DRAFT

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

December 14, 1993

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Senate Crime Bill Working Group (Sentencing)

SUBJECT: Preliminary Recommendations

MANDATORY MINIMUM PROVISIONS AND THE SENATE CRIME BILL

A. Basic Issues: Mandatory Minimums v. Sentencing Guidelines

A starting point for the analysis of the proposed new mandatory minimum provisions (set forth in Appendix A) is the recognition that the approach which they reflect was rejected by Congress when it enacted the Sentencing Reform Act of 1984 and established the Sentencing Commission. In establishing the Sentencing Commission, Congress rejected the notion of sentencing by the legislature, and instead created a mandate for the promulgation of sentencing laws (subject to Congressional review) by a Commission of experts. The Sentencing Guidelines promulgated by the Commission have been largely effective in accomplishing many of the stated goals of mandatory minimums--tough, certain, non-parolable punishment for serious offenses. (The "Guidelines" are not simply advisory, but mandatory, with limited bases for departure permitted the sentencing judge). Moreover, they accomplish important sentencing goals such as proportionality and individualized punishment that are not achieved by mandatory minimum statutes.

In its August 1991 Special Report to the Congress on mandatory minimums, the Sentencing Commission identified several basic reasons why mandatory minimum statutes are inferior to Guidelines. Thus, mandatory minimum statutes sweep too broadly and punish individuals with different levels of culpability similarly; the flat, tariff-like penalty levels set by mandatory minimum statutes can produce irrational and unfair results; mandatory minimums are not multi-dimensional, and they ignore, for example, the defendant's role in the offense, whether the defendant obstructed justice, or accepted responsiblity. (It should be noted that Chief Justice Rehnquist and the Judicial Conference have joined the Commission in condemning mandatory minimum statutes).

B. Options

1. The Department could urge that the Sentencing Guidelines have been working; that they are tough (indeed, some critics have argued that they are too harsh); and that the proposed mandatory minimums are unnecessary and should be opposed. For example, the Sentencing Guidelines' "career offender" provisions establish very high guidelines ranges for recidivist, violent offenders.

2. The Department could urge that the proposed mandatory minimum provisions be converted to "directives" to the Sentencing Commission to evaluate and perhaps raise offense levels in certain categories.

3. The Department could urge a "safety-valve" or carve-out approach. Under this approach, (which is also inconsistent with the Sentencing Guidelines scheme), mandatory minimum proposals would not be opposed across-the-board. Rather, certain categories of defendants (such as "first-time," low level, non-violent offenders) would be exempted from mandatory minimum statutes, but would be sentenced under Guidelines. This approach is embodied, to a limited extent, in Section 2404 of the Senate Crime Bill (allowing for flexibility in application of mandatory minimum sentence provisions for essentially mules or couriers with no prior criminal record). There may relatively few opportunities to implement "safety-valve" or carve-out approaches in the context of the Senate Crime Bill, as many of the mandatory minimum provisions are directed at serious, violent criminals. Thus, the thrust of the Department's efforts might be directed towards ensuring that the various proposed mandatory minimum provisions in fact deal with serious, violent criminals.

4. The Department should be careful in assessing the extent to which mandatory minimum proposals also raise "federalization of crime" concerns.

5. The Department should assess how the various legislative proposals would impact on the Bureau of Prisons. See Appendix B (prepared by the Bureau of Prisons).

APPENDIX A

MANDATORY MINIMUM PROVISIONS

Section 611 Criminal Street Gang Offenses

- command, counsel, persuade, induce, entice, or coerce someone to participate in a gang (5 years); second offense (10 years)
- employ, use, command, counsel, persuade, induce, entice, or coerce someone to commit a gang crime (most violence offenses, all drug crimes, including possession or purchase) (5 years); second offense (10 years)
- persuade someone under 18 to participate in the gang or to commit gang crime (10 years)
- gang organizer or supervisor (presumed if defendant counseled, commanded, induced, or procured five or more others to join gang (15 years)
- attempt, or be part of a gang that attempts, murder (20 years)
- commit, or be part of a gang that commits, murder or a conspiracy that results in a killing (life)

Section 844 Establishment of Program

The Attorney General is to establish guidelines for state programs to require a sexually violent predator to register a current address with a designated state law enforcement agency upon release from prison. It is the sense of Congress that the penalties for failure to register should include imprisonment for not less than 180 days. Failure to implement program will result in ineligibility for funding.

Section 2404 Flexibility in Application of Mandatory Minimum Sentence Provisions in Certain Circumstances

- conviction for a controlled substance offense or a crime of violence in which a mandatory minimum term of imprisonment is required after being sentenced under this section, shall result in an additional five years imprisonment

Section 2405 Mandatory Prison Terms for Use, Possession, or Carrying of a Firearm or Destructive Device During a State Crime of Violence or State Drug Trafficking Crime

- possession of a gun during a state crime of violence or drug trafficking offense, including drug possession (10 years); second offense (20 years); third offense (life)
- discharge of a firearm during the same (20 years); second offense (30 years); third offense (life)
- possession of a machine gun or destructive device or one equipped with a silencer or muffler (30 years); second offense (life); third offense (life)

Section 2407 Mandatory Minimum Prison Sentences for Those Who Sell Drugs to Minors or Who Use Minors in Drug Trafficking Activities

- distributing drugs to a person under 18 years of age (10 years); second offense (life)
- employing someone under 18 years of age to distribute drugs (10 years); second offense (life)

Section 2408 Life Imprisonment Without Release for Drug Felons and Violent Criminals Convicted a Third Time

Crime of violence defined:

- an offense that is a felony punishable by a maximum term of imprisonment of ten years or more and
- has an element the use, attempted use, or threatened use of physical force against the person or property of another or
- by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense

Section 2907 Increased Penalties for Arson

- maliciously damaging or destroying, or attempting to, by means of fire or explosives, any building, vehicle, or other personal or real property owned, possessed, used by, or leased to the United States (five years)
- offense above results in person injury to any person (five years)

- use of fire or explosives to commit, or carrying explosives during the commission of, a federal felony (10 years); second or subsequent conviction (20 years)

- maliciously damaging or destroying, or attempting to, by means of fire or explosives, any building, vehicle, or other personal or real property used in interstate or foreign commerce (five years)

- offense above results in person injury to any person (five years)

Section 3321 Interstate Enforcement

- second violation of a protective order (fine or imprisonment not less than five years)

Section 4502 Restriction on Manufacture, Transfer, and Possession of Certain Semiautomatic Weapons

- adds semiautomatic assault weapons to those firearms covered under 18 U.S.C. § 924(c).

Section 5111 Mandatory Life Imprisonment of Persons Convicted of a Third Violent Felony

Violent felony defined:

- a crime of violence (as defined under 18 U.S.C. § 16) under state or federal law that

- involves the threatened use, use, or risk of use of physical force against the person of another

- is punishable by a maximum term of five years or more and

- is not designated as a misdemeanor by the law that defines the crime

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APPENDIX B

Changes in Sentencing

There are a variety of sections in the pending version of the crime bill that would create new federal offenses or change sentences for existing offenses, and consequently have substantial impact on the size and character of the Bureau of Prisons inmate population

Summary of Illustrative Sections and Related Issues

Section 2405 adds a new section to 18 U.S.C. §924(c). This section extends the penalties for 924(c) to possession of a firearm in relation to state crimes of violence or drug trafficking crimes. Because under this statute there is both state and federal jurisdiction, it is impossible to estimate the federal impact--it will be different from district to district.

However, following Operation Triggerlock, the number of firearms convictions in FY 1992 was 1000 more than in FY 1991. If there were 1000 additional convictions under this new section, each lasting up to 10 years, there would be 10,000 additional inmates in federal custody after 10 years. Prosecutorial discretion and policy regarding this section will affect our population in a dramatic fashion.

Section 2408 requires that those defendants convicted a of a third violent or drug felony be sentenced to life without release. We estimate that there might be 200 defendants per year that will be subject to this provision. Although there is no short term population impact since these persons currently receive long sentences, the long term impact will be significant. After 10 years, there could be 2000 more "lifers" than we currently expect. In the long run, there will be a serious "aged prisoner" problem. In the short term, there may be inmate behavior problems.

The criminal street gangs provision in Title VI also has the potential for a rather large prison impact. Again, because so much depends upon prosecutorial policy, USSC implementation, and court interpretation, any impact would be extremely difficult to predict. This section allows for an additional, consecutive, term of prison, up to 10 years, for an offender who has a felony drug or violent conviction within the previous five years, and who commits a felony drug or violent offense as part of a criminal "gang."

If, for example, the USSC treated the gang provision as an enhancement, then additional elements of an offense would not have to be charged and proven, and the effect could be very large. On the other hand, if the USSC treated this provision as a separate Guideline, which was triggered only upon a conviction under this statute, the effect might be small if prosecutors decide that the additional effort of proving all the elements was too cumbersome or not efficient, or not worth the investment given a large case load.

Population Management

Over the past four years, the Bureau has experienced a substantial increase in the number of disruptive incidents in our institutions caused by inmates acting in concert. Ranging from food strikes to major disturbances resulting in the loss of life, the frequency of these incidents has increased by 287.5% over this period, while the inmate population has grown by 63.6% during the same period. During the same interval, the number of gangs represented in the inmate population and the proportion of inmates affiliated with such gangs prior to commitment has risen significantly. This suggests that the composition of the federal inmate population is changing, with an increasing proportion of individuals who are accustomed to acting as part of a group in a highly disruptive manner. With these trends, it is clear that Bureau of Prisons resource needs for the incarceration of increasing numbers of inmates will increase not only based on the numbers of new inmates, but also because of the increased security needs of young, aggressive inmates who are skilled at working in concert with others for illicit purposes and who are serving very long sentences.

Recommendation for DOJ Action

Collectively, the changes in sentencing provisions currently under consideration will not only increase the numbers of inmates coming into federal custody, but increase the length of stay as well. In addition, these sentencing provisions may add to the changes we are already experiencing in the character of the current population, resulting in greater concentrations of young, aggressive gang affiliated inmates in the short run and much older inmates serving life sentences in the long run. The resources required to satisfy these provisions and maintain facilities that are safe for both staff and inmates must be made available if these provisions are enacted.

DIALOGUE

Drugs, Crime and Punishment

Don't Let Judges Set Crooks Free

By Phil Gramm

WASHINGTON

Two Federal judges recently announced that they would refuse to take drug cases because they oppose mandatory minimum sentences. One judge, Jack Weinstein of Brooklyn, confessed to a "sense of depression about much of the cruelty I have been party to in connection with the war on drugs." The other, Whitman Knapp of Manhattan, heartened that President Clinton "has not committed himself to the war on drugs in such a way as the Republican Administration had," hoped his action would influence the President to abandon tough mandatory sentencing.

If the Clinton Administration listens to these voices, and their echoes, and tries to roll back minimum mandatory sentences, it will certainly win applause from some criminal defense lawyers, judges and the media — and no doubt many criminals — but it will betray millions of Americans who took the President at his word when he promised to be tough on crime.

Contrary to conventional wisdom, most criminals are perfectly rational men and women. They don't commit crimes because they're in the grip of some irresistible impulse. They commit crimes because they think it pays. Unfortunately, in most cases they are right: In America today, crime *does* pay.

Morgan Reynolds, an economist at Texas A&M University, has calculated the amount of time that a person committing a serious crime in 1990 — the last year for which we have complete statistics — could reasonably expect to spend in prison. By analyzing the probability of arrest, prosecution, conviction, imprisonment and the average actual sentence served by convicts for particular crimes, Professor Reynolds has reached some shocking conclusions.

On average, a person committing murder in the United States today can expect to spend only 1.8 years in prison. For rape, the expected punishment is 60 days. Expected time in prison is 23 days for robbery, 6.7 days for arson and 6.4 days for aggravated assault. And for stealing a car, a person can reasonably expect to spend just a day and a half in prison.

Given this extremely low rate of expected punishment, is it any wonder that our nation is deluged by a tidal wave of crime? In trying to account for the six million violent crimes committed annually, analysts point to the breakdown of the family, the effects of television violence and the failure to teach moral values in our schools. While these factors have an impact, they overlook the main culprit: a criminal justice system in which the cost of committing crimes is so shamelessly cheap that it fails to deter potential criminals.

Mandatory minimum sentences deal with this problem directly. When a potential criminal knows that if he is convicted he is *certain* to be sentenced, and his sentence is *certain* to be stiff, his cost-benefit calculus changes dramatically and his willingness to engage in criminal activity takes a nose dive.

Again, Professor Reynolds's statistics are revealing. He found that since 1950, the expected punishment for a serious criminal has declined by two-thirds, while the annual number of crimes has risen seven-fold. In 1950, each perpetrator of a serious crime risked, on average, 24 days in prison. By 1988, the amount of risked time was 8.5 days. Over 38 years, soft sentencing — treating criminals as victims of dysfunctional families, of predatory capitalism, of society at large — has brought a dramatic decline in the cost of committing a crime and a dramatic increase in crime.

Critics of mandatory minimum sentences point out, often with considerable indignation, that mandatory sentencing denies judges discretion in imposing sentences. And they are perfectly right. That's what we want.

Americans have lost faith in our criminal justice systems. Too many violent criminals have walked away with light or even no prison sentences. Mandatory minimum sentencing is a massive no-confidence vote by the American people in the discretionary powers of our judges. If judges and parole boards were legally liable for the actions of convicted felons who walk the streets due to their decisions, I would have more confidence in their judgment. But they are not.

"But what about fairness?" critics of mandatory minimum sentencing ask. "Is it fair that someone who has never committed a crime in his life should go to prison for 10 years because one day he sold drugs to some kid? Shouldn't we distinguish between a major drug dealer and a minor drug offense?"

Once again, the critics are right: There is a distinction between major and minor drug offenses. A minor drug offense takes place when a pusher sells drugs to somebody else's child; a major drug offense takes place when he pushes drugs on yours. Only when our nation's elites are as outraged about what happens to someone else's child as they would be were it happening to their own will we deal with crime effectively.

Of course, there is the cost issue to be considered. At a time when we are desperately trying to reduce the Federal deficit, can we really afford to sentence more criminals to jail for lengthier periods of time?

Mandatory jail sentences work.

Of course we can. In 1990, the Department of Justice's bureau of statistics found that it costs from $15,000 to $30,000 to keep a felon in prison for a year. A Rand Corporation study calculated that the active street criminal imposes a financial cost of $430,000 a year on the general public — not to mention such immeasurable but very real costs as grief, fear and anger. By Washington standards (or anybody's, for that matter), spending $30,000 a year to save $430,000 a year is a brilliant allocation of resources.

In dealing with our nation's crime problem, cost is not the fundamental issue. Indifference is. I am appalled by the shoulder-shrugging approach some Americans take to the issue of crime in this country. Americans saw the pictures of starving children in Somalia and were outraged; we saw "ethnic cleansing" in Bosnia and were furious. But our outrage and fury evaporate when American children are the victims of criminals.

Like Judge Weinstein, all too many are ready to agonize over the "cruelty" that mandatory sentencing inflicts on drug pushers, and to overlook the cruelty that mandatory sentencing avoids by keeping these criminals off the streets and preventing them from brutalizing your children, mine or even Judge Weinstein's.

