitutional provision defines the outer boundaries that a federal criminal statute must be crafted to honor. Most statutes and the penalties they impose have survived scrutiny.

Legislative Authority: The federal government is a creature of the Constitution. It enjoys only such powers as can be traced to the Constitution. All other powers are reserved to the states or to the people. The Constitution grants Congress authority to enact legislation "necessary and proper" to the execution of those powers which it vests in Congress or in any officer or department of the federal government. Among the powers which the Constitution bestows upon Congress are the powers to define and punish felonies committed upon the high seas, to exercise exclusive legislative authority over certain federal territories and facilities, to make rules governing the armed forces, and to regulate interstate and foreign commerce, and to enact legislation necessary and proper for the execution of those and other constitutionally granted powers.

Many of the existing federal sex offenses with mandatory minimum sentencing requirements were enacted either pursuant to Congress' legislative authority over crimes occurring on the high seas or within federal enclaves or to its power to regulate the commerce. The Supreme Court has explained that under the commerce clause: "Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." When a statute falls

for want of legislative authority, the penalties it would impose fall with it. This has yet to occur in the area of mandatory minimum sentences.

Cruel and Unusual Punishment: The Eighth Amendment bars mandatory capital punishment statutes. And although the case law is somewhat uncertain, the Amendment seems to condemn any punishment that is “grossly disproportionate” to the misconduct for which it is imposed. A sentence imposed under a mandatory minimum federal sex offense statute might be “grossly disproportionate” to the offense under extreme circumstances, but the sentences in most cases are not.

Separation of Powers: While “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another,” the Supreme Court has observed that “Congress has the power to define criminal punishments without giving the courts any sentencing discretion.” Thus, the lower federal courts have regularly upheld mandatory minimum statutes when challenged on separation of powers grounds, and the Supreme Court has found no separation of powers infirmity in the federal sentencing guideline system, a system which might have been thought to produce its own form of mandatory minimums.

Equal Protection: The Fifth Amendment due process clause contains an equal protection component that cabins federal action in the manner that the Fourteenth Amendment equal protection clause cabins state action. Equal protection precludes punishing a defendant more severely than others similarly situated, when the distinction is based on some constitutionally suspect classification such as race or alternatively when the distinction has no rational basis. However, a defendant convicted of a federal sex crime has no equal protection claim, simply because he might have been less severely punished under state law or because he might have been charged with a less serious federal offense. Equal protection also prohibits punishment, under a facially neutral statute, that is intended to have an adverse impact on a constitutionally protected class. Yet, the presence of a rational basis for a classification will belie an intent to adversely impact.

Recidivism, Ex Post Facto, and Double Jeopardy: Defendants whose prior convictions trigger a mandatory minimum sentencing requirement have occasionally objected on double jeopardy or ex post facto grounds. Double jeopardy bans trying or punishing a defendant twice for the same offense. Ex post facto bars retroactive criminal statutes. As the Supreme Court explained when it rejected the double jeopardy challenge to the California “three strikes” statute: “Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an ‘offense.’ Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence ‘because of the manner in which [the defendant] committed the crime of conviction.’ An enhanced sentence imposed on a persistent offender thus ‘is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes’ but as ‘a stiffened penalty for the latest crime which is considered to be an aggravated offense because a repetitive one.’” Courts confronted with ex post facto challenges to recidivist statutes have similarly focused upon the “latest crime” and not upon the first.

Federal Enclaves and Prisons

Most mandatory minimum sex offenses appear in one of three chapters of title 18 of the United States Code. Chapter 109A outlaws rape and other forms of sexual abuse and sexual contact when committed in federal enclaves or federal prisons. Chapter 110 outlaws child pornography. Chapter 117 outlaws sexual activities that have travel or commercial attributes.

Chapter 109A reaches a relatively wide range of sexual misconduct under relatively narrow jurisdiction circumstances. It applies in the special maritime and territorial jurisdiction of the United States. It applies as well in federal prisons and other institutions where individuals are held in federal custody by contract or agreement with federal authorities, regardless of whether they are located within the territorial jurisdiction of the United States.

Within the United States, the “territorial jurisdiction of the United States” refers to those areas over which Congress enjoys state-like legislative jurisdiction. It includes some, or parts of some, military installations, Indian reservations, national parks, and national forests. Outside of the United States, it includes overseas federal facilities and residences with respect to offenses committed by or against U.S. nationals. Felonies proscribed when committed within the territorial jurisdiction of the United States are also proscribed when committed outside the United States by members of the Armed Forces, or employees of the Armed Forces, or those accompanying the Armed Forces. The “maritime jurisdiction of the United States” includes vessels of U.S. registry, vessels owned by Americans, and vessels scheduled to arrive in, or depart from, the United States with respect to crimes committed by or against a U.S. national.

Prosecution of the mandatory minimum offenses of chapter 109A and each of the other mandatory minimum federal sex offenses may begin at anytime. There is no applicable statute of limitations, although in rare instances due process may preclude prosecution of a stale complaint.