With the end of the cold war, domestic crime is now the greatest threat to the safety and well being of Americans. And just as the U.S. developed a military strategy — "containment" — to deter Soviet aggression by raising its costs, so today we need a legal strategy to contain, and reverse, the growth of violent crime.

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That is why, along with many other Americans, I am a strong supporter of mandatory minimum sentences. In fact, I will go so far as to say that as long as I am in the Senate, we will be imposing more minimum sentences, not repealing them.

Phil Gramm, Republican of Texas, is a member of the Senate subcommittee on Commerce, Justice, State and Judiciary.

The War On Drugs Is Self-Defeating

By Jack B. Weinstein

In the debate over national drug policy, too many policy makers, unsure of what might work or why, appear to rely upon what seems politically safe: harsher law enforcement based on more prison time.

A nonpartisan Federal Commission on Drugs needs to be formed. Its object should be to report candidly on the costs, benefits, risks and advantages of present and potential national drug policies. Such a commission could provide the fact-finding and serious analysis lacking in the political climate surrounding drugs.

The nation can look for guidance to the Wickersham Commission, appointed by President Hoover in 1929, whose report led to a full debate on Prohibition laws and a constitutional amendment returning responsibility to the states for control of alcohol. Also instructive is the National Commission on Marijuana and Drug Abuse, appointed by President Nixon in 1971, which recommended ending prosecution for possession of marijuana for private use.

So urgent is the issue that Chief Justice William H. Rehnquist in a speech in June said, "The law by itself is not going to solve the problems of drugs and violence," raising "questions of public policy which must be decided, not by lawyers, judges or other experts, but by the popularly elected branches of government" — and ultimately, I think, by a well-informed electorate.

Attorney General Janet Reno, confronting the problem of drug crime immediately upon assuming office, emphasized the importance of reconsidering the existing policy.

America has had three national drug policies. Before 1914, a freedom model reigned. Opiates were sold as over-the-counter household remedies and marijuana was a legal crop. In 1914, we began to tax narcotics to control them, but we, like Britain, relied primarily on a medical model of treatment and prescriptions.

In the 1930's, we embarked upon a strict punitive model, and the medical profession was largely pushed out of the field. The drug supplier-law enforcement complex was enormously expanded by the war on drugs in the 1980's at an annual cost of tens of billions of dollars.

Meanwhile, in my judicial district, the Federal probation service has had to radically cut its drug-testing and medical treatment program; many parents have no place to send their children for help; educational and other nonpenal controls are ineffective, and, too frequently, ghetto youths seek to emulate sellers and thugs who brazenly walk city streets.

Largely because of drug prosecutions, our justice system is in crisis. Nationally, over one-third of all new inmates are drug offenders. Over 60 percent of those in Federal prisons have been convicted of drug offenses.

In the Eastern District of New York, we sentence about 400 drug "mules" each year. These are usually poor people who smuggle drugs, primarily heroin, from Nigeria and cocaine and heroin from Colombia. They are cheaply hired for one trip. Before the adoption of guideline sentencing, they were sentenced to 30 months and paroled in about one year.

Now they must serve an average of two additional years, and sometimes a 10-year minimum, leading to at least 800 more penal years, at millions of dollars of added expense for incarceration in our district alone.

Largely because of mandated and unnecessarily harsh sentences for minor drug offenders, which fail to deter, I have exercised my option as a senior Federal judge not to try minor drug cases.

When I wrote a report on drug laws for the City Bar Association in the early 1950's and then served as chairman of the lay board of the North Brothers Island 60's, as a father I supported some form of criminal model because I thought that it might discourage drug use by young people. As a judge, in the 80's and 90's, I have become increasingly despondent over the cruelties and self-defeating character of our war on drugs.

A national commission could address the difficult questions. How should marijuana be treated? Has it become such a large and widely available cash crop that prohibition is neither attainable nor affordable? (In some districts Federal prosecutors decline cases involving less than a ton, while in other places people are sent to prison for years when they possess a few plants for their own use.)

How dangerous is marijuana? Does it have useful therapeutic values? How much money could be saved in law enforcement by decriminalizing its use? Would savings be offset by an increase in health and other costs attributable to a rise in consumption? Or would we find that noncriminal social controls — ranging from taxation and bans on smoking in public places to peer pressure — would reduce use, as they have for cigarette smoking?

For hard drugs, a national commission should consider the tradeoffs between medical controls and education, and our current punitive approach. Our investments in increased law enforcement are no longer providing adequate returns. If we reduce our criminal-penal efforts, how much of the savings could be better utilized for education and medical efforts to decrease demand? What is the optimal balance?

A new Federal panel could devise a better strategy.

We must also consider moral and religious issues. Would decriminalization imply society's approval? Is there an overlooked moral dilemma in our penal approach that results, for example, in one in four black males in their 20's being under the control of the criminal justice system?

Different strategies might be required in dealing with different sectors of society. An airplane mechanic testified before me that he stopped using cocaine and marijuana when random drug testing was imposed, for fear of losing his job. Should we take greater advantage of alternative forms of control? Would such forms of control help those who may have lost hope for better lives?

Many such questions require analysis by economists, scientists, law enforcement specialists, sociologists, ethicists, religious leaders and others.

In considering loosening legal controls on narcotics, we must weigh the claim that our inner cities would be devastated against the price we now pay in daily body counts from gunfire. Unthinking acceptance of the current policy is unreasonable. It is time to compile the likely results of different drug policies. Only a national commission can do this. If we are fortunate, a national debate would follow. Perhaps then we could reduce the violence, moral degradation and waste associated with drugs in a more humane, effective and cost-efficient way.

Jack B. Weinstein is a judge in Federal District Court in Brooklyn.

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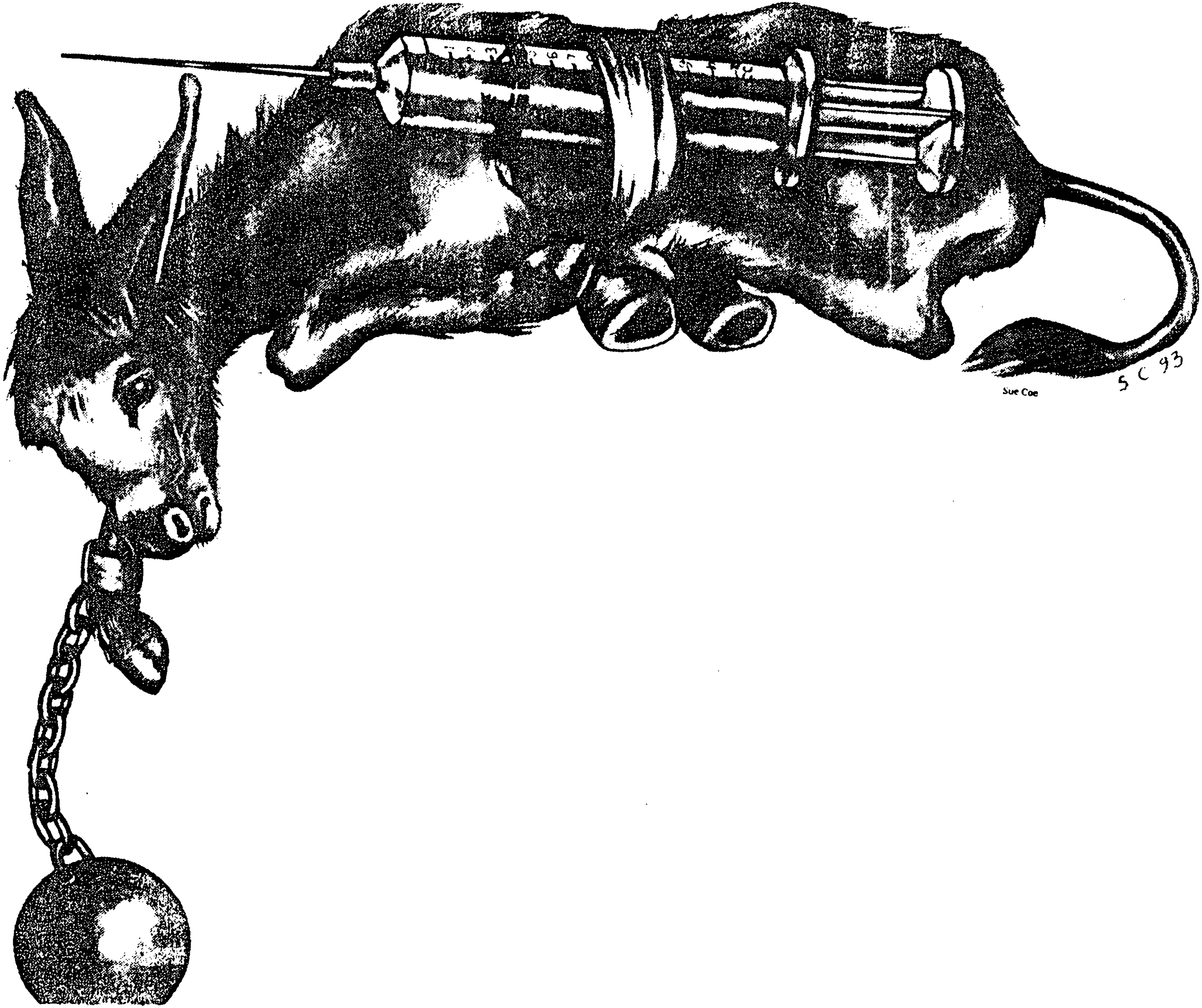

Statement of the Honorable William P. Barr

to the

Subcommittee on Crime and Criminal Justice
Committee on the Judiciary, U.S. House of Representatives

Regarding Mandatory Sentences for Federal Drug Offenders

July 28, 1993

Thank you, Mr. Chairman, for inviting me to this hearing and allowing me to share my thoughts on the issue of mandatory minimum sentences for federal drug trafficking violations. I particularly appreciate the opportunity to offer my perspective because much of the media attention given to this subject has overlooked the views of law enforcement. Perhaps today's hearing will help to remedy this situation.

My purpose in being here today is to offer my support for the mandatory minimum sentences currently included in federal drug control statutes. I firmly believe that Congress, with the strong support of both Presidents Reagan and Bush, acted appropriately when it established these penalties in the 1980's, and that mandatory sentences have contributed greatly to a major shift in attitude over the past five years concerning drug abuse.

The support I offer for these penalties stands in sharp contrast to the attacks now being waged against them. A clear impression now exists that a substantial portion of the federal prison population consists of non-violent, low-level drug abusers who have never before been convicted of a felony. The picture being painted of this supposed group is one of essentially hapless people who have been caught up in the drug war and are barely culpable of criminal wrongdoing. Moreover, it has been suggested that this large segment of the prison population is displacing the real violent criminals who are presently on the streets because of a shortage of prison beds.

This image of significant numbers of drug war "victims" sitting in federal prisons for long periods of time is simply a myth. Even a quick review of the relevant information, including available statistics, the testimony of federal law enforcement, and federal law, reveals that this image does not square with the facts.

Nearly 80% of the federal drug offenders sentenced in 1992 were either armed, recidivists or found by the court to be leaders or organizers of drug distribution networks. Of the 22% of the federal drug prisoners not fitting this description, nearly half are not incarcerated under a mandatory drug sentence. This means that less than 12% of all drug traffickers in federal prison are serving mandatory sentences and were unarmed non-leaders who had no prior convictions. It should be noted, however, that many in this 12% group could still pose a significant threat to public safety based upon other factors such a juvenile convictions and prior arrests.

These statistics would come as no surprise to federal drug agents and prosecutors. Anyone within those ranks could tell you that nearly all of the drug traffickers they encounter are not merely misguided souls making their first mistake. Rather, they focus their efforts on deadly drug distribution organizations who often view violence as simply a part of business. Indeed, federal law enforcement officials spend thousands of hours training and preparing to dismantle such enterprises.

Finally, there is no legal basis to the claim that drug offenders are displacing violent criminals from federal prisons. Here there are two points to keep in mind. First, since parole was abolished in the federal system in 1987, it is legally impossible to push violent criminals out of prison early. Second, while there has been a large number of drug offenders sent to federal prisons in recent years, there also has been an unprecedented number of violent criminals imprisoned during this same period of time. "Project Triggerlock" alone has netted over 12,000 felons using firearms in only the past two years.

Beyond these important facts about the true composition of the federal prison population, we must not lose sight of the severe threat drug abuse poses to the public's well-being. In the 1980's, Congress made the judgment that drug trafficking is a heinous act and established punishment that fits the crime. I still believe that the punishment fits the crime.

Consider all that our nation has been through over the past decade in the struggle against drugs -- the virtual devastation of neighborhoods, the destroyed lives of drug abusers, the murdered law enforcement officers and their suffering wives and children, the newborn children who have entered life as drug addicts. Add to these numbers the hundreds of brave judges, police and soldiers in Colombia, Italy and other foreign countries who have died violent deaths fighting the drug lords. The conclusion is clear. The penalties Congress established for drug distribution unquestionably match the destructive effects of the crime.

It is difficult not to conclude that those who continue to engage in drug trafficking after all that this nation has been through must possess a contumacious state of mind. In weighing the substantial risks involved against the specific business opportunity, they display a cold and calculating nature. It is obvious that such behavior is completely inconsistent with the best interests of the community in which they live.

Not only did Congress act justly in creating mandatory sentences, but it also gave federal law enforcement an extremely valuable tool for dismantling drug distribution organizations.

Thornburgh Memo - practices trying to reconcile
B/c of lack resource, then prosecutors have to make choices as to who to prosecute.
E.D.N.Y. (can't prosecute every courier)

GAO - report 85% when mms applied, applied correctly

U.S. Sentencing Comm'n

Barr - in fed. system no displacement
→ no appreciable displacement nationwide
Florida (study - inconclusive)
distinction b/t. drug & gun offenses
drugs - penetrate org.
guns - keep people from carrying guns.

Drug trafficking enterprises are highly integrated structures. Thus, law enforcement officials frequently rely upon those within the conspiracy to acquire evidence of criminal violations. Mandatory minimum sentences have proven to be a very successful tool for law enforcement in working its way up in an organization.

In conclusion, Mr. Chairman, I hope that you and your colleagues will proceed cautiously in reviewing this issue and considering any changes to the law. I have reservations about creating a safety valve which empowers the judiciary to automatically nullify a mandatory sentence. Such an exception could undermine the effectiveness of mandatory sentences as a law enforcement tool because defendants, knowing that the judge will waive the tough sentence, may claim that they cannot provide substantial assistance to the government. I trust you will weigh this concern in your future deliberations.

fair in principle and fairly implemented
egregious cases are few & far between.
people are scared of Fed. System
How important mms in fighting drug trade
prosecutors single most imp. tool.