Chapter 109A violations trigger mandatory minimum sentencing provisions when: (1) the offender commits or attempts to commit a sexual act by force or threat or by rendering the victim unconscious or intoxicated (aggravated sexual abuse); (2) a sexual act is committed against a minor under the age of 12, or under the age of 16, if there is disparity of 4 years or more between the age of the victim and the age of the offender (aggravated sexual abuse of a child); (3) the offender commits or attempts to commit a sexual act by threat or when the victim is incapacitated (sexual abuse); (4) had the sexual contact been a sexual act, it would have been punishable as sexual abuse or aggravated sexual abuse (abusive sexual contact); or (5) the offense is a federal sex offense, including an offense subject to a mandatory minimum sentence, committed against a minor by an offender with a prior state or federal conviction for a sex offense committed against a minor (repeated sexual offense).

Definitions: Chapter 109A offenses each involve some form of “sexual act” or “sexual contact.” The term “sexual act” includes oral sexual activity as well as sexual penetration by sex organ, foreign object, or digitally. It also covers touching the genitalia of a child under the age of 16 for purposes of humiliation or sexual gratification. The term “sexual contact” includes touching any of the sexually sensitive areas of the body of another for purposes of humiliation or sexual gratification.

Aggravated Sexual Abuse: Section 2241 of Chapter 109A proscribes two types of aggravated sexual abuse, each punishable by a mandatory minimum term of imprisonment. First, under the prison and territorial conditions noted above, subsections 2241(a) and (b) outlaw causing, or attempting to cause, another person to engage in a sexual act, when it is accomplished by force, threat, rendering the victim unconscious, or by substantially incapacitating the victim by administering drugs or intoxicants. Such misconduct is punishable by fine, or by imprisonment for any term of years or for life, or by both a fine and imprisonment, regardless of the age of the victim.

Second, under prison and territorial conditions or when the offender crosses a state border with intent to commit the offense, subsection 2241(c) criminalizes engaging or attempting to engage in a sexual act with a child under 12 years of age (or under 16 years of age, if the offender is 4 years or more the victim's senior). The offense is punishable by imprisonment for not less than 30 years or for life. The mandatory minimum sentencing requirement cannot be overcome by the general sentencing instruction in 18 U.S.C. 3553(a) that a sentence imposed should be no greater than necessary to serve the sentencing purposes identified in that section. The offense is punishable by life imprisonment, if the offender has a prior comparable federal or state conviction.

A defendant may be guilty of an attempted violation of subsection 2241(a), (b), or (c), when he intends to commit the offense and takes a substantial step towards its completion. The prosecution under subsection 2241(c) need not show that the defendant knew that the victim was under 12 years of age, and the greater protection afforded victims under the age of 12 offends neither the equal protection nor due process clauses of the Constitution. The courts have held that a 30-year mandatory minimum sentence for violation of subsection 2241(c) is not so disproportionate as to constitute unconstitutional cruel and unusual punishment, nor does its imposition upon Native Americans violate the equal protection clause. Although abusive sexual contact is a lesser included offense of aggravated sexual abuse, both may be prosecuted without offending the double jeopardy clause, when they involve distinct criminal acts, even if occurring in the same criminal episode.

Sexual Abuse: Section 2242 makes sexual abuse a federal crime when comparable jurisdiction conditions exist, that is, when it is committed within the special maritime and territorial jurisdiction of the United States or equivalent overseas locations or in a federal prison or other federal custodial institution. Sexual abuse is punishable by a fine and a mandatory minimum term of imprisonment for any term of years or for life, regardless of the age of the victim. The offense may be committed by using or attempting to use threats to cause another to engage in a sexual act or by engaging or attempting to engage in a sexual act with an incapacitated victim. A victim who is asleep or incapacitated by intoxication is considered incapacitated for purposes of sexual abuse. A victim with reduced mental capacity may also be considered more susceptible to threats.

Abusive Sexual Contact: Section 2244 proscribes abusive sexual contact, that is, engaging in sexual contact (touching) under circumstances (threats, force, etc.) that would constitute abuse under Section 2241 or 2242 had the contact been a sexual act (penetration). Abusive sexual contact is punishable by a fine and a mandatory term of imprisonment for any term of years or for life when engaging in a sexual act under similar circumstances would have violated subsection 2241(c)(victim under 12 or under 16 if the offender is more than 4 years the victim's senior). Abusive sexual contact is not otherwise punishable by a mandatory minimum term of imprisonment.

Repeated Sex Offenses Against Children: A defendant, guilty of a “federal sex offense” against a child and previously convicted of a federal or state felonious sex offense committed against a child, must be sentenced to life imprisonment under 18 U.S.C. 3559(e). A child for purposes of subsection 3559(e) is a minor under the age of 17. The federal predicate offenses for purposes of the subsection include both violations of chapter 109A and other similar federal and state offenses, that is, violations of “section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), 2423(a) (relating to transportation of minors)”;

or any state equivalent felony. The defendant must also have been convicted and sentenced prior to the commission of the second offense. An equivalent state offense qualifies as a subsection 3559(e) predicate, when it consists of conduct that would be a federal offense should it occur under one of two jurisdictional circumstances—(1) the offense involves use of the mails or interstate commerce, or (2) the offense occurs on a federal enclave, prison, or facility, or in Indian country. Although the predicate state offense must be committed against a child, the victim’s status as a child need not be an element of the state offense. Moreover, the state predicate offense need have no federal nexus at the time of commission; it is enough that it would have been a federal offense under the designated jurisdictional circumstances.