Safety valve – discretion to judge dilute strength of mms – incentive of def. to persuade a judge not a prosecutor

Substantial Assistance
Keep the prosecutor "in the loop", prove cooperation, that person was a de minimis player.
(kids, empathetic girlfriends)
Thornburgh memo – prosecutors are trying to get " the "

Schumer
(This hearing trying to learn)

How low would you go? – judge Wilkins
pass mms – structure up or down (fear is that too much discretion would let some who deserve to be incar. off)
(only 6% / Guidelines – safety valve

Barr would oppose J. Wilkins
would not like judges to have any discretion
if so, prosecutor should have specific exemptions
- message of involvement in trafficking is not so culpable
- if AG thought there were miscarriages of justice can commute sentence

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- Safety valve – 2nd bite at apple (down road
- Wilkins – some discretion
- commission rejected – sua sponte
motion must be made by prosecutor. – fear of opening – judges not partial to mms would get a mms
- no effect

Wake Forest Law Review

THE ROLE OF CONGRESS IN SENTENCING: THE UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM SENTENCES, AND THE SEARCH FOR A CERTAIN AND EFFECTIVE SENTENCING SYSTEM

*The Honorable Orrin G. Hatch**

This article discusses the role of Congress in the federal sentencing system, reviews the creation of the United States Sentencing Commission, and examines the effectiveness of the sentencing guidelines promulgated by the Commission in meeting Congress' sentencing goals. The author, a United States Senator, also reviews the effectiveness of mandatory minimum sentences and provides an overview of ..ne alternatives to mandatory minimum sentencing, of which Congress has begun to make greater use.

INTRODUCTION

The Constitution of the United States does not exclusively assign the responsibility for federal sentencing—the function of determining the scope and extent of punishment for federal offenses—to any one of the three branches of government.[1] Still, the Constitution does assign to Congress the power to define crimes and to determine the degree and method of punishment.[2] Moreover, while the right to try offenses and impose punishment is conferred upon the judicial branch,[3] Congress has the power to limit the scope of judicial sentencing discretion.[4] If exercised appropriately, these powers provide Congress with a prominent and constructive role in federal sentencing.

* United States Senator, Utah; Ranking Republican Member, Senate Judiciary Committee; B.S. 1959, Brigham Young University; J.D. 1962, University of Pittsburgh Law School; Honorary Doctorate 1981, University of Maryland.

1. *See* Mistretta v. United States, 488 U.S. 361, 364 (1989) (Constitution does not confer complete sentencing authority upon any one branch of government).

2. The Supreme Court addressed this issue in *Ex parte* United States, 242 U.S. 27, 42 (1916). *See also* U.S. CONST. art. I, § 8, cl. 10 (specifically granting Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").

3. *See Ex parte* United States, 242 U.S. at 41-42 (stating "under our Constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial").

4. *Id.*

I. Background

Despite its power, Congress had historically exercised an only minor, indirect role in federal sentencing.[5] For almost a century, Congress delegated near-absolute discretion to the sentencing judge to determine the duration of a sentence within a customarily wide range. Within this wide range, sentencing decisions were virtually unreviewable on appeal.[6] The power of the sentencing judge grew stronger when judges were granted the power to suspend imprisonment sentences in favor of probation. In 1910, Congress delegated further sentencing power when it established the United States Parole Commission, which was charged with evaluating and setting the release date of federal prisoners.[7]

Despite such a broad assignment of sentencing power and discretion, a review of sentencing policy shows that Congress, over the years, has employed a number of methods to maintain some influence over sentencing policy. These methods include: (1) the enactment of a limited number of mandatory minimum sentences;[8] (2) requirements that sentences for certain offenses be served consecutively;[9] (3) increases in statutory maximum penalties;[10] and (4) the enactment of specialized sentencing statutes applicable to narrow classes of offenders.[11] In addition, oversight hearings[12] and "sense of the Congress resolutions"[13] have allowed for important, though less formal, input into sentencing policy.

5. For a historical overview of Congress' role in federal sentencing, *see* S. Rep. No. 225, 98th Cong., 1st Sess. 40 (1983) [hereinafter S. Rep. No. 225].

6. Review of sentences imposed was confined to two particular statutes unless the sentence was illegal. Those statutes were 18 U.S.C. § 3576, *repealed by* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (relating to dangerous special offenders) and 21 U.S.C. § 849, *repealed by* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 219, 98 Stat. 2027 (relating to dangerous special drug offenders).

7. For comments on the role of the United States Parole Commission, see 45 Cong. Rec. 6374 (1910) (remarks of Rep. Clayton).

8. For a discussion of research on mandatory minimum penalties conducted pursuant to Act of Nov. 29, 1990, Pub. L. No. 101-647, § 1703, 104 Stat. 4926, see U.S. Sentencing Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System (1991) [hereinafter Mandatory Minimum Report]. This report provided a compilation of all mandatory minimum sentencing provisions. Minimum sentences requiring life imprisonment for certain acts of piracy were enacted by Congress as early as 1790. For the current version of these statutes, see 18 U.S.C. § 1651 (1988) (regarding piracy under the Law of Nations) and § 1652 (regarding piracy by U.S. citizens).

9. *See, e.g.*, 18 U.S.C. § 924(c) (1988) (requiring an additional five-year prison sentence for using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime and providing that such a five-year sentence would be in addition to the punishment already provided for such crime).

10. *See, e.g.*, Act of Aug. 9, 1989, Pub. L. No. 101-73, § 961(b), 103 Stat. 499 (increasing the maximum term of imprisonment for bank embezzlement offenses under 18 U.S.C. § 656 from five years to 20 years).

11. *See, e.g.*, 18 U.S.C. § 4216, *repealed by* Act of Nov. 10, 1986, Pub. L. No. 99-646, § 3(a), 100 Stat. 9592 (regarding sentencing of young offenders); 18 U.S.C. § 3575, *repealed by* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (regarding increased sentences for dangerous special offenders).

12. For a discussion of the operation of congressional oversight powers, see Walter A. Oleszek, Congressional Procedures and the Policy Process 263-82 (3d ed. 1989).

13. The phrase "sense of Congress resolutions" refers to concurrent resolutions of the Congress. These resolutions are passed by both houses, but are not referred to the President for his signature and do not have the force of law. These resolutions are used to express the feeling or position of Congress on a particular issue. Congressional Quarterly's Guide to Congress 420 (Mary Cohn ed., 4th ed. 1991).

Congress' role has been limited largely because the federal system came to adopt "coercive rehabilitation"[14] as its foundation principle. According to this theory, rehabilitation of the offender represents the overwhelming consideration in sentencing.[15] Such a scheme necessarily involves a sharing of power between the sentencing judge, who is expected to sentence the defendant to a long term,[16] and the Parole Commission which is charged with setting release dates for those sufficiently rehabilitated.[17]

In 1984, after studying the rehabilitation model of punishment and its characteristic feature of indeterminate sentencing for nearly a decade, Congress concluded that the entire system was outmoded and in need of reform.[18] The system lacked the certainty necessary to inspire public confidence and operate as a meaningful deterrent to crime. These deficiencies were the product of unwarranted disparity and inconsistency in sentencing application.[19] The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was at the heart of sentencing disparity. An unjustifiable variation existed in the sentences imposed by judges on similarly situated defendants.[20] The Parole Commission compounded the problem by releasing prisoners according to its own view of the appropriate term of imprisonment.[21] In response, judges began to

14. *See* S. Rep. No. 225, *supra* note 5, at 40 (Senate Judiciary Committee discussion of coercive rehabilitation as a "theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons").

15. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 894 (1990).

16. *Id.*

17. For a discussion of the system of sentencing review established by Congress through the Parole Commission, see United States v. Addonizio, 442 U.S. 178, 188-89 (1979); *see also* Williams v. New York, 337 U.S. 241, 248 (1949) (noting that the execution of the parole system depends on the Parole Commission being able to exercise discretion).

18. *See* S. Rep. No. 225, *supra* note 5, at 38.

19. *Id.* The Senate Judiciary Committee cited several published analyses of correctional rehabilitation programs. *See, e.g.*, Robinson & Smith, *The Effectiveness of Correctional Programs*, 17 Crime & Delinq. 67 (1971); Douglas Lipton et al., Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (1975).

20. The Senate Judiciary Committee cited several studies indicating disparate practices among federal judges. S. Rep. No. 225, *supra* note 5, at 41-46. *See, e.g.*, Anthony Partridge & William B. Eldridge, The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit 1-3 (1973) (report of a sentencing experiment conducted to determine the extent of sentencing disparity wherein 50 district court judges of the Second Circuit rendered sentences on 30 presentence reports which produced significant variances in sentences).

21. S. Rep. No. 225, *supra* note 5, at 46. The Parole Commission had attempted to reduce unwarranted disparity in prison terms by utilizing parole guidelines that recommended appropriate periods of incarceration for different offenses and offender characteris-

factor into sentences the anticipated actions of the Parole Commission.[22] Despite this conflicting process and its harmful effects on the system, the judiciary, as an institution, did little to utilize its power to effect positive change. When Congress chose to act to correct a faltering sentencing system, the judiciary failed to take a leadership role in determining the course of reform legislation.[23]

II. Congress Establishes Sentencing System Goals

A. *The Sentencing Reform Act of 1984*

Beginning in the 1970's, Congress deliberately chose to assume a more active role in federal sentencing, fundamentally altering our nation's sentencing goals and practices. A bipartisan majority of Congress rejected the rehabilitation model of punishment and enacted a sweeping overhaul of the federal sentencing process. With its passage of the Sentencing Reform Act of 1984 (SRA),[24] Congress specified the objectives or purposes of sentencing, described in detail the kinds of sentences that could be imposed, and prescribed the appropriate factors to be considered in sentencing.[25] The objectives of sentencing as announced in the SRA were: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with educational or vocational training, medical care, or other correctional treatment.[26] Consistent with Congress' rejection of the rehabilitation model of punishment, rehabilitation of the offender was not listed as a primary sentencing objective. Rather, certain and effective sentencing became the primary goals of sentencing reform.

The most revolutionary aspect of the SRA was its creation of the United States Sentencing Commission (Commission), which was established as "an independent commission in the judicial branch"[27] and was charged with producing a sentencing guidelines system that would further the SRA's objectives by curtailing unwarranted sentencing disparity, ensuring certainty, and providing just punishment. Although Congress had considered and rejected strict determinate sentencing as an option,[28] the Commission viewed its mission as developing a system that would ensure that similar offenders, committing similar offenses, would be sentenced in a similar fashion.[29] To ensure adherence to this new sentencing philosophy, Congress made the guidelines compulsory[30] and abolished parole.[31] In ensuing years, Congress would maintain its adherence to the concept of binding guidelines by consistently rejecting efforts to make the guidelines more discretionary.[32]

To ensure that its goals of certain and effective punishment would be met, Congress directed many of the decisions of the Commission and enumerated specific priorities in the SRA. For example, Congress instructed the Commission to develop a series of imprisonment sentencing ranges for offenses where the maximum sentence for each range would not exceed the minimum sentence by more than the greater of six months or twenty-five percent.[33] The trial court would then set a sentence within the applicable range. While the statute provided detailed guidance, Congress recognized that decisions regarding technical and implementation matters would best be left to the Commission. Accordingly, it granted the Commission the necessary flexibility to combine the competing goals of the criminal justice system with the practical needs of administration and institutional considerations,[34] in order that implementation of the guide-

tics. It also set presumptive release dates for prisoners in order to increase certainty in sentencing. *See* 28 C.F.R. § 2.20 (1992) (regarding parole guidelines) and § 2.12 (regarding release dates).

22. The Senate found that some sentencing judges, in anticipation of the Parole Commission's response, would impose a sentence on the basis of when they believed the Parole Commission would release the defendant. S. Rep. No. 225, *supra* note 5, at 46.

23. Former Chief Judge of the U.S. Court of Appeals for the Eighth Circuit, Donald Lay, has suggested that the SRA and the resulting guidelines are the "fault" of the federal judiciary. Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 Yale L.J. 1755 (1992). As Lay observed:

> The truth is that the federal judiciary, lacking both "the sword" and "the purse," was asleep at the switch. Because sentencing had traditionally been a judicial prerogative, judges thought that no one would ever have the audacity to deprive them of sentencing discretion. More importantly—and perhaps as a result—the federal judiciary essentially ignored the problem until Congress enacted the Sentencing Reform Act, and it became too late to stop the train.

Id. at 1757.

24. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

25. 18 U.S.C. § 3553(a) (1988).

26. *Id.* § 3553(a)(2).

27. 28 U.S.C. § 991(a) (1988).

28. S. Rep. No. 225, *supra* note 5, at 67.

29. According to the Commissioners, the SRA was intended to reduce disparity in sentencing through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences. *See, e.g.*, William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990); Helen G. Corrothers, *Rights in Conflict: Fairness Issues in the Federal Sentencing Guidelines*, 26 Crim. L. Bull. 38 (1990).

30. 18 U.S.C. § 3553(b) (1988).

31. *Id.* The Parole Commission argued that parole should be retained because the Parole Commission, a small collegial body, would be better able than federal judges, to achieve the goal of eliminating unwarranted disparity. The Senate Judiciary Committee rejected this proposal for several reasons: it was at odds with the rationale of the guidelines system; it was based on the same "discredited" assumptions as the then current system; and it would have continued a degree of unfairness and uncertainty. S. Rep. No. 225, *supra* note 5, at 53-58.

32. During Congress' debate regarding a certain minor and technical amendments package to the SRA (Sentencing Reform Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266), the Senate rejected efforts on the part of the House to suggest that language be added to 18 U.S.C. § 3553(a) (1988). The additional language would have stated that the court "shall impose a sentence sufficient, but no greater than necessary, to comply with the purposes" of sentencing and would have broadened the departure standard for judges. 133 Cong. Rec. S16644-48 (daily ed. Nov. 20, 1987).

33. 28 U.S.C. § 994(b)(2) (1988 & Supp. II 1990).

34. The Commission made several compromises regarding the creation of the guide-

lines would be less complicated.[35] The guidelines became effective for offenses committed after November 1, 1987, and the constitutionality of the SRA was upheld by the United States Supreme Court in 1989.[36]

Since their introduction in Congress in 1987,[37] the sentencing guidelines have been the focus of considerable debate within the courts and the criminal justice system. Guidelines advocates and opponents continue to disagree over their merit. The effectiveness of the guidelines in accomplishing Congress' stated sentencing objectives remains somewhat in question. Furthermore, constitutional problems associated with the initial implementation of the guidelines,[38] as well as the decision to apply the guidelines only to offenses committed on or after November 1, 1987, have made a definitive study of their impact unfeasible.[39]

Currently, the guidelines are applied nationwide, with more than seventy-five percent of federal criminal defendants subject to the SRA as of December 1991.[40] While evidence exists that sentencing disparity has declined among certain selected groups of offenders,[41] it is also evident that unwarranted sentencing disparity has not been entirely eradicated by the guidelines. In addition, while many within the criminal justice system believe that the guidelines have been generally successful in meeting the goals of uniformity and just sentencing,[42] a majority of recently interviewed judges, defense attorneys, and probation officers cite significant problems with the guidelines.[43]

The Federal Courts Study Committee,[44] the General Accounting Of-

lines. These compromises arose out of the practical needs for creating an effective administration, providing for certain institutional considerations, and considering the competing goals of the criminal justice system. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

35. William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181 (1988) (discussing the effect of certain policy decisions in the guidelines).