A qualified defendant must be sentenced under subsection 3559(e), notwithstanding the fact that he might otherwise have been sentenced under the less severe recidivist provisions. Subsection 3559(e) provides defendants with a narrow affirmative defense when either the offense of conviction or the predicate offense arises under subsection 2422(b)(relating to inducing another to engage in prostitution) or under subsection 2423(a)(relating to transportation of a child for illicit sexual purposes). To claim the benefits of the defense, an accused must show by clear and convincing evidence that “(A) the sexual act or activity was consensual and not for the purpose of commercial or pecuniary gain; (B) the sexual act or activity would not be punishable by more than one year in prison under the law of the State in which it occurred; or (C) no sexual act or activity occurred.”

Restitution and Supervised Release: The victims of the sexual abuse and sexual contact offenses punishable by mandatory minimum terms of imprisonment under chapter 109A are entitled to restitution. As a general rule, federal courts may not order restitution absent express statutory authority. Congress, however, has authorized the courts to order restitution for the victims of a wide range of federal crimes. Moreover, Section 2248 of chapter 109A demands that victims be compensated for “full amount” of the losses attributed to the offense, including an even more extensive array of expenses than might be available under the general provisions. When the victim is a child, the courts have said that coverage extends to costs incurred by a child’s parents “acting in their capacity as [such and] incurred as a result of [the] offense.”

Federal courts may impose a term of supervised release at the time of sentencing. They will do so in most serious sex offense cases. Supervised release is not unlike parole, except that supervision is imposed in addition to, rather than in lieu of, time served in prison. For most federal crimes, the maximum term of supervised release is no more than 5 years. For the mandatory minimum sentencing offenses of chapter 109A and other serious federal sex offenses, the term of supervised release is “any term of years not less than 5, or life.” The court may sentence the offender to an

additional term of imprisonment for failure to comply with the terms imposed as a condition of supervised release.

If the court elects to issue a supervised release order, the order must require offenders to (1) refrain from criminal activity; (2) comply with sex offender registration requirements; (3) cooperate with authorized collection of DNA samples; and (4) submit to periodic drug tests. The court also enjoys the discretion to impose any condition that is reasonably related to the statutory sentencing factors; that “involves no greater deprivation of liberty than is reasonably necessary”; and that is consistent with the Sentencing Commission’s policy statements. The courts regularly select conditions from among the Sentencing Guidelines’ collection of close to 30 “standard,” “special,” or “additional” discretionary conditions. The Sentencing Guidelines note that in sex offense cases “a condition[,] limiting the use of a computer or an interactive computer service in cases in which the defendant used such items,” may be appropriate. Nevertheless, the courts are divided over the extent to which a defendant’s Internet use may be restricted in light of his conviction or past history. Sentencing courts may impose other supervisory release conditions as long as they satisfy the same criteria as those listed in the Sentencing Guidelines’ collection: relatedness to statutory sentencing factors; no greater deprivation of liberty than necessary; and consistency with the Sentencing Guidelines’ policy statements. In case of sex offense convictions, the courts often limit the defendant’s access to children following his release from prison. Some conditions restrict access to children generally; some to areas frequented by children; and some to occupations that involve frequent contact with children. Whether these conditions survive review depends upon whether they are sufficiently related to the circumstances of the offense or the offender; whether they are drawn with sufficient precision to avoid undue restrictions on the defendant’s liberty; and whether they are compatible with the policies of the Sentencing Guidelines.

Travel and Commerce

Several mandatory minimum sentencing statutes punish sexual misconduct based on Congress’ legislative authority to regulate interstate and foreign commerce. Most are found in chapter 117 (relating to transportation for illegal sexual activity), but a few others appear in either chapter 109A (relating to sexual abuse) or chapter 77 (relating to peonage, slavery, and human trafficking).

Chapter 117: Generally known as the Mann Act or the White Slave Act or the White Slave Traffic Act, chapter 117 has five sections that proscribe travel or the use of the facilities of interstate or foreign commerce when they relate to sexual misconduct: (1) 18 U.S.C. 2421 that outlaws transporting or attempting to transport another in interstate or foreign commerce for purpose of prostitution or other illicit sexual activity; (2) 18 U.S.C. 2422 that outlaws either (a) enticing or attempting to entice another to engage such travel for such a purpose or (b) using or attempting to use the facilities of interstate commerce for such enticement of a minor for such purpose; (3) 18 U.S.C. 2423 that outlaws travel under various circumstances for illegal purposes; (4) 18 U.S.C. 2424 that outlaws false or incomplete filings relating to foreign nationals maintained in a house of prostitution; and (5) 18 U.S.C. 2425 that outlaws the use of the facilities of interstate commerce to communicate information relating to a juvenile for illicit sexual purposes. Sections 2422 and 2423 contain mandatory minimum sentencing provisions; the others do not.

Coercion and Enticement: Subsection 2422(b) requires imposition of a fine and a mandatory minimum term of imprisonment of 10 years for using the facilities of interstate commerce to coerce or entice a child under 18 years of age to engage in prostitution or other illicit sexual activity. Subsection 2422(a) punishes such misconduct involving an adult victim with imprisonment for not more than 20 years with no minimum sentence required.

Coercion or enticement in violation of subsection 2422(b) consists of “(1) use of a facility of interstate commerce (2) to knowingly persuade, induce, entice, or coerce (3) an individual under the age of 18 (4) to engage in illegal sexual activity.” The subsection also proscribes any attempt to engage in such conduct. Conviction for attempt requires proof of an intent to violate the subsection and of a substantial step beyond mere preparation towards accomplishment of that intent. The intent required is the intent to entice or coerce—not the intent to engage in the illicit sexual act. The effort to entice need not be addressed to a child directly; culpability may result from efforts to entice through an adult intermediary. An offender who is misled as to the existence of an actual child victim is no less culpable.

Transportation of a Minor: Section 2423 establishes four sex-related travel offenses and condemns attempts or conspiracies to commit them as well. Subsection 2423(a), which bans interstate or foreign transportation a child under 18 years of age for criminal sexual purposes, carries a mandatory minimum sentence of imprisonment of 10 years; the same mandatory minimum applies to attempts or conspiracies to violate the subsection. The other three subsections—travel for illicit sexual purposes; travel and illicit sexual conduct overseas; and facilitation of travel for illicit sexual purposes—punish violations by imprisonment for not more than 30 years, with no minimum term of imprisonment required.

The courts have said that, “to obtain a conviction under §2423(a), the government must prove beyond a reasonable doubt that the defendant: (1) knowingly transported a minor across state lines, (2) with the intent to engage in sexual activity with the minor, and (3) that the minor was under eighteen at the time of the offense.” The government need not show that the defendant knew the minor was underage. Nor must it show that illicit sexual activity was the sole purpose or even the dominant purpose for the travel, as long as it constituted a significant consideration.

Travel to Sexually Abuse a Child: The Mann Act’s prohibitions on an offender’s travel for illicit sexual purposes carry no mandatory minimum penalties. However, chapter 109A, which ordinarily deals with prison and territorial offenses, provides for such a penalty. As noted earlier, subsection 2241(c) establishes a mandatory minimum sentence of imprisonment of not less than 30 years for “[w]hoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years ... or attempts to do so.” Recidivists face a mandatory term of life imprisonment. Subsection 2241(d) provides that the government need not establish that the defendant knew that the victim was underage.

Commercial Sex Trafficking of a Child or by Force: Section 1591 of chapter 77 establishes a pair of mandatory minimum sentencing provisions when commercial sex trafficking occurs in or affecting interstate or foreign commerce or within the special maritime or territorial jurisdiction of the United States. One outlaws sex trafficking; the other profiting from it. In either case, violations are punishable by a fine and imprisonment for not less than 10 years, if the child is between the ages of 14 and 18 and no force or coercion is involved. Otherwise, violations are punishable by a fine and imprisonment for not less than 15 years. The courts have held that the interstate commerce prong of the two offenses comes within the reach of Congress’ authority to regulate interstate and foreign commerce. To pass muster, the defendant’s misconduct must have

at least some minimal effect on interstate or foreign commerce. The prosecution, however, need not prove that the defendant knew that his activities were occurring in or affecting commerce. Moreover, while as a general rule, the defendant must be shown to have known that his juvenile victim was underage, the statute relieves the government of the obligation, if the defendant has had sufficient opportunity to observe the victim and thus presumably to discern the victim's age.

Murder in the Course of Certain Sexual Offenses: Section 2245 establishes a mandatory minimum sentence of imprisonment for any term of years for murder committed during the course of a violation of sex trafficking, child pornography, or Mann Act violations, regardless of the age of the victim. Other sections of the Code establish a mandatory minimum term of life imprisonment for murder in the course of the other federal sex offenses, that is, those committed while in federal custody or within the special maritime or territorial jurisdiction of the United States. Section 2251 establishes a 30-year mandatory minimum term of imprisonment when the production, attempted production, or conspiracy to produce, child pornography results in a death.

Restitution and Supervised Release: Victims of sex trafficking are entitled to restitution under a specifically tailored provision available for the benefit of any victim of a violation of chapter 77. The provision, Section 1593, is comparable in some respects to Section 2248 that applies in enclave cases. It too incorporates the compatible general restitution procedures. It uses essentially the same "legal guardian" language. Thus, coverage presumably extends to parental costs incurred on behalf of a victimized child. It calls for restitution in the full amount of the victim's losses. It references a similar list of specific qualifying expenses, but adds to the list the right to recover the value of the services of the trafficked victim. The Mann Act contains no explicit restitution provision. Some offenders may also be guilty of sex trafficking or some sex offense that triggers a crime-specific restitution requirement. If not, the court must order offenders to pay victim restitution under the general restitution provisions.

As in the case of chapter 109A, offenders convicted of Mann Act violations or sex trafficking must be sentenced to a term of supervised release for any term of years not less than 5, or life. The mandatory conditions for supervised release demand that the defendant: (1) comply with sex offender registration requirements; (2) submit to collection of DNA samples; (3) agree to periodic drug testing; and (4) refrain from engaging in criminal activity. The court may impose any discretionary conditions that relate to the statutory sentencing factors concerning the offense or the offender; that are consistent with Sentencing Guidelines policies; and that do not unduly restrict the defendant's liberty. As noted earlier, the courts often condition a sex offender's supervised release on restricted use of the Internet and limited contact with children.