36. *See* United States v. Mistretta, 488 U.S. 361 (1989). In *Mistretta*, the Supreme Court concluded that Congress had neither "delegated excessive power nor upset the constitutionally mandated balance of powers among the coordinated Branches" when it created the Commission. *Id.* at 412.

37. U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS (Apr. 13, 1987).

38. This issue was ultimately settled by the U.S. Supreme Court in United States v. Mistretta, 488 U.S. 361 (1989).

39. *See* GEN. ACCT. OFF. REP. TO CONG. COMMITTEES, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAINED UNANSWERED (Aug. 1992) [hereinafter GAO REPORT]; U.S. SENTENCING COMM'N REP., THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (Dec. 1991) [hereinafter COMMISSION GUIDELINES REPORT].

40. *See* GAO REPORT, *supra* note 39, at 11.

41. *See* COMMISSION GUIDELINES REPORT, *supra* note 39, at 269.

42. *See* GAO REPORT, *supra* note 39, at 13.

43. *See id.* at 148.

44. *See generally* FED. COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990) [hereinafter STUDY COMMITTEE REPORT].

fice,[45] and numerous commentators[46] have detailed problems with the guidelines, including the sentiment that the guidelines are excessively time consuming, rigid and technical in their application, and overly harsh in their effect. Indeed, the opinion that guidelines sentences are too severe may be the catalyst for other criticisms. Despite virtually unanimous support among the courts of appeals, certain sentencing practices—such as the consideration of nonconvicted and acquitted conduct—remain controversial. As well, Chief Justice Rehnquist has cited a "dramatic increase" in criminal appeals since the guidelines were imposed.[47]

Perhaps the most serious criticism of the guidelines is that their compulsory nature has given prosecutors too much leverage over defendants, thereby elbowing judges out of the sentencing process.[48] Discretionary decisions by prosecutors, regarding both charges and factual allegations, can powerfully expand or limit a judge's sentencing boundaries. This increased leverage, in turn, promotes "hidden bargaining," wherein prosecutors and defense attorneys manipulate the guidelines in order to induce pleas necessary to keep the system working.[49] The extent to which the presentencing decisions and policies promulgated by the Department of Justice have affected the sentencing system must be examined by Congress. These policies include the use of discretion in the choice of charges filed and in the plea bargaining procedure.[50] As the Commission concluded in a 1991 report on the impact of the guidelines, prosecutorial charge reductions and other bargaining affect the sentencing process in seventeen percent of cases.[51] In light of this impact, Congress must determine the extent to which presentencing decisions produce unwarranted disparity and, subsequently, whether prosecutors exercise too much power under the present guidelines system, bearing in mind the broad latitude to charge and bargain cases which prosecutors have always been afforded under the Constitution and federal statutes.

Obviously, the binding nature of the guidelines is a significant aspect of this issue. To the extent that the power of the trial court has been constrained, greater discretion is now exercised by others in the criminal law enforcement process. While some shift in power away from the court is inherent in any compulsory guidelines system, such a result does not

45. *See generally* GAO REPORT, *supra* note 39.

46. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992); Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION, Dec. 1991, at 45; G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, FED. PROBATION, Dec. 1991, at 16.

47. Address by Chief Justice William Rehnquist, American Bar Association Mid-Year Meeting (Feb. 4, 1992).

48. *See, e.g.*, Freed, *supra* note 46, at 1723.

49. GAO REPORT, *supra* note 39, at 138.

50. *See* Commission Guidelines Report, *supra* note 39, at 166.

51. *Id.*

excuse Congress from the responsibility of ensuring that the guidelines protect against undue prosecutorial influence. Supporters maintain that the guidelines provide *some* protections against prosecutorial abuse and that those protections rest with the courts and with the Attorney General.[52] Congress should review the adequacy of these protections and, where lacking, encourage remedial action by the Commission. Congress should consider all options, including, if necessary, giving judges greater flexibility in deciding the appropriate application of, and departure from, guidelines sentences.

Supporters and critics alike acknowledge that, while the guidelines have been in force for only a short time, the current system is more predictable and uniform, and thus, preferable to the pre-guidelines sentencing scheme.[53] At the same time, however, judges, scholars and bar associations call for an intensive analysis of the guidelines. Many of the problems and concerns they raise warrant examination by Congress.

B. *Increased Enactment of Mandatory Minimum Sentences*

Congress' pursuit of enhanced sentencing effectiveness through certain and objective punishment did not end with the enactment of the SRA. Congress took a second approach, as well, in the form of renewed support for mandatory minimum sentences.[54] From 1984 to 1990, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime.[55] The purpose of these mandatory penalties was to deter—through the prospect of certain and lengthy prison terms—potential offenders from engaging in these offenses. More recently, however, Congress has begun to reconsider the merit of these statutes.

In 1990, Congress formally directed the Commission to study the effectiveness of mandatory minimum sentencing. The Commission determined that, while mandatory minimums were not new to the federal criminal justice system, the enactment of mandatory minimums had historically been an occasional phenomenon aimed at special classes of offenders.[56] Since 1984, however, a decided trend toward the use of mandatory minimum penalties was underway. Responding to the nation's legitimate concerns about violent crime and drug related problems, Congress, in 1986, significantly altered sentencing policy by focusing on drug trafficking and distribution offenses and by tying the minimum penalty to

52. *See, e.g.*, William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795 (1992).

53. *See* STUDY COMMITTEE REPORT, *supra* note 44, at 136.

54. *See* MANDATORY MINIMUM REPORT, *supra* note 8, at 9.

55. *Id.* at 5.

56. Throughout the first half of this century, Congress adopted mandatory minimum sentencing provisions in somewhat of a piecemeal fashion. During this period, short prison terms were mandatory for disobeying various orders while longer sentences of one to two years were applied to a number of economic crimes. *Id.* at 9.

the *quantity* of drugs involved in the offense.[57] Congress also provided substantial mandatory sentence enhancements for the use or carrying of a firearm during a crime of violence and established mandatory minimums for certain drug offenses.[58] Congress passed additional mandatory minimums for drug offenders who sold drugs to minors[59] or who possessed certain weapons during commission of the offense.[60] In 1988, Congress cast an even larger net over drug offenses at different levels of the drug distribution chain by applying mandatory minimum penalties to conspiracies to commit certain offenses[61] and by providing a mandatory minimum of five years imprisonment for simple possession of "crack" cocaine.[62] Today, over one hundred separate federal mandatory minimum penalty provisions are operative in sixty criminal statutes.[63]

On its face, mandatory minimum sentencing appears to satisfy the sentencing objectives established under the SRA. In fact, the rationales cited by supporters of mandatory minimums include many of the sentencing objectives set forth in the SRA itself—deterrence, certainty, incapacitation, and the reduction of unwarranted sentencing disparity.[64] Despite noting the potential inconsistencies between mandatory minimum sentences and sentencing guidelines,[65] Congress has continued to pursue this method of sentencing.

Recent findings of the Commission, the Federal Courts Study Committee, and the Judicial Conference, however, have prompted a growing number of legislators to question the merit and efficacy of mandatory minimum sentences. While mandatory minimum sentences may increase the potential for severe punishment, a current lack of uniform application[66] may be dramatically undermining sentencing certainty. As the

57. *Id. See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (1988 & Supp. III 1991).

58. *See generally* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138 (1984) (codified as amended at 18 U.S.C. § 924(c) (1988)) (providing significant mandatory sentence increases for the use or carrying of a firearm during a crime of violence); *id.* § 503(a), 98 Stat. 2069 (codified as amended at 21 U.S.C. § 860 (1988)) (establishing mandatory minimum sentences for drug offenses committed near schools).

59. *See, e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1105(a), 100 Stat. 3207-11 (codified as amended at 21 U.S.C. § 859 (Supp. II 1990 & Supp. III 1991)).

60. *See, e.g.*, *id.* § 1002, 100 Stat. 3207-167 (codified as amended at 15 U.S.C. § 1245 (1988)).

61. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377.

62. 21 U.S.C. § 844 (1988 & Supp. II 1990 & Supp. III 1991).

63. MANDATORY MINIMUM REPORT, *supra* note 8, at 10.

64. The Sentencing Commission reviewed relevant legislative history, executive branch statements, and views expressed in academic literature which, in turn, identified six common rationales for mandatory minimum sentencing provisions: retribution, deterrence, incapacitation (especially for serious offenders), disparity reduction, inducement of cooperation, and inducement of pleas. *Id.* at 13.

65. *See, e.g.*, S. REP. No. 225, *supra* note 5, at 37.

66. The Commission conducted an empirical research study of the effect of mandatory minimum sentencing provisions using a variety of sources which contain sentencing data. Such sources included Commission monitoring data for fiscal year 1990 and data from a 12.5% sample survey from the Commission's files containing defendants sentenced in fiscal

Commission confirmed in its recent study of mandatory minimum sentencing, despite the expectation that mandatory minimums would be applied to all relevant cases, an inconsistent application has created substantial disparity in sentencing.[67] In addition, the Federal Courts Study Committee has determined that lengthy mandatory minimums may work to hamper federal criminal adjudication and frustrate the traditional pretrial settlement of criminal cases.[68] Of the sixty statutes containing such minimums, only four result in frequent convictions.[69]

The compatibility of the guidelines system and mandatory minimums is also in question.[70] While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner,[71] in certain fundamental respects, the general approaches of the two systems are inconsistent.[72] Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases

year 1990. *See* Mandatory Minimum Report, *supra* note 8, at 36. The Commission found that defendants whose conduct and offender characteristics appeared to warrant application of mandatory minimum sentencing provisions failed to receive those sentences approximately 41% of the time. For example, in 35% of cases in which data strongly suggested that a defendant's behavior warranted a sentence under a mandatory minimum statute, defendants pled guilty to offenses carrying non-mandatory minimum or reduced mandatory minimum provisions. *Id.* at 35-89. The lack of uniform application of mandatory minimum sentences by prosecutors is a result of discretion given to prosecutors. Congress should examine mandatory minimums to determine whether such minimums vest too much discretion in prosecutors and to what extent they are misused.

67. An empirical study conducted by the Commission determined that an increase in disparity can be produced through the use of mandatory minimums in two ways. First, an increase in disparity can be realized if similar defendants are charged and convicted pursuant to mandatory minimum provisions depending on such factors as race, circuit, and prosecutorial practices. Second, if defendants who appear to be different with respect to distinguishing characteristics receive similar reductions in sentences below the mandatory minimum provisions disparity will increase. *Id.* at 89.

68. Study Committee Report, *supra* note 44, at 134.

69. Although there are over 60 federal mandatory minimum sentencing provisions, only four statutes (which involve drug and weapons offenses) are used with any regularity. Mandatory Minimum Report, *supra* note 8, at 89.

70. *See, e.g.*, Crime Control Act of 1990, Pub. L. No. 101-647, § 1703(b), 104 Stat. 4789, 4845-46.

71. In developing the guidelines, the Commission determined that when sentencing drug offenders, mandatory minimum penalties would serve as starting points for determining the base offense level. This was decided despite the fact that this structure defeated the mitigation scheme of the guidelines for less serious cases. Mandatory Minimum Report, *supra* note 8, at 29.

72. While both sentencing guidelines and mandatory minimums have common objectives, they are structurally and functionally at odds with each other and with the SRA's goals for three reasons: (1) mandatory minimums are wholly dependent on defendants being charged and convicted of the specified offense, while the guidelines adopt a modified real offense system; (2) mandatory minimums are not proportionate sentences, while the guidelines are; and (3) mandatory minimums employ a narrow approach to sentences, while the guidelines provide a degree of individualization. *Id.* at 26.

in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts. In view of these distinctions, the Judicial Conference[73] and the Federal Courts Study Committee[74] concluded that mandatory minimum sentences were more rigid than the guidelines and, thus, were inconsistent with the sentencing goals adopted by Congress under the SRA. Moreover, as the Study Committee suggested, the impact of mandatory minimum sentences on the guidelines system and on individual cases has yet to be fully realized.[75]

III. New Avenues for Accomplishing Sentencing Goals

Congress, in its continuing pursuit of uniform, certain, and effective sentencing, has lately begun to reevaluate its use of mandatory minimum sentences as a means of shaping sentencing policy. A growing tendency exists among those members of Congress most familiar with the criminal justice system to seek alternatives that are more compatible with the sentencing guidelines and with the purposes of sentencing articulated in the SRA.[76]

The Commission, in its report on mandatory minimum sentences, noted several alternative sentencing methods,[77] methods that Congress has used to varying degrees in recent years. Consistent with the Commission's findings, I believe Congress should seriously consider greater use of these alternatives which include: specific statutory directives, general directives, and increased statutory maximums. In my view, Congress should also make greater use of its oversight powers to review legitimate proposals aimed at furthering the sentencing objectives established in the SRA.

73. Report of the Proceedings of the Judicial Conference of the United States (September 23-24, 1991).

74. *See* Study Committee Report, *supra* note 44, at 133-34.

75. *Id.* at 134.

76. For example, in 1990, Congress passed the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789. Earlier versions of that Act contained several new mandatory minimum sentencing proposals. However, the enacted bill contained only one new mandatory minimum sentence for continuing financial crimes enterprises. *See* 18 U.S.C. § 225 (Supp. III 1991) (establishing that a party convicted of committing a continuing financial crimes enterprise shall be fined not more than a fixed sum and be imprisoned not less than ten years and which may be life). In addition, 1991 saw each house of Congress pass their own omnibus crime bills. The Senate version of the bill contained nearly two dozen new mandatory minimum proposals. S. 1241, 102d Cong., 1st Sess. (1991). The conference report to the House and Senate bills, which failed to pass the Senate for reasons generally unrelated to sentencing policy, contained only three new mandatory minimum sentences. H.R. 3371, 102d Cong., 1st Sess. (1991).

77. Mandatory Minimum Report, *supra* note 8, at 118.

A. *Specific Statutory Directives*

In recent years, Congress has made increased use of specific statutory directives to the Commission to set forth desired guidelines amendments.[78] In 1990, for example, Congress instructed the Commission to set the minimum guideline offense level for bank fraud convictions where the defendant derives more than $1 million in gross receipts at twenty-four.[79] That same year, rather than enact a mandatory minimum penalty previously passed by the Senate, Congress instructed the Commission through a specific directive to increase by two offense levels the offense level for drug offenses involving minors.[80]

Specific directives allow Congress to implement a desired penalty enhancement for targeted offenses and still achieve some measure of uniformity. As well, such directives enable the Commission to integrate the congressionally desired penalty into the guidelines structure. In effect, this approach permits meaningful distinctions to be made among defendants based on their role in the offense, their criminal history, their acceptance of responsibility, and other pertinent factors. Furthermore, the integration of congressional directives into the guidelines gives the courts a degree of flexibility, permitting departure from the guidelines on those rare occasions where certain, unusual mitigating factors are found to exist.

B. *General Directives*

In addition to specific directives, Congress has begun to make greater use of general directives to instruct the Commission to review current sentencing practices for specific offenses and provide more substantial penalties where warranted.[81] For example, Congress recently instructed the Commission to consider the appropriateness of the existing fraud guidelines and to enhance the guidelines where warranted.[82] As with specific directives, general directives permit formal congressional input into the guidelines structure, while still deferring to the independence and expertise of the Commission in addressing the finer points of sentencing policy formulation.