Child Pornography

Four federal child pornography sections establish mandatory minimum terms of imprisonment for violations: 18 U.S.C. 2251 (relating to sexual exploitation of children), 18 U.S.C. 2251A (relating to selling or buying children), 18 U.S.C. 2252 (relating to certain activities relating to material involving sexual exploitation of children), and 18 U.S.C. 2252A (relating to certain activities relating to material constituting or containing child pornography).

Production of Child Pornography: Section 2251 creates a series of mandatory minimum terms of imprisonment for the production of, attempted production of, or conspiracy to produce, child pornography or related misconduct under various jurisdictional circumstances. First time offenders are punishable by a fine and imprisonment for not less than 15 years; offenders with a

prior conviction face a fine and imprisonment for not less than 25 years; and offenders with 2 or more prior convictions must be fined and sentenced to imprisonment for at least 35 years. Should a death result from the commission of such offense, the offender must be imprisoned for at least 30 years.

Section 2251 outlaws four substantive offenses: the use of a child to produce child pornography, subsection 2251(a); the participation of a parent or other custodian of a child in such production, subsection 2251(b); the overseas production of such material, subsection 2251(c); and the advertising of such material, subsection 2251(d). Subsection 2251(e) applies the same penalties to attempts or conspiracies to commit any of the four substantive offenses. The elements common to all four are a child under 18 years of age and at least the goal of creating a visual depiction of sexually explicit conduct of the child. A majority of courts have held that neither the statute nor the Constitution requires the prosecution to show that the defendant knew the child was underage and that mistake of age constitutes no defense. “Visual depiction” includes photographs, video, and computer disks. “Sexually explicit conduct” is defined to encompass various sexual acts as well as “lascivious exhibition[s]” of an individual’s pubic area. The lower federal appellate courts have endorsed the so-call *Dost* factors as a guide to determine when the otherwise lawful depiction of nudity has become a lascivious exhibition.

Use of a Child to Produce: Subsection 2251(a) outlaws employment, use, or inducement of a child to produce a visual depiction of sexually explicit conduct under a range of jurisdictional circumstances, or by virtue of subsection (e) attempting or conspiring to do so. The jurisdictional circumstances include interstate or territorial transportation of the child, anticipated or actual transmission or transportation of the depiction in or affecting interstate commerce, and use of materials transported in interstate commerce. The courts have held that subsection 2251(a) constitutes a valid exercise of Congress’ legislative power under the commerce clause. Moreover, they have concluded that its mandatory minimum term of imprisonment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishments.

Permitting the Use of a Child to Produce: Subsection 2251(b) applies the mandatory minimums of subsection 2251(e) to a parent, or other custodian of a child under 18 years of age, who permits, attempts to permit, or conspires to permit a child to be used for the visual depiction of sexually explicit conduct under jurisdictional circumstances comparable to those that apply to subsection 2251(a). A related provision with a more substantial mandatory minimum sentence of imprisonment appears in 18 U.S.C. 2251A and differs primarily in its requirement of a transfer of custody or control.

Overseas Production: Subsection 2251(c) applies the mandatory minimums of subsection 2251(e) to the overseas use, attempted use, or conspiracy to use, a child in the visual depiction of sexually explicit conduct with the intent to transport, or the transportation of, the depiction into the United States.

Advertising: Subsection 2251(d) applies the mandatory minimums of subsection 2251(e) to anyone who “knowingly makes, prints, or publishes, or causes to be made, printed, published any notice or advertisement seeking or offering child pornography” or to anyone seeking or offering to participate in the production of child pornography under various jurisdictional circumstances. Federal jurisdiction exists if the notice or advertisement is transported or transmitted using the facilities of interstate commerce or the defendant anticipates that it will be. The notice or advertisement need not “specifically state that it offers or seeks a visual depiction to violate §2251(c)(1)(A)”; all that is required is that its implications are clear.

Selling or Buying Children for Pornographic Purposes: Section 2251A demands a mandatory minimum sentence of imprisonment of 30 years for those convicted of relinquishing or acquiring custody or control of a child under 18 years of age, knowing or intending that the child will be used to produce visual depictions of sexually explicit conduct, under certain jurisdictional circumstances. “Custody or control” is statutorily defined to “include[] temporary supervision over or responsibility for a minor whether legally or illegally obtained.” “The statute does not require transfer of full parental authority; something less than the control a parent exercises—including ... limitations on time and scope—suffices to violate the law.” Moreover, “the terms contained in the title of §2251A(b)—buying and selling—do not exclusively define the statute’s reach.” The statute’s reach extends as well to instances where the defendant acquires custody or control of the child by paying the victim herself. Federal jurisdiction over the offense exists if it occurred within the territorial jurisdiction of the United States, if it involved travel in or affecting interstate commerce, or if the offer was transported or transmitted through the facilities in or affecting interstate commerce.

Certain Activities Involving Child Pornography (Real Child): Three of the four offenses created in 18 U.S.C. 2252 require imposition of a sentence of imprisonment for not less than 5 years: transportation, receipt, or possession with intent to sell, of visual depictions of sexually explicit conduct involving a child under 18 years of age—under various jurisdictional circumstances. Attempts or conspiracies to commit those offenses carry the same mandatory minimum penalties. Simple possession by a first time offender is not punishable by a mandatory minimum term of imprisonment. Defendants charged with any of the four offenses, who have a prior similar conviction, face increased mandatory minimum sentences of imprisonment.

Transporting: The mandatory minimum sentences of subsection 2252(b)(1) apply to those convicted of violating subsection 2252(a)(1) which outlaws the transportation or transmission of child pornography in or affecting interstate commerce or by using the facilities of interstate commerce. The mandatory minimum sentences apply as well to those convicted of attempting or conspiring to violate the subsection. The courts have said that, “under Section 2252(a)(1), the government must prove that: (1) the defendant knowingly transported or shipped, (2) in interstate or foreign commerce, (3) any visual depiction involving the use of a minor engaging in sexually explicit conduct.” The government must also prove that the visual depiction was of an actual child not a mere computer simulation, and that the defendant knew the child was underage. Moreover, simply because the statute indicates that transportation may take the form of computer transmission “does not mean that use of a computer is a required element of the crime.” For purposes of subsection 2252(a)(1), “interstate commerce” includes commerce to and from the possessions and the territories of the United States, and “foreign commerce” includes travel between foreign nations by way of the United States. The government, however, need not prove that the defendants know of the interstate or foreign commercial nature of the transportation or shipment. When the government seeks the 15-year recidivist mandatory minimum sentence and the “state law [upon which the prior conviction was based] covers conduct some of which is within, and the rest of which is outside, the scope of a recidivist statute, the federal court may examine the [state] charging papers (and any guilty-plea colloquy) to classify the conviction.”

Receipt or Distribution: The same mandatory minimum terms of imprisonment apply when the defendant is convicted of receipt or distribution of, attempted receipt or distribution of, or conspiracy to receive or distribute, child pornography, under the same jurisdictional circumstances—not less than 15 years with a prior conviction; not less than 5 years otherwise. The courts have explained that, “the elements of receipt under 18 U.S.C. 2252(a)(2) require the

defendant to knowingly receive an item of child pornography, and the item to be transported in interstate or foreign commerce” or otherwise satisfy the subsection’s jurisdictional requirements.

To be sure, the exact contours of the crime of “knowingly receiving” electronic child pornography in a constantly shifting technological background are murky. Part of the problem is that computers connected to the internet store vast quantities of data about which many users know nothing. As a user browses the internet, the computer stores images and text and other kinds of data in its temporary memory the way a ship passing through the ocean collects barnacles that cling to its hull. Thus, there is some risk that the computer of an internet user not intending to access child pornography may be infected with child pornography. Understandably, our sister circuits have struggled with whether to impute knowledge from the presence of illicit files found in such temporary storage.

Ultimately, the facts of a given case will determine whether the defendant is the unwitting victim of technology or knowingly received child pornography. The government’s burden includes proving that the defendant knew that child depicted was real and underage. For purposes of the jurisdictional element, “the government prove[s] images traveled interstate when it introduce[s] evidence that the defendant received images that were transmitted over the Internet.” To be guilty of attempted violation of subsection 2252(b)(2), the defendant must have intended to receive or distribute child pornography and taken a substantial step towards the achievement of that goal. When a court faces the question of whether a defendant must be sentenced to the mandatory minimum 15-year term of imprisonment reserved for recidivists in a case where the prior conviction occurred under a statute proscribing both qualifying and non-qualifying offenses, the court “may refer to the charging document, the terms of a plea agreement, the transcript of the colloquy, jury instructions, and other comparable judicial records.”

Sale or Possession With Intent to Sell: Subsection 2252(a)(3), which prohibits sale of, or possession with intent to sell, child pornography under various jurisdiction circumstances, requires imposition of a 5-year mandatory minimum term of imprisonment as well (a minimum of 15 years for recidivists). The same penalties must be assessed upon conviction of an attempt or conspiracy to violate the subsection. Jurisdiction exists if the offense occurs within the special maritime and territorial jurisdiction of the United States, on a federal facility or Indian reservation. It also exists if interstate commerce is implicated in the offense.

Recidivist Possession: Recidivists in possession of child pornography must be sentenced to 10-year minimum term of imprisonment under subsection 2252(a)(4), as must recidivists convicted of attempting or conspiring to violate the subsection. The necessary jurisdictional circumstances are the same as those that apply in the case of the sale offense under subsection 2252(a)(3). Qualifying prior convictions may include convictions under either state or federal law. The offender’s prior state conviction must be “related to” one of the statutorily described offenses and involve a minor, but the statute of conviction need not list a minor victim as an element of the offense. “[T]he sentencing court looks to the fact of conviction and the statutory definition of the prior offense and determines whether the full range of conduct encompassed by the statute qualifies to enhance the sentence.” In this exercise, “[i]f the statute [of prior conviction] criminalizes both conduct that would qualify a defendant for an enhancement, as well as conduct that would not do so, the court may refer to the charging document, the terms of a plea agreement, the transcript of the colloquy, jury instructions, and the comparable judicial records to determine the basis for the guilty plea or verdict [in the prior case].”

Subsection 2252(a)(4) has two distinctive features. First, offenders are not subject to a mandatory minimum term of imprisonment, unless the recidivist provisions are tripped. Second, subsection

2252(c) provides a narrow explicit statutory defense, available when possession is minimal and the individual destroys the material or reveals it to authorities.