78. Since passage of the SRA, Congress has enacted ten additional instructions to the Commission regarding desired amendments to the guidelines, seven of which are specific in nature. *Id.* at 121.

79. Crime Control Act of 1990 Pub. L. No. 101-647, § 2507, 104 Stat. 4862. A level twenty-four offense carries a minimum prison term of fifty-one to sixty-three months for a first-time offender.

80. *Id.*

81. After the guidelines were promulgated and implementation had begun, Congress began providing more flexible guidelines instructions to the Commission. Congress directed the Commission to study and, in some cases, increase the penalties for guidelines regarding fraud, criminal conduct substantially jeopardizing the safety and soundness of federally insured financial institutions, and sexual crimes against children. MANDATORY MINIMUM REPORT, *supra* note 8, at 121.

82. *See* Pub. L. No. 100-700, § 2(b), 102 Stat. 4632 (1988).

C. *Increased Maximum Sentences and Legislative History*

A third recommended alternative involves congressional changes in statutory maximum sentences, accompanied by expressions of congressional intent for guidelines responses.[83] Again, such legislation allows congressional input in the sentencing system, while affording the Commission the necessary latitude to integrate the statutory penalty changes into the guidelines structure.

D. *Diligent Oversight*

Finally, Congress can continue to promote uniformity and certainty in punishment through proper oversight of the Commission's activities. Continued study and review of proposed guidelines amendments promulgated by the Commission is critical if Congress wishes to ensure that the goals established in 1984 are met. As an example of such oversight, guidelines amendments promulgated in 1991 contained a proposal to lower the offense level for crimes related to the receipt of child pornography. Although the amendment took effect, Congress disapproved. The amendment was quickly superseded by a corrective amendment implementing a congressional directive.

Several key criminal justice issues will confront Congress and the Commission in the next several years, not the least important of which is the membership of the Commission itself. Other issues affecting sentencing and Commission activity will be closely scrutinized. Congress and the Commission must acknowledge their differing views on specific aspects of sentencing policy and must discuss these views candidly. As well, the Commission should renew and analyze serious proposals intended to improve the guidelines. Congress should closely review the Commission's actions and remain open to the Commission's consideration of alternative views.

In reaching informed decisions, Congress should make more active use of the growing volume of empirical data and related research that has been accumulated by the Commission pursuant to its statutory mission. Other bodies, such as the Judicial Conference, offer equally rich sources of data which Congress should utilize to educate itself, and in turn, to educate the public. In the past, some legislators have sought to develop sentencing policy based on anecdotal information; however, Congress cannot now ignore the available wealth of data describing the application of the guidelines to actual cases. As the ultimate architects of a sentencing policy that affects the liberty interests of defendants and the lives of all citizens, congressional policy makers must take advantage of the most current and complete information available when making legislative decisions. Whenever possible, Congress should call upon those with relevant empirical research information, encouraging those most knowledgeable of

83. The Commission has issued guidelines amendments in response to a number of legislative enactments that increased the statutory maximum fine, term of imprisonment, or other penalties for different offenses. MANDATORY MINIMUM REPORT, *supra* note 8, at 119.

and most involved with the guidelines—judges, prosecutors, practitioners, and the Commission—to express their views.

As a final recommendation, Congress should carefully study and monitor the effects of the guidelines' compulsory nature. While Congress has ordained that sentences be imposed according to the recommendations in the guidelines, it has not intended that the guidelines be imposed in an overly mechanistic fashion.[84] Many of the guidelines' problems, including their perceived rigidity and their facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature. Congress must review whether these problems can be appropriately remedied within a compulsory guidelines system. If not, Congress should consider whether uniform and predictable sentencing can alternatively be accomplished through a more general guidelines system that identifies presumptive sentences. In other words, Congress may need to examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.

Conclusion

Over the last decade, Congress has assumed a more active role in the federal sentencing system and should continue to do so. Inherent in this role is the responsibility to analyze the effectiveness of sentencing guidelines, to conduct a broad examination of their deficiencies, and to suggest necessary improvements. While mandatory minimum sentences yet remain within the legislature's power and prerogative, Congress should continue to assess the merit of these measures in advancing the objectives of sentencing established in the SRA. In its pursuit of a certain and effective sentencing system, Congress must continue to study these sentencing approaches, seeking a broad spectrum of input. Yet, Congress must not allow itself to lose sight of its principal constituency—the law abiding citizen whose confidence in our criminal justice system must be restored and maintained.

84. S. Rep. No. 225, *supra* note 5, at 52.

RETHINKING MANDATORY MINIMUMS

*Stephen J. Schulhofer**

At long last, the time may be ripe for congressional reexamination of mandatory minimum sentencing statutes. Despite persistent criticism of mandatories,[1] change has seemed unthinkable because of strong public support for long sentences and the assumption that flaws in the concept of mandatories are too complex to be explained to voters. Senator Orrin Hatch's thoughtful contribution to this symposium[2] suggests that the tide may be turning. Although Senator Hatch does not commit himself to the repeal of mandatories, he notes many of their major faults and calls for a complete reexamination of the issue of mandatory minimum sentencing.

In this comment, I respond to Senator Hatch's call by offering an overview of what is currently known about the administration of mandatory minimum sentences in the federal system. Unlike many judicial and academic critics, I will not assume that the goals of mandatories are inherently objectionable or that the statutes were ill-conceived from the start. Mandatories have had strong bipartisan support in Congress, and during the last presidential campaign they were endorsed by then-Attorney General William Barr and by the presidential and vice-presidential candidates of both major parties.[3] I take these endorsements seriously and assess mandatories primarily from the perspective of those who subscribe to their basic goals.

Although some element of symbolic politics has no doubt played a role in congressional support for (or unwillingness to oppose) long mandatory sentences, support for mandatories also reflects real and important policy objectives. Frustrated with the persistence of violent crime and a spreading drug problem during the 1970's and 1980's, Congress saw uncertain and inadequate penalties as partly to blame.[4] It concluded that

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1. *See, e.g.*, Federal Courts Study Committee, Report 133-34 (Apr. 2, 1990). *See also* American Bar Ass'n, Standards for Criminal Justice, ch. 18, §18-2.1(c) & cmts. 18.25-18.33 (2d ed. 1980).

2. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185 (1993).

3. *See, e.g.*, *The McNeil/Lehrer News Hour* (Sept. 10, 1992); *1992 Republican Platform: The Vision Shared: Uniting Our Family, Our Country, Our World*, Daily Rep. for Executives, Aug. 18, 1992 (approved by Republican Nat'l Convention, Aug. 17, 1992); Clarence Page, *Clinton-Gore's Suburban Ticket*, Chi. Trib., July 12, 1992, § 4, at 3.

4. H.R. Rep. No. 1030, 98th Cong., 2d Sess. 38-40 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3221-23.

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Crime
and Criminal Justice
Committee on the Judiciary
House of Representatives

For Release on Delivery
Expected at
10 a.m., EDT
Wednesday,
July 28, 1993

MANDATORY MINIMUM SENTENCES

Are They Being Imposed and Who is Receiving Them?

Statement of Henry R. Wray
Director
Administration of Justice Issues

GAO/T-GGD-93-40

GAO Form 160 (12/91)
OPR:OIMC/PCC

MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM?

SUMMARY STATEMENT OF HENRY R. WRAY
DIRECTOR, ADMINISTRATION OF JUSTICE ISSUES
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At the Subcommittee's request, GAO has reviewed certain issues associated with statutes carrying mandatory minimum sentences, as well as the imposition of federal sentencing guidelines. Since enactment of the statutes, questions have been raised about mandatory minimum sentences, including whether they are being imposed where required, who is receiving them, and their relationship to the sentencing guidelines.

GAO reviewed 900 cases in 8 judicial districts. In 595 of these cases, the offender was convicted of an offense involving drugs and/or firearms carrying a mandatory minimum sentence. In the cases GAO reviewed, 85 percent of the offenders convicted of violating mandatory minimum statutes received at least the statutory minimum sentence. In the remaining cases, the sentence imposed was less than the mandatory minimum as a result of a substantial assistance motion being filed by the prosecution and a corresponding departure granted by the judge. The frequency both with which substantial assistance motions were filed and departures granted varied among the districts.

Several factors can influence whether mandatory minimum charges are brought in specific cases, such as the quality of the evidence and plea bargaining agreements to reduce workload. In addition, district charging practices and policies, including not charging couriers, limiting the amount of drugs on which the prosecution was based, and prosecution thresholds above the mandatory minimum amount of drugs, influenced whether mandatory minimum charges were pursued against certain categories of defendants.

Offenders convicted of offenses carrying mandatory minimum sentences are to be sentenced under the federal sentencing guidelines, unless the guidelines sentence would be lower than the statutory minimum. In the drug cases GAO reviewed the mandatory minimum sentence was higher 5 percent of the time. In approximately 70 percent of the drug cases, the guidelines sentencing range was longer than the mandatory minimum and was the sentence imposed.

Offenders receiving mandatory minimum sentences in the eight districts GAO reviewed had several common characteristics. In all districts the majority were male and between the ages of 21 and 40. In four districts, the majority were first-time offenders, although in one district almost 80 percent were repeat offenders. In five districts hispanics were most frequently represented, in two districts blacks, in one district whites.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the results of our work for this subcommittee on mandatory minimum sentences.[1] At your request we reviewed

-- whether offenders convicted of crimes carrying a mandatory minimum sentence received that sentence;

-- how local prosecutorial practices influenced mandatory minimum charging decisions;

-- the relationship between the federal sentencing guidelines and mandatory minimums sentences; and

-- race, gender, age, criminal history, and education characteristics of offenders receiving mandatory minimum sentences.

We reviewed 900 selected cases in 8 judicial districts in which defendants were convicted of a federal offense and, according to arrest records, the potential existed for a charge carrying a mandatory minimum sentence. Specifically, we selected cases

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[1]Mandatory minimum sentences are those for which a minimum period of incarceration is specified by statute. For defendants convicted under statutes containing mandatory minimum provisions, judges are required to impose a period of imprisonment not less than the minimum number of years specified. These defendants cannot receive probation or suspended sentences.

where the offender was arrested for an offense involving either a mandatory minimum amount of drugs or the presence of a firearm.[2] In 595 of the cases, the offender was convicted of an offense carrying a mandatory minimum sentence. In the remaining 305 cases the offender was convicted under a statute not carrying a mandatory minimum.

BACKGROUND

Traditionally, Congress has established in statute broad sentencing ranges for specific crimes. Judges then imposed a sentence within the statutory range. Judges had wide discretion to sentence in accordance with their own theories of justice and rehabilitation. However, with enactment of the Sentencing Reform Act of 1984, Congress made fundamental changes to federal sentencing policy in an attempt to bring more certainty to (1) sentences and to (2) reduce sentencing disparity. The act created the United States Sentencing Commission and required it to develop a system of sentencing guidelines.

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[2]These 900 cases represent all cases that met these criteria during the randomly selected months of February, May, September, and October 1990. The eight judicial districts we selected the cases from were the eastern district of New York (EDNY), the southern district of New York (SDNY), the southern district of Florida (SDFL), the southern district of Texas (SDTX), the central district of California (CDCA), the southern district of California (SDCA), the northern district of Illinois (NDIL), and the district of Nebraska (NEB). The results of our work apply only to those cases we reviewed. They are not generalizable to other cases in the eight districts, nor to all districts nationally.

In 1984 and subsequent years, growing concern over drug use and associated crime also led Congress to enact mandatory minimum sentences as a way to get tough on drug crimes and as a means of meting out sure and certain punishment. Mandatory minimum sentences were intended to send to those involved in violence and drug activities a different message that convictions under those statutes will result in specific periods of incarceration.

Most Frequently Imposed Mandatory Minimum Sentences

As of December 31, 1991, there were about 100 federal mandatory minimum penalty provisions included under 60 different criminal statutes, dating back to the 18th century. However, four recently-enacted statutes dealing with drugs and firearms account for more than 90 percent of all mandatory minimum convictions. These four statutes encompass the following offenses:

-- Manufacturing or distributing controlled substances: conviction under 21 U.S.C. 841 carries minimum sentences of 5, 10, 20 years, or life imprisonment, depending upon the quantity of drugs involved, whether death or serious bodily injury occurred, and whether the offender has previous convictions under this or other statutes.

-- Possessing a mixture containing a cocaine base: conviction under 21 U.S.C. 844 carries a sentence of not less than 5 or more than 20 years for amounts exceeding 5 grams if this is the offender's first conviction under the statute, and for lesser amounts if the offender has previous convictions under the statute.

-- Importing/exporting controlled substances: conviction under 21 U.S.C. 960 carries minimum sentences of not less than 5, 10, 20 years, or life imprisonment, depending upon the quantity of drugs involved, whether death or serious bodily injury occurred, and whether the offender has previous convictions under this or other statutes.

-- Using or carrying a firearm during certain drug or violent crimes: conviction under 18 U.S.C. 924(c) carries a mandatory minimum sentence of 5, 10, 20, 30 years or life imprisonment depending upon the type of firearm involved and whether the offender has previous convictions under this statute.

MANDATORY MINIMUM SENTENCES IMPOSED WHEN WARRANTED BY CONVICTION

Our review of the 595 cases in our sample in which the offender was convicted of violating a statute carrying a mandatory minimum sentence showed that the defendant was generally sentenced to at least the mandatory minimum amount of prison time. The exceptions were cases in which the prosecution filed a motion for a lesser sentence based on the defendant providing substantial assistance in the investigation or prosecution of another party, and the judge agreed to depart from the mandatory minimum sentence.

The substantial assistance motion allows departure from both drug and firearm mandatory minimum sentences.[3] The impact of a substantial assistance motion on the length of sentence can be significant because it eliminates any statutory or guideline sentencing requirements. However, judges are not required to sentence below the mandatory minimum if a substantial assistance motion is filed.

In every district, prosecutors filed motions for substantial assistance--allowing judges to sentence below the mandatory minimum. All 104 of the substantial assistance motions in the cases we reviewed were part of plea bargaining agreements. In 91 of these cases, the sentence imposed was below the mandatory minimum.

[3]All substantial assistance motions in our sample involved drug offenses.

Views on Substantial Assistance Motions Differed

How prosecutors viewed substantial assistance varied in the districts we reviewed, as did the number of departures granted. According to prosecutors in the southern district of New York, they are "generous" with substantial assistance motions. Conversely, motions for substantial assistance occur less frequently in the central district of California. In this district, a substantial assistance motion requires the defendant's full cooperation, willingness to testify before a grand jury or any other trial jury, provision of information leading to other significant offenders, and admission of culpability in the offense.

In most of our cases, judges were receptive to motions for substantial assistance. In seven out of eight districts, judges departed from the mandatory minimum sentence for most or all defendants who received a substantial assistance motion. In contrast, in the northern district of Illinois judges did not depart from a mandatory minimum for 8 out of 17, or almost half, of the defendants for whom substantial assistance motions were filed. District specific results on substantial assistance are detailed in table I.1 in the appendix.