Certain Activities Involving Child Pornography (Real and Virtual): Sections 2252 and 2252A were almost identical at one point. Section 2252 covered only visual depictions of sexual activity involving an actual child. Section 2252A covered visual depictions of sexual activity involving a digitally created child as well. Other changes have occurred over the years, but that essential distinction remains. So too do the mandatory minimum terms of imprisonment that attend comparable violations of either section. At least a 5-year term of imprisonment must be imposed for a violation, attempt to violate, or conspiracy to violate any of five child pornography-related offenses found in subsection 2252A: transportation; receiving or distributing; reproducing or promoting; selling or possession with intent to sell; or providing to a child. Recidivists must be sentenced to imprisonment for not less than 15 years (not less than 10 years for a recidivist guilty of simple possession). As discussed below, a 20-year mandatory term of imprisonment attends conviction for a child exploitation enterprise offense involving multiple violations of subsection 2252A(a) and related child abuse offenses that involve several children and several collaborators.

Transporting: A 5-year mandatory term of imprisonment must be imposed on “[a]ny person who - (1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography.” A mandatory 15-year term of imprisonment awaits recidivists. The subsection’s recently expanded jurisdictional statement (“using any means ... affecting ... commerce”) eliminates the split among the lower federal appellate courts over whether the earlier version of the statute covered any Internet use, or use where actual interstate transportation can be shown. On the other hand, the use of a computer is not an element of the offense; the offense may be committed with or without the use of computer. Defendants accused of violating the transportation prohibition of subsection 2252A(a)(1) enjoy a relatively narrow affirmative defense. The defense is available, if, after giving the required pre-trial notice, the defendant establishes that the alleged child pornography did not involve the use of a real child or the image of a real child.

Receipt or Distribution: Section 2252A punishes the knowing receipt or distribution of child pornography, committed under certain jurisdictional circumstances, with imprisonment for not less than 5 years. It punishes attempt and conspiracy in the same manner. It imposes a minimum 15-year term of imprisonment upon recidivists. The offense must be committed knowingly; inadvertent receipt is not a violation. Knowing violation occurs, for instance, when the defendant “intentionally views, acquires, or accepts child pornography on a computer from an outside source.” Attempted violation requires evidence of an intent to commit the offense and a substantial step beyond mere preparation towards that goal. Factual impossibility, such as the absence of real child in a sting situation, poses no obstacle to conviction for attempt.

Possession of child pornography under subsection 2252A(a)(5) is a lesser included offense to the crime of receipt of child pornography under subsection 2252A(a)(2). The Constitution’s double jeopardy clause thus precludes punishment under both subsections for the same misconduct. Punishment under both subsections is permissible, however, when each addresses a different violation. The double jeopardy clause may also bar punishment for receipt of child pornography under both subsection 2252(a)(2) and 2252A(a)(2), unless the offenses involve different violations; for example, the 2252A(a)(2) offense involves a digital image and the other involves a real child.

Reproduction or Promotion: Knowingly reproducing or promoting child pornography carries the same 5-year mandatory minimum term of imprisonment (15 years for recidivists). Reproduction and the promotion offenses are distinct. Both offenses, however, rest on a broad claim of federal jurisdiction: utilization of a means or facility “affecting interstate or foreign commerce” by any manner “including by computer.” The Supreme Court in *Williams* held that neither the reproduction nor promotion proscription violates either First Amendment over breadth restrictions or Fifth Amendment due process vagueness limitations. The Court dissected several of subsection 2252A(a)(3)’s features in the course of its analysis. First, it observed that the knowledge requirement applies to both the reproduction and promotion offenses. Second, it said that the action elements of the promotion offense—“advertises, promotes, presents, distributes, or solicits”—bespeaks a transaction, although not necessarily a commercial transaction. “That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography—via production or physical delivery—from one person to another.”

For the promotion offense, the advertisement, promotion, or presentation must be advanced with one of two intents: either “in a manner that reflects belief” that child pornography is being offered, or in a manner that is calculated to induce another to believe child pornography is being offered. As for the first, the manner of advertisement, promotion, or presentation “must objectively manifest a belief that the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.” As for the second, “the defendant must ‘intend’ that the listener believe the material to be child pornography, and must select a manner of ‘advertising, promoting, presenting, distributing, or soliciting’ the material that he thinks will engender the belief—whether or not a reasonable person would think the same.” Defendants charged with the reproduction offense may invoke the narrow affirmative defense covering pornography that involves only adults; defendants charged with the promotion offense may not.

Sale or Intent to Sell: The same 5- and 15-year mandatory minimum terms of imprisonment follow conviction for selling or possession with intent to sell child pornography if committed under a wide range of jurisdictional circumstances, or for attempting or conspiring to do so. Jurisdiction exists if the offense occurs on federal enclaves or facilities or in Indian country. It also exists if the offense involves transportation using a means or facility in or affecting interstate or foreign commerce. The affirmative defense available when children have not been used in the pornography may be claimed by defendants charged with selling or intent to sell child pornography.

Offering Child Pornography to a Child: Section 2252A requires a fine and a minimum term of imprisonment of 5 years for offering child pornography to a child with the intent to induce the child to engage in illegal activity, or attempting or conspiring to do so. It requires a fine and a minimum term of 15 years for recidivists. The offense is punishable if the offer, the pornography, or the material used to produce the pornography, was transported using a means or facility in or affecting interstate or foreign commerce. The defendants charged under the offering offense of subsection 2252A(a)(6) may not claim the affirmative defense available elsewhere for when the pornography involves only adults.