DISTRICT POLICIES AND PRACTICES INFLUENCED CHARGING DECISIONS

In 305 of the 900 cases we reviewed, the defendants were not convicted of charges carrying mandatory minimums. In 198 of the 305 cases, charges carrying mandatory sentences were originally filed but later dropped, and the defendant was convicted under a statute without a mandatory minimum provision. In the remaining 107 cases, no mandatory minimum charge was ever brought. Most of the charges dropped, reduced, or never filed were drug charges. Tables I.2 and I.3 in the appendix provide a district breakout of these cases and illustrate the type of charges either dropped/reduced or never filed.

Prosecutors consider many factors in making charging decisions. On the basis of the information in the case files we reviewed, we were unable to determine for individual cases why a mandatory minimum charge was dropped, reduced, or never brought. According to Justice officials, key concerns that may result in mandatory minimum charges not being pursued in specific cases include the quality of the evidence, district workload, and the relationship of the particular case to the prosecution of other more important cases.

We did identify several district charging policies and practices that influenced decisions whether to pursue mandatory minimum convictions against certain categories of defendants.

Couriers

The eastern district of New York had a large number of drug cases involving couriers who are apprehended at J.F.K International Airport with drug amounts that indicated a mandatory minimum violation. However, the district's general policy was to charge couriers under a statute that did not carry a mandatory minimum sentence.

According to district prosecutors there were three reasons why they generally did not charge these couriers under mandatory minimum statutes:

-- Resources are limited, i.e., with the number of drug courier cases in the eastern district of New York if prosecutors were to charge them with mandatory minimum drug amounts and increase the number of cases going to trial the court would be overwhelmed;

-- Most couriers have limited culpability; and

-- Judges in the district generally disliked sentencing such low-level offenders to mandatory minimums.

"Limiting Proof"

In the southern district of Texas we found that some plea agreements included the practice of "limiting proof" or limiting the evidence to be considered in prosecuting a case. This often had the effect of reducing the amount of drugs on which the sentence is based. According to a senior prosecutor in the district, limiting proof was originally used to avoid mandatory minimums because of the belief that the sentences were too severe. Prosecutors also limited proof to expedite case disposition and to account for their lack of confidence in the technique used to determine drug amounts.[4]

In October 1991, the U.S. Attorney's office in the southern district of Texas eliminated the practice of limiting proof as a means of avoiding mandatory minimum sentences. Other practices aimed at avoiding or reducing mandatory minimum charges--such as dividing the "load" between codefendants in order to reduce the criminal exposure of each, dismissing the mandatory minimum gun

[4]According to a senior prosecutor in the southern district of Texas, DEA's weighing technique relies on a sampling method for the quantity of drugs and the quantity of packaging.

count to secure a plea, or refraining from seeking an enhancement that is readily provable--were also eliminated.[5]

Alternative Charges Brought

Prosecutors in the central and southern districts of California stated that they sometimes avoided drug mandatory minimums by charging defendants under 21 U.S.C. 843(b) for use of a communication facility (usually a telephone) with intent to commit a drug offense.[6] For example, in some instances the charge was used for low-level defendants in cases where higher level defendants had been convicted. According to prosecutors, this expedited the prosecution of the lower level defendants and allowed them to focus on more significant cases.

Prosecutive Thresholds

Prosecutive guidelines generally govern the types, level, and severity of cases a U.S. Attorney's office will prosecute or decline to prosecute. We found that some U.S. Attorneys' offices

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[5]18 U.S.C. 924(c) is an example of a statute that operates as an enhancement. If a conviction is obtained for both the underlying offense and section 924(c), the 924(c) penalty must be made consecutive to the sentence for the underlying offense.

[6]The relevant sentencing guideline was amended as of November 1, 1990, to take into account the severity of the underlying drug offense committed, thus exposing the defendant to a higher sentence. Our sample of defendants were all sentenced prior to the amendment date.

had declination policies that established drug thresholds for prosecution that exceeded mandatory minimum amounts. Accordingly, they have declined to prosecute cases involving a mandatory minimum amount of drugs. In addition, federal investigators told us that some cases involving a mandatory minimum amount of drugs may not have been referred for federal prosecution if the agent knew the amount of drugs involved is below the threshold for prosecution in a particular district.

Five of the eight districts we reviewed had established prosecutive guidelines based on specific drug amounts. Of these five districts, three had declination policies with drug thresholds for some drugs that were higher than the mandatory minimum threshold drug amounts. Prosecutors in some districts said that their case acceptance policies were based primarily on resource considerations. Prosecutors said that the acceptance criteria were viewed as guidelines and were adhered to only generally. If a case was not prosecuted at the federal level, it may have been prosecuted in state court. However, it was not possible for us to determine how frequently cases were referred to the states for prosecution.

GUIDELINES SENTENCES VERSUS

MANDATORY MINIMUMS

The Sentencing Reform Act of 1984 required the United States Sentencing Commission to develop sentencing guidelines that apply to defendants convicted of offenses occurring on or after November 1, 1987. Under the statute, all sentencing decisions for convicted felons must comply with the sentencing guidelines. The guidelines required that sentencing should be neutral as to race, gender, creed, national origin, and socioeconomic profile of offenders, while taking into account the nature of the circumstances of the offense and the criminal history of the offender.

While the Commission was compiling data and calculating guidelines, Congress enacted additional statutes requiring mandatory minimum sentences for certain drug and firearms violations. The Commission used mandatory minimums to "anchor" the guidelines for drug offenses. Where Congress enacted a N.B. mandatory minimum for a specific drug amount, the Commission set the guidelines for similar offenses at a base offense level that reflected the minimum sentence established in the statute.

When a defendant is convicted under a statute that carries a mandatory minimum sentence that exceeds the guidelines sentencing range (after any adjustments, e.g. for role in offense), the mandatory minimum becomes the sentence to be imposed.

In the 595 mandatory minimum cases we reviewed, 573 were for drug related offenses. In 402 of these cases (70 percent), the offender's minimum guidelines sentence was higher than the statutory minimum. In 142 of the cases (25 percent), the guidelines sentence range included the mandatory minimum. In only 5 percent of these cases was the mandatory minimum sentence imposed higher than the maximum guidelines sentence. This finding also varied by district; district-specific results are provided in table I.4 in the appendix.

Drug offenders convicted under statutes carrying a 60-month mandatory minimum who did not receive a substantial assistance departure were sentenced to an average of 81 months. For those convicted under statutes with a 120-month mandatory minimum, the average sentence was 167 months. Table I.5 in the appendix provides a district breakdown of the offenders in each category and the average sentences.

OFFENDER PROFILES

Offenders receiving mandatory minimum sentences in the eight districts we reviewed had several common characteristics. In all districts they were most frequently male and between the ages of

21 and 40. In four districts the majority were first-time offenders, although in one district almost 80 percent were repeat offenders. In five districts Hispanics were most frequently represented, in two districts blacks, in one district whites. Most offenders had less than a high school education. As with other findings in this report, in many cases this profile varied by district. Table 1 provides an overview of the offenders in the cases we reviewed. Tables I.6-I.11 in the appendix provide offender data by district.

Table 1: Overview of Offenders[a]

Characteristic		Number of Offenders	Percentage of Offenders[b]
Gender:	Male	516	87
	Female	78	13
Race:	Black	144	24
	White	120	20
	Hispanic	316	53
	Other	14	2
Age:	< 21	17	3
	21 - 30	214	36
	31 - 40	211	35
	41 - 50	120	20
	> 50	33	6
Education:	< High School	301	51
	High School	122	21
	> High School	164	28
HISTORY OF SUBSTANCE ABUSE:	Drugs	145	24
	Alcohol	53	9

[a]Not all attributes could be determined for all offenders.

[b]Percentages do not add due to rounding.

CONCLUSIONS

In summary Mr. Chairman, we found that when an offender was convicted under a statute that carried a mandatory minimum sentence, the judge generally imposed at least that sentence.

Offenders in our cases convicted of offenses carrying a mandatory minimum sentence of 60 months received an average of 87 months. For those convicted of 120-month mandatory minimums, the average sentence was 164 months.

The exceptions were cases where the judge granted a departure for substantial assistance. Different district interpretations on what constituted substantial assistance influenced how often substantial assistance departures were requested by the prosecution in individual districts. In some districts we reviewed, the requirements were stringent, in others liberal.

We identified several district prosecutorial policies and practices that influenced whether mandatory minimum charges were pursued against certain categories of offenders. These included a policy not to charge certain drug couriers in one district and district prosecutive thresholds for certain drugs that were higher than the mandatory minimum threshold.

All offenders are to be sentenced under the federal sentencing guidelines. In those cases where the maximum guidelines sentence would be lower than the statutory minimum, the mandatory minimum becomes the guidelines sentence and is the sentence to be imposed. This happened 5 percent of the time for the drug cases we reviewed. In approximately 70 percent of the drug cases carrying mandatory minimums sentences that we reviewed, the guidelines sentencing range was longer than the mandatory minimum and consequently was the sentence imposed.

That concludes my statement Mr. Chairman. We would be happy to respond to any questions.

DISTRICT-SPECIFIC ANALYSIS RESULTS

Table I.1: Substantial Assistance Motions and Departures

District	Defendants Convicted Under Mandatory Minimum Statutes	Substantial Assistance Motions Filed	Offenders Sentenced Below the Mandatory Minimum
EDNY	74	14	14
SDNY	79	17	17
SDFL	155	15	14
SDTX	89	14	11
CDCA	81	8	8
SDCA	52	15	14
NDIL	54	17	9
NEB	11	4	4
Total	595	104	91

Table I.2: Mandatory Minimum Charges Not Pursued

District	Number of Defendants (Total)	Defendants with Mandatory Minimum Charges Not Filed	Defendants with Mandatory Minimum Charges Dropped or Reduced
EDNY	125	72	53
SDNY	25	7	18
SDFL	5	1	4
SDTX	57	7	50
CDCA	15	7	8
SDCA	66	11	55
NDIL	4	0	4
NEB	8	2	6
Overall	305	107	198

APPENDIX

Table I.3: Offenders With Mandatory Minimum Charges Dropped/Reduced or Not Filed by Offense Type[a]

District	Drug Charges		Firearms Charges[b]	
	Dropped/ Reduced	Not Filed	Dropped/ Reduced	Not Filed
EDNY	50	68	3	4
SDNY	17	6	1	1
SDFL	4	1	0	0
SDTX	43	1	7	6
CDCA	5	0	3	7
SDCA	50	8	5	3
NDIL	4	0	0	0
NEB	4	2	2	0
Overall	178	86	21	21

[a]An offender may have had more than one charge dropped/reduced or not filed.

[b]Eight offenders with firearms charges dropped/reduced also had drug charges dropped/reduced.

Table I.4: Guidelines Versus Mandatory Minimum Sentences

Drug Offenses Only

District	Total Offenders (Number)	Minimum Guidelines Sentence More Than Mandatory Minimum	Guidelines Sentence Range Included Mandatory Minimum	Maximum Guidelines Sentence Less Than Mandatory Minimum
EDNY	70	46 (66%)	18 (26%)	6 (9%)
SDNY	77	61 (79%)	14 (18%)	2 (3%)
SDFL	155	102 (66%)	46 (30%)	7 (5%)
SDTX	86	60 (70%)	21 (24%)	5 (6%)
CDCA	74	57 (77%)	14 (19%)	3 (4%)
SDCA	49	34 (69%)	11 (22%)	4 (8%)
NDIL	52	36 (69%)	15 (29%)	1 (2%)
NEB	10	6 (60%)	3 (30%)	1 (10%)
Overall	573	403 (70%)	142 (25%)	28 (5%)

Table I.5: Average Sentences for Mandatory Minimum Drug Defendants with No Departure for Substantial Assistance.

District	60-Month Mandatory Minimum Convictions		120-Month Mandatory Minimum Convictions	
	Offenders (Number)	Average Sentence Imposed (Months)	Offenders (Number)	Average Sentence Imposed (Months)
EDNY	41	87	15	130
SDNY	38	83	22	160
SDFL	75	68	58	179
SDTX	49	86	21	167
CDCA	17	86	47	162
SDCA	18	85	16	165
NDIL	25	86	10	177
NEB	2	101	4	190
Overall	265	81	193	167

APPENDIX

Table I.6: District Analysis of Offenders By Racial Category

District	Total Number of Offenders	White Offenders	Black Offenders	Hispanic Offenders	Other[a]
EDNY	74	13	20	34	7
SDNY	79	4	28	43	3
SDFL	155	25	28	102	0
SDTX	89	16	6	67	0
CDCA	81	15	37	26	3
SDCA	52	28	3	21	0.
NDIL	54	15	16	23	0
NEB	11	4	6	0	1
Overall	595	120	144	316	14

[a]Other = Native American, Asian, and all others.

Table I.7: District Analysis of Offenders by Gender

District	Total Number of Offenders	Male Offenders	Female Offenders
EDNY	74	68 (92%)	6 (8%)
SDNY	79	73 (92%)	6 (8%)
SDFL	155	125 (81%)	30 (19%)
SDTX[a]	89	81 (91%)	7 (9%)
CDCA	81	65 (80%)	16 (20%)
SDCA	52	47 (90%)	5 (90%)
NDIL	54	46 (85%)	8 (15%)
NEB	11	11 (100%)	0 (0%)
Overall	595	516 (87%)	78 (13%)

[a]Gender could not be determined for one offender.

Table I.8: Offender Criminal History

District	Total Offenders	First Time Offenders	Repeat Offenders		
			Drugs	Gun	Other
EDNY	74	55	5	7	7
SDNY	79	56	14	4	5
SDFL	155	123	21	8	3
SDTX	89	44	20	3	22
CDCA	81	41	13	9	18
SDCA	52	16	11	2	23
NDIL	54	27	17	7	3
NEB	11	3	2	1	5
Overall	595	365	103	41	86

APPENDIX

Table I.9: Offender Age

District	Total Offenders (Number)	Age				
		<21	21-30	31-40	41-50	>50
EDNY	74	1 (1%)	26 (35%)	34 (46%)	9 (12%)	4 (5%)
SDNY	79	5 (6%)	35 (44%)	25 (32%)	12 (15%)	2 (3%)
SDFL	155	3 (2%)	43 (30%)	49 (32%)	41 (26%)	19 (12%)
SDTX	89	3 (3%)	36 (28%)	29 (33%)	18 (20%)	3 (3%)
CDCA	81	3 (4%)	30 (37%)	34 (42%)	12 (15%)	2 (3%)
SDCA	52	0	21 (40%)	15 (29%)	14 (27%)	2 (4%)
NDIL	54	2 (4%)	16 (30%)	22 (41%)	13 (24%)	1 (2%)
NEB	11	0	7 (64%)	3 (27%)	1 (9%)	0
Overall	595	17	214	211	120	33

APPENDIX

Table I.10: Offender Education Level

District	Offenders (Number)	<High School	High School Graduate	>High School	Don't Know
EDNY	74	36 (49%)	11 (15%)	27 (36%)	0 (0%)
SDNY	79	50 (63%)	11 (14%)	16 (20%)	2 (3%)
SDFL	155	68 (44%)	36 (23%)	50 (32%)	1 (1%)
SDTX	89	54 (61%)	15 (17%)	19 (21%)	1 (1%)
CDCA	81	37 (46%)	21 (26%)	23 (28%)	0 (0%)
SDCA	52	27 (52%)	8 (15%)	14 (27%)	3 (6%)
NDIL	54	26 (48%)	14 (26%)	13 (24%)	1 (2%)
NEB	11	3 (27%)	6 (55%)	2 (18%)	0 (0%)
Overall	595	301 (51%)	122 (21%)	164 (28%)	8 (1%)

Table I.11: Offenders with Indications of Substance Abuse

District	Offenders (Total)	Offenders With Indications Of Drug Abuse	Offenders With Indications Of Alcohol Abuse
EDNY	74	15	5
SDNY	79	31	4
SDFL	155	15	6
SDTX	89	14	7
CDCA	81	29	8
SDCA	52	19	11
NDIL	54	16	9
NEB	11	6	3
Overall	595	145	53

Linda Willis

Lynn Gibson, Assoc. Gen Counsel

NEWS RELEASE

CATO INSTITUTE

For Immediate Release
May 17, 1994

Contact: Linda Clark
(202) 789-5225

Mandatory Drug Sentences Endanger Public Safety, Study Finds

Washington - Mandatory minimum sentences for nonviolent drug offenders are the best thing that ever happened to violent criminals, says David B. Kopel, a former assistant attorney general for the state of Colorado, in a new study from the Cato Institute.