Recidivist Possession: There is no mandatory minimum term of imprisonment for conviction of simple possession of child pornography. However, there is a 10-year mandatory minimum term of imprisonment for conviction of possession by a recidivist. The possession which triggers the minimum sentence may occur in Indian country or on federal enclaves or facilities. Interstate

commerce may also provide a basis for jurisdiction. Defendants charged with possession may assert the affirmative, adults-only pornography defense, if they do so in a timely fashion.

Child Molesting Enterprises: Subsection 2252A(g) outlaws “child exploitation enterprises,” a crime punishable by a fine and imprisonment “for any term of years not less than 20 or for life.” The crime’s federal predicate felony offenses include not only pornography, but sex trafficking, kidnaping a child, sex abuse of a child, and Mann Act violations involving a child. More precisely, the penalty applies to: (1) Whoever; (2) in concert with three or more other persons; (3) commits a series of predicate offenses; (4) constituting three or more separate incidents; (5) involving more than one victim; (6) when the predicate offenses involve sex trafficking of a child or by force, kidnaping a child, sexual abuse of a child, child pornography, or Mann Act violations. Each predicate offense need not involve more than one victim nor be committed in concert with three other offenders; it is enough that the series of predicate offenses, taken in total involve more than one victim and three or more other offenders. The Constitution’s double jeopardy clause bars punishment for both a violation of subsection 2252A(g) and for conspiracy to violate the underlying predicate offenses.

Restitution and Supervised Release: Child pornography offenses come with their own mandatory restitution provisions, not unlike those covering sex trafficking and sex abuse in federal enclaves. The provision, Section 2259, is much like Section 2248 that applies in enclave cases. It adopts the procedures generally applicable in restitution cases. Its definition of the term the “victim” suggests that parents must be awarded restitution for expenses incurred on behalf of a victimized child. The examples of qualifying expenses are the same as those used for the victims of sexual abuse in federal enclaves under Section 2248. It references a similar list of specific qualifying expenses, but adds to the list the right to recover the value of the services of the trafficked victim. Offenders convicted of a mandatory minimum pornography offense must be sentenced to a term of supervised release for “any term of years not less than 5, or life.” A defendant sentenced to a term of supervised release must: (1) avoid further criminal activity; (2) submit to drug testing and the collection of DNA samples; and (3) obey sex offender registration requirements. In addition, Internet use and child contact restrictions are particularly common conditions of supervised release in pornography cases. Here too, however, the discretionary conditions of supervised release must be consistent the policies of the Sentencing Guidelines, must be related to the statutory sentencing factors concerning the circumstances of the offense and the offender, and must not unduly deprive the defendant of his liberty.

Table I. Federal Sex Offenses: Mandatory Minimum Terms of Imprisonment

Citation	Offense	Mandatory Minimum Term of Imprisonment
18 U.S.C. 2241(a)	aggravated sexual assault (by threat or force)(including attempt)	any term of years
18 U.S.C.2241(b)	aggravated sexual assault (upon an incapacitated victim)(including attempt)	any term of years
18 U.S.C. 2241(c)	a. sexual act (victim under 12 or victim under 16 and at least 4 years the offender's junior)(including attempt)	a. 30 years
	b. with a prior conviction	b. life
18 U.S.C. 1591	a. sex trafficking by force or fraud or of a child under 14	a. 15 years
	b. sex trafficking of a child (14 to 18)(w/o force or fraud)	b. 10 years
18 U.S.C. 2422(b)	enticing or coercing a child under 18 to engage in prostitution (including attempt)(Mann Act)	10 years
18 U.S.C. 2423(a)	transporting a child under 18 for illicit sexual purposes (including attempt) (Mann Act)	10 years
18 U.S.C. 2245	murder in the course of a Mann Act, sex trafficking, or production of child pornography offense	any term of years
18 U.S.C. 2251	child pornography: inducing a child under 18 to produce, custodial involvement in production, or advertising (including attempt)	
	a. death results	a. 30 years
	b. 2 or more prior convictions	b. 35 years
	c. 1 prior conviction	c. 25 years
	d. otherwise	d. 15 years
18 U.S.C. 2251A	child pornography: custodial involvement in production	30 years
18 U.S.C. 2252	a. child pornography (real): transportation, receipt, or sale (including attempt)	a. 5 years
	b. prior conviction	b. 15 years
	c. child pornography (real): recidivist possession	c. 10 years

Citation	Offense	Mandatory Minimum Term of Imprisonment
18 U.S.C. 2252A	a. child pornography (real or virtual): transportation, receipt, promotion, sale, or distribution to a child (including attempt)	a. 5 years
	b. prior conviction	b. 15 years
	c. child pornography (real or virtual): recidivist possession	c. 10 years
18 U.S.C. 2252A(g)	child exploitation enterprise; 3 or more instances involve 3 or more others and multiple victims of child pornography, child sex trafficking, or Mann Act violations involving a child	20 years
18 U.S.C. 3559(e)	federal sex offense (sex trafficking, sexual assault, Mann Act, or production of child pornography violation), involving a victim under 17, by an offender with a prior federal or state equivalent conviction and sentence	life

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