Kopel, who is also a former prosecutor for New York City, shows how mandatory minimum sentences enacted in the 1980s have led to the early release of violent criminals to make room in our prisons for nonviolent, often first-time, drug offenders.

Despite record booms in state and federal prison construction, the average American prison system remains 15.4 percent over capacity. Forty states, two territories, and the District of Columbia are currently under court orders to reduce prison overcrowding. The federal system is 38 percent over capacity. The drastic increase in the state and federal prison population is primarily the result of policy changes, not demographics.

In 1981 only 22 percent of federal prisoners were drug prisoners. Today 60 percent of federal prisoners are drug

-- more --

prisoners, and that figure is expected to hit 70 percent next year. In virtually every state there has been a massive emphasis on imprisoning drug offenders. Illinois prisons, for example, hold five times as many drug prisoners as they did five years ago.

Kopel uses free-market analysis to show that trying to control drug use through imprisonment is doomed to fail. If society imprisons one-half of the armed robbers, the rate of armed robbery will decline about 50 percent. The same analysis applies to burglars and rapists. But if a drug dealer is imprisoned, the availability of drugs will not be diminished. The law of supply and demand states that as long as there is a demand for a product, a market will make that product available at some price. Kopel argues that allocating vast amounts of prison space to such easily replaced offenders is not simply a waste of resources but a dangerous waste.

Instead of spending more money on prison space for nonviolent offenders, Kopel argues that we should return prisons to their original purpose of incapacitating violent criminals. He advocates revision or repeal of mandatory minimums for consensual offenses, tightening of parole standards, and tougher laws aimed at repeat violent offenders.

"Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," is no. 208 in the Policy Analysis series published by the Cato Institute, an independent public policy research organization in Washington, D.C.

-- 30 --

Clinton Presidential Records
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Policy Analysis

No. 208 May 17, 1994

Routing

PRISON BLUES: HOW AMERICA'S FOOLISH SENTENCING POLICIES ENDANGER PUBLIC SAFETY

by David B. Kopel

Executive Summary

The amount of money that American taxpayers spend on prisons has never been greater, and the fraction of the American population held in prison has tripled during the last 15 years, as has national prison capacity. Yet the expected punishment of violent criminals has declined, and violent crime flourishes at intolerably high levels. The seeming paradox of more prisons and less punishment for violent criminals, which means less public safety, is explained by the war on drugs. That war has gravely undermined the ability of America's penal institutions to protect the public. As prisons are filled beyond capacity with nonviolent "drug criminals" (many of them first offenders), violent repeat offenders are pushed out the prison doors early, or never imprisoned in the first place.

As prison crowding worsens, many public officials are embracing alternatives to incarceration, such as electronic home monitoring, boot camps, and intensive supervised probation. Although those alternatives have their place, their benefits have frequently been overstated.

The most effective reform would be to return prisons to their primary mission of incapacitating violent criminals. Revision or repeal of mandatory minimum sentences for consensual offenses, tighter parole standards, and tougher laws aimed at repeat violent offenders can help the state and federal criminal justice systems get back to their basic duty: protecting innocent people from force and fraud.

David B. Kopel is research director of the Independence Institute in Golden, Colorado, and an associate policy analyst of the Cato Institute. A former assistant attorney general for the state of Colorado, he is the author, most recently, of The Samurai, the Mountie, and the Cowboy *(Cato/Prometheus, 1992), which was named Book of the Year by the American Society of Criminology's Division of International Criminology.*

CATO INSTITUTE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C.

Subcommittee on Crime and Criminal Justice
362 Ford House Office Building
Washington, D.C. 20515

DATE: July 29, 1993

NUMBER OF PAGES (INCLUDING COVER SHEET): 18

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TO: Jose Cerda

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FROM: Daniel A. Cunningham, Counsel

COMMENTS: Jose, attached is a copy of the background memo we prepared and a copy of the data we requested the Sentencing Commission to generate. The Commission staff rushed a fax copy of the data to us, and we haven't received the good copy yet. Hope it's legible.

IF YOU DO NOT RECEIVE A TOTAL TRANSMISSION,
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ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

MEMORANDUM

TO: Members of the Subcommittee on Crime and Criminal Justice

FROM: Charles E. Schumer, Chairman

DATE: July 26, 1993

RE: Oversight Hearing on Mandatory Minimum Sentencing

On Wednesday, July 28, 1993, at 10:00 a.m., in room 2247 of the Rayburn House Office Building, the Subcommittee on Crime and Criminal Justice will convene an oversight hearing on mandatory minimum sentencing.

Scheduled to testify at the hearing are: Honorable William W. Wilkins, Chairman, U.S. Sentencing Commission; Honorable Vincent L. Broderick, Chairman, Criminal Law Committee of the Judicial Conference; Honorable John M. Walker, Jr., President, Federal Judges Association; Honorable William P. Barr, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.; Mr. Tim Mullaney, Member of the Legislative Committee, Fraternal Order of Police; Mr. Neal Sonnett, Chairman, Criminal Justice Division, American Bar Association; Mr. Henry R. Wray, Director, Administration of Justice Issues, General Government Division, U.S. General Accounting Office; Ms. Julie Stewart, President and Founder, Families Against Mandatory Minimums; Ms. Nicole Richardson, a prisoner who is currently serving a Federal 10-year mandatory minimum sentence; and Ms. Joanne LaRotonda, whose son is currently serving a 10-year mandatory minimum sentence. A witness list is attached to this memorandum.

BACKGROUND

Mandatory minimum sentences are not new to the Federal criminal justice system. Indeed some date back to as early as 1790, when Congress established mandatory penalties for certain capital offenses.[1] From that time through the 19th Century, Congress enacted definite prison terms for various crimes in a somewhat piecemeal fashion. However, mandatory minimum provisions were not enacted comprehensively at entire classes of offenses until relatively recently.

This piecemeal approach ended with the enactment of the Narcotic Control Act of 1956.[2] Under the 1956 Act, Congress mandated minimum sentences of considerable length for most drug importation and distribution offenses. The rationale behind the broad application of mandatory minimum sentences was a need to "define the gravity of this class of crime and the assured penalty to follow."[3] The 1956 Act contained mandatory minimums that applied to both first offenses and subsequent offenses, including life imprisonment or death for a third or subsequent conviction.

By 1970, however, Congress had become disenchanted with the comprehensive application of mandatory minimums first embodied in the 1956 Act, finding that increases in sentence length "had not shown the expected overall reduction in drug law violations."[4] Congress that year passed the Comprehensive Drug Abuse Prevention and Control Act of 1970,[5] repealing virtually all mandatory penalties for drug violations. Although many reasons were cited for the repeal of the mandatory minimum penalties,[6] many Members of Congress argued that the mandatory sentences reduced the deterrent effect of the drug laws, in part, because even some prosecutors viewed them as overly severe:

> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offenses. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual

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[1]Except as otherwise noted, much of the material in this section is drawn from United States Sentencing Commission, <u>Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress</u> 5 - 15 (1991)(hereinafter referred to as the "<u>Commission Report</u>").

[2]Pub. L. No. 84-728, 70 Stat. 651 (1956)(hereinafter referred to as the "1956 Act").

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

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

[5]Pub. L. No. 91-513, 84 Stat. 1236 (1970)(hereinafter referred to as the "1970 Act").

[6]Among those who supported the 1970 repeal of mandatory minimum sentences was then Congressman George Bush, who urged that mandatory sentences were ineffective and unjust. 116 Cong. Rec. 33,314 (1970).

violators as severely as they treat hardened criminals, tend to make conviction somewhat more difficult to obtain.[7]

While the 1970 Act repealed most mandatory minimum sentences, it both preserved and strengthened certain mandatory minimums for the Continuing Criminal Enterprise offenses.[8]

During the ensuing 14 years, a sea change occurred in the fundamental approach to punishment in the Federal criminal justice system that was to have a dramatic impact upon the application of mandatory minimum sentencing. Prior to that time, the Federal system had been guided upon the "coercive rehabilitation" model, in which the rehabilitation of the offender represented the primary consideration in sentencing. After an exhaustive, decade-long review of the rehabilitation model of punishment, and its attendant, unwarranted sentencing disparity which was found to be "shameful,"[9] Congress moved to dramatically reform the Federal criminal sentencing process with enactment of the Sentencing Reform Act of 1984.[10]

The Sentencing Reform Act implemented reform in criminal sentencing by two primary means. First, it created the U.S. Sentencing Commission, and directed the Commission to develop a body of laws to regulate Federal sentencing and eliminate the prevalent disparity in sentencing. This body of law is now known as the Federal Sentencing Guidelines. The second approach taken under the Sentencing Reform Act was a renewal of support for mandatory minimum penalties.

Beginning in 1984, Congress has enacted an array of mandatory minimum penalties specifically targeted at drugs and crime. Today, there are approximately 100 separate Federal mandatory minimum penalty provisions located in 60 different criminal statutes. However, in practice, relatively few statutes requiring mandatory minimum sentences are used with frequency. For example, 94 percent of the 59,780 cases sentenced under a mandatory minimum between 1984 and 1990 were sentenced under just four statutes, 21

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

[8]See 21 U.S.C. §848.

[9]S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983). The disparity in Federal criminal sentences was renowned and well-documented. In one study, 50 Federal district judges in the Second Circuit were given 20 identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant. The variations in the sentences were dramatic. In one extortion case, for example, the sanctions ranged from 20 years imprisonment and a $65,000 fine to a three-year prison sentence and no fine. Commission Report, supra note 1, at 16.

[10]Pub. L. No. 98-473, 98 Stat. 1837 (1984)(hereinafter referred to as the "Sentencing Reform Act").

U.S.C. §841 (manufacture and distribution of controlled substances), 21 U.S.C. § 844 (possession of controlled substances), 21 U.S.C. § 960 (penalties for the import/export of controlled substances), and 18 U.S.C. § 924(c) (minimum sentence enhancements for carrying a firearm during a drug or violent crime).[11] All the other mandatory minimum statutes (93 percent of these statutes) accounted for only six percent of the sentences imposed pursuant to a mandatory minimum. More than one-half of the 60 statutes containing mandatory minimum penalties were never used during the 1984-90 period, while six were used six or fewer times.[12]

THE OBJECTIVES OF MANDATORY MINIMUMS

The mandatory minimums in effect today are the result of broad, bipartisan efforts designed to respond to the nation's legitimate concerns about violent crime and drug-related problems. As intended to function by Congress, mandatory minimums can serve a number of desirable goals:

- **Deterrence**. Mandatory minimum sentences serve to deter the commission of the targeted offenses by discouraging not only the individual sentenced to a substantial penalty, but also by example, to discourage other potential lawbreakers from committing similar offenses. There is strong in both the certainty of substantial punishment and the severity of the sentences they insure in the war against crime.

- **Retribution**. Mandatory minimum provisions impose long prison terms for particularly serious offenses. Simply stated, longer sentences are deserved for these crimes. Absent the mandatory penalties, judges would impose sentences more lenient than would be appropriate.

- **Incapacitation**. Mandatory minimum sentences protect the public by incapacitating offenders convicted of serious crimes for definite, and generally substantial, periods of time.

- **Reduction in Disparity**. Mandatory minimum sentences eliminate any disparity of sentences imposed for similar offenses. Mandatory minimums are meant to guarantee that defendants convicted of similar offenses receive penalties that at least begin at the same minimal point.

- **Inducement of Cooperation**. Because they provide specific, lengthy sentences, mandatory minimums encourage offenders to assist in the investigation of criminal conduct by others. This is because cooperation is the only statutorily-recognized way to permit the

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[11] Commission Report, supra note 1, at 10 - 11.

[12] Id.

court to impose a sentence below the length of imprisonment required by the mandatory minimum sentence.

- **Inducement of Pleas**. Mandatory minimum sentences also can be valuable tools in obtaining guilty pleas, saving scarce enforcement resources and increasing the certainty of at least some measure of punishment.

Each of these objectives are consonant with the goals set forth generally under the Sentencing Reform Act, and the supporters of mandatory minimums believe mandatory minimums are an equitable and efficient means of achieving these objectives.

CRITICISMS OF MANDATORY MINIMUMS

In recent years, mandatory minimum sentencing provisions have come under increasing attack. The criticisms leveled at mandatory minimums generally fall into five principal areas:

- **Lack of Uniform Application**. Critics of mandatory minimums insist that these provisions are not being applied uniformly and this inconsistent application has created a substantial disparity in sentencing. For example, the U.S. Sentencing Commission identified a sample of 1,165 defendants apparently eligible for a mandatory drug or weapons sentence, and traced the processing of their cases in detail.[13] The Commission found that only 74 percent of the defendants were charged with the highest mandatory indicated by their conduct.[14] Among drug defendants who appeared eligible for a weapons enhancement under 18 U.S.C. § 924(c), only 55 percent were so charged, and among defendants who appeared eligible for prior-record enhancements, only 37 percent were so charged. The attrition continued after indictment. Only 59 percent of indicted defendants were eventually convicted at the mandatory level for which they appeared eligible, and 17 percent of this group (ten percent of all the defendants in the sample) still managed to avoid the mandatory through a "substantial assistance" departure. Among defendants who entered into plea agreements, more than half were sentenced below the mandatory level for which they appeared eligible.[15]

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[13] Commission Report, supra note 1, at 37 - 38.

[14] Id. at 56 - 57.

[15] Although less comprehensive in scope, another study confirms the disparity in application of mandatory sentences resulting from plea agreements. That study revealed that, over the period examined, from mid-1988 through mid-1992, prosecutors evaded the applicable legal sentence (including both the requirements of mandatories and the sentencing guidelines) in 20 to 35 percent of all cases resolved by guilty plea. Nagel & Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing

The Commission found that this disparate application of mandatory minimums appeared to be related to the race of the defendant. Whites were more likely than non-whites to be sentenced to below the applicable mandatory minimum.[16] Disparate application also appeared to result due to the circuit in which the defendant happens to be sentenced as defendants in some circuits are more likely to be sentenced below the applicable mandatory minimums than defendants sentenced in other circuits.[17]

Unfortunately, serious methodological problems limit the usefulness of the Commission's findings. Its review relied heavily on the presentence report in each case and other records not affording access to the case prosecutor's reasoning. Objective evidentiary problems not apparent from the probation officer's report could explain what otherwise appears as unjustifiable manipulation. Similarly, the Commission's report takes no account of genuine cooperation as a potentially valid explanation for charge reductions and downward departures. Additionally, the General Accounting Office has recently completed a study of mandatory minimum sentencing that contradicts many of the conclusions reached by the Commission and challenges the statistical underpinnings of the Commission report. We will learn the details of that study at the hearing.

Other studies, however, do indicate some apparent, potential disparate application of mandatory minimums between districts by use of alternative statutes not carrying a mandatory minimum. For example, in 1990, only two percent of all guilty pleas in drug cases resulted from pleas to a telephone count, 18 U.S.C. § 843.[18] However, § 843 convictions represented a major share of all drug convictions in several districts, including New Hampshire (18 percent) and Colorado (25 percent).[19] Similarly, on a national basis, only seven percent of all guilty pleas in drug cases resulted from pleas to a charge of simple possession under 21 U.S.C. § 844. However, convictions under § 844 were frequent in several districts, including Maryland (25 percent), Eastern Virginia (24 percent) and Middle Alabama (34 percent).[20] In many districts, § 843 and § 844 counts combined represented

Guidelines, 66 S. Cal. L. Rev. 501, at 515 - 544, 552 - 557 (1992).

[16]Id. at 76.

[17]Id. at 61.

[18]Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 219 (1993).

[19]Id.

[20]Id.

more than 30 percent of all drug convictions.[21] The inference of evasion of drug mandatories in these districts is compelling.

Despite the expectation by Congress that mandatory minimum sentences would be applied to all relevant cases, an inconsistent application would create a substantial disparity in sentencing, undermining both the objective of disparity elimination and sentencing certainty. However, while this criticism is often asserted as an argument for repeal of mandatory minimum penalty provisions, it appears more logical to demand uniform application of such provisions in a manner more true to the intent of Congress when it enacted them.

- **The Cliff Effect**. The Cliff Effect results when an offender's conduct just barely brings the offender within the terms of a mandatory minimum. For example, a first-time offender who sells 495 grams of cocaine would receive guideline sentence of between two to two and one-half years. However, for an identical offender who sold just five grams more the sentence would double because of the mandatory minimum sentence applicable to sales of 500 grams of cocaine. Critics of mandatory minimums assert that it is unreasonable for such small quantities of drugs to have such an enormous impact on a sentence, while all other factors bearing on culpability and dangerousness have no importance at all. Such critics insist that a finely calibrated system of sentences, such as that under the Sentencing Guidelines, giving a proportional increase in sentence as the quantity of drugs increases, would be more rational and fair.

- **Unwarranted Uniformity**. A common problem associated with mandatory minimums by their critics is excessive uniformity of sentences. Mandatory minimum sentences do prevent unequal treatment of like offenders, but they also result in equal treatment of offenders who played sharply different roles in the offense. The ringleader receives the same sentence as the minor messenger or secretary who had little responsibility or control over the events of the offense. Just punishment for lesser roles is precluded.

- **The Cooperation Paradox**. The only statutorily recognized means for avoiding a mandatory minimum penalty is by motion of the prosecutor under 18 U.S.C. § 3553 for a reduction in sentence in exchange for substantial assistance to the government. Unfortunately, the critics of mandatory minimums assert that this escape hatch creates a paradox. Defendants who know the most, and, thus, have the most "substantial assistance" to offer, are often those who are most centrally involved in the offense. The highly culpable offender may be the best placed to negotiate a big sentence break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and often wind up with far more severe sentences than the boss.

- **Incompatibility with the Sentencing Guidelines**. While critics of mandatory minimums assert that each of the preceding objections to mandatory minimums also demonstrates their

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[21] Id.

incompatibility with the Sentencing Guidelines, they also point out one additional level of conflict. Whereas the Guidelines incorporate a "real offense" approach to sentencing, basing sentences upon the real life facts of the case, as opposed to the contents of the charging order or the whims of a judge, mandatory minimums are basically a "charge specific" approach. The sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.

THE PROBLEM OF FIRST-TIME, NON-VIOLENT DRUG OFFENDERS

Without addressing the specifics of the criticisms of mandatory minimums described above, in recent years, I have been increasingly concerned about the effect of mandatory minimum sentences on some first-time, non-violent offenders, especially those who are minimal participants in the crime. Although I believe these cases to be few and far between, the imposition of mandatory minimum sentences in some of these cases may result in disproportionately harsh punishment where it may not be warranted and may, indeed, be counterproductive.

While I generally support mandatory minimum sentences, I believe it is appropriate for Congress to consider a potential "safety valve" that could be invoked to ameliorate any manifest injustice that might result from the imposition of a mandatory minimum sentence. Such a "safety valve" must be carefully crafted and tailored to apply only to specific, narrow classes of cases where the need has been demonstrated. Such an approach would strike a balance between the desirable effect mandatory minimums have in our criminal justice system and the avoidance of any unwarranted and unintended injustices.

THE HEARING

This oversight hearing will examine the state of mandatory minimum sentencing in the Federal criminal justice system. The hearing will provide the Subcommittee a solid foundation to enable us to adequately address this issue in the coming months of the Session. It is my hope that we will receive constructive feedback on the appropriate role of mandatory minimums in our war against drugs and violence. It is also my intent that we will receive suggestions on a means to craft a "safety valve" for use in the cases of certain first-time, non-violent drug offenders. If you have any questions regarding the hearing, please have your staff contact Dan Cunningham of the Subcommittee staff (6-2406).

DRAFT

Statistical Profile of Mandatory Minimum Drug Cases
Fiscal Year 1992

From the pool of 38,258 guideline cases sentenced in 1992, cases were selected for analysis if the defendant was sentenced under Part D ("Offenses Involving Drugs") of the guidelines, and a mandatory minimum penalty was applicable to the case. From this sample, a group of "less serious" drug offenders was identified which included only first offender (i.e., no countable criminal history points) who had no aggravating role in the offense and no dangerous weapon involvement.

Tables 1 through 7 profile this group of "less serious" defendants by the primary drug type in the offense; defendant race, gender, citizenship status and age group; and average sentence length imposed by type of drug.

Table 8, using the entire sample of drug offenders with mandatory minimum provisions, provides mean and median sentence lengths for cases sentenced within the guideline range; actual sentence lengths for cases receiving downward departures pursuant to a government motion for substantial assistance; and estimated sentence lengths for these substantial assistance cases absent a substantial assistance departure. (The estimate is based on the assumption that the court, if sentencing within the guideline range, would sentence these defendants at or near the guideline range minimum.) Table 8 also notes that of the 2,585 defendants receiving a substantial assistance departure, 1,678 (or 64.9%) would qualify as "more serious," based on one or more aggravating conditions (i.e., weapon use, criminal history, and/or aggravating role in the offense).

Table 1

DRUG TYPE OF LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM (October 1, 1991 through September 30, 1992)

Drug Type	N	%
TOTAL	3,189	100.0
Cocaine	1,747	54.8
Crack	390	12.2
Heroin	378	11.9
Marihuana	491	15.4
Meth.	127	4.0
LSD	45	1.4
Other	11	0.3

*"Less" Serious is used as a label for a particular set of offense/offender circumstances. Less serious is defined as no weapon use, first offender, and no aggravating role in the offense.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

Table 2

RACE OF LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM (October 1, 1991 through September 30, 1992)

Race	N	%
TOTAL	3,196	100.0
White	941	29.4
Black	787	24.6
Hispanic**	1,400	43.8
Other	68	2.1

*"Less" Serious is used as a label for a particular set of offense/offender circumstances. Less serious is defined as no weapon use, first offender, and no aggravating role in the offense.
**For purposes of this report, defendants whose ethnic background is designated as Hispanic are shown as Hispanic regardless of racial background. The *Other* category includes defendants of Native American, Alaskan Native, and Asian or Pacific Islander origin.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

Table 3

GENDER OF LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM (October 1, 1991 through September 30, 1992)

Gender	N	%
TOTAL	3,198	100.0
Male	2,688	84.1
Female	510	16.0

*"Less" Serious is used as a label for a particular set of offense/offender circumstances. Less serious is defined as no weapon use, first offender, and no aggravating role in the offense.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

Table 4

EDUCATION OF LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM (October 1, 1991 through September 30, 1992)

Education	N	%
TOTAL	3,163	100.0
Less than High School	1,429	45.2
GED	163	5.2
High School	803	25.4
Tech., Vocat., Military	22	0.7
Some College	584	18.5
College Graduate	130	4.1
Graduate Degree	32	1.0

*"Less" Serious is used as a label for a particular set of offense/offender circumstances. Less serious is defined as no weapon use, first offender, and no aggravating role in the offense.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

Table 5

CITIZENSHIP OF LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM (October 1, 1991 through September 30, 1992)

Citizenship	N	%
TOTAL	3,188	100.0
U.S. Citizen	1,835	57.6
Non-U.S. Citizen	1,353	42.4

*"Less" Serious is used as a label for a particular set of offense/offender circumstances. Less serious is defined as no weapon use, first offender, and no aggravating role in the offense.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

RCV BY:HouseSubc. Crim. Justice

Table 6

AGE OF LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM (October 1, 1991 through September 30, 1992)

Age	N	%
TOTAL	3,192	100.0
Under 21	170	5.3
21-25	581	18.2
26-30	632	19.8
31-35	592	18.6
36-40	471	14.8
41-50	546	17.1
Over 50	200	6.3

*"Less" Serious is used as a label for a particular set of offense/offender circumstances. Less serious is defined as no weapon use, first offender, and no aggravating role in the offense.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

OFFICE OF NATIONAL DRUG CONTROL POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
Washington, D.C. 20500

June 2, 1993

MEMORANDUM FOR LEE BROWN
RICIA McMAHON
DAN SCHECTER
GARY CROSBY
INGRID KOLB
MIKE WALSH
ADRIENNE O'NEAL

FROM: BRUCE CARNES

SUBJECT: Impact of Changing the Average Length of Sentence for Drug Offenses on the Federal Sentenced Prison Population and Budget

During the past three fiscal years, the Federal drug control budget has allocated approximately 65 percent to supply-side programs and 35 percent to demand-side efforts. The fastest growing segment of the supply-side budget has been for construction of new prisons. In 1981, the drug prison budget, adjusted for inflation, accounted for approximately 5 percent of the drug control budget; in 1992, prisons accounted for about 11 percent of total expenditures.

It has been suggested that if mandatory minimum sentences were reduced or eliminated for drug offenses, funds being made available for prisons could be shifted to relatively more effective supply-side programs. Attached is a paper that examines the impact of reducing the average sentence length for drug offenses on the Federal prison population and incarceration costs.

Our analysis shows that a reduction in the average sentence length of drug offenders (both those currently incarcerated and those who will be sentenced and incarcerated) by 10 percent a year through 2000 could result in:

- o Present value gross savings of $6.4 billion dollars in the Federal prison system for the period;
- o Approximately 86,000 additional bed spaces by 2000;

- o a 58 percent reduction in the total Federal sentenced prison population; and,

- o Enough additional capacity to double the average sentence length for violent offenders over 1991 averages without increasing prison resources.

In addition, our analysis suggests that for the period 1981 through 1991 violent offenders received shorter sentences to make room for drug offenders. We estimate that every 1 percent increase in the average sentence length for drug offenses results in a 3.1 percent increase in the total Federal sentenced drug offender population, and a .8 percent <u>decrease</u> in the average sentence length for violent offenders.

c: J. Carnevale
B. Hankey

FEDERAL SENTENCED PRISON POPULATION: PAYOFFS FROM REDUCING AVERAGE SENTENCE LENGTH FOR DRUG OFFENDERS

During the past three fiscal years, the Federal drug control budget has allocated approximately 65 percent to supply-side programs and 35 percent to demand-side efforts. The fastest growing segment of the supply-side budget has been for construction of new prisons. In 1981, the drug prison budget, adjusted for inflation, accounted for approximately 5 percent of the drug control budget; in 1992, it had more than doubled to about 11 percent.

It has been suggested that if mandatory minimum sentences were reduced or eliminated for drug offenses, funds being made available for prisons could be shifted to relatively more effective supply-side programs. This paper examines the impact of reducing the average sentence length for drug offenses on the Federal prison population and incarceration costs. We developed results for only one scenario; however, the methodology can and should be applied to a wide spectrum of alternatives.

Our analysis shows that a reduction in the average sentence length of drug offenders (those currently incarcerated and those who will be sentenced and incarcerated) by 10 percent a year through 2000 could result in:

- Present value gross savings of $6.4 billion in the Federal prison system for the period;
- Approximately 86,000 additional bed spaces by the year 2000;
- a 58 percent reduction in the total Federal sentenced prison population; and,
- Enough additional capacity to double the average sentence length for violent offenders over 1991 averages without increasing prison resources.

In addition, our analysis suggests that for the period 1981 through 1991 violent offenders received shorter sentences to make room for drug offenders. We estimate that every 1 percent increase in the average sentence length for drug offenses results in a 3.1 percent increase in the total Federal sentenced drug offender population, and a .8 percent <u>decrease</u> in the average sentence length for violent offenders.

Introduction

The dramatic growth in the Federal prison population in the mid- to late-eighties has been attributed to an increased number of drug arrests, mandatory minimum sentences, and increased sentence lengths for drug offenders. These increases sparked debate about the effectiveness of mandatory minimum sentences for drug offenses relative to the increased burdens on the criminal justice and corrections systems.

Mandatory minimum Federal sentences take into account the type and amount of drugs involved, aggravating circumstances, and the criminal history of the offender. The law allows judges to impose sentences longer than the mandatory minimum, or a lesser sentence if the prosecutor recommends it. The law also includes minimum periods of supervised release after the full prison sentence is served.

A growing number of Federal judges oppose mandatory minimum sentences since they limit their sentencing discretion. Many argue that mandatory minimums are unduly harsh and unconstitutional and refuse to handle drug cases for these reasons. More recently, arguments against mandatory minimums have focused on the fact that shortages of judicial and correctional resources, coupled with the growth of incarcerated drug offenders, is reducing sentence lengths for violent and other offenders, overwhelming criminal dockets to the exclusion of other crimes, driving out civil cases, clogging courts with demands for speedy trials, and generally straining an overburdened Federal criminal justice system.

Mandatory Minimum Sentencing for Drug Offenses and Trends in Federal Prison Populations: A Brief Background

Mandatory minimum sentence statutes attempt to ensure that certain crimes deemed particularly heinous by society receive at least a specified minimum prison term. Mandatory minimums exist for many types of crimes, but those developed for drug offenses have had the greatest impact on Federal sentencing, Federal prison populations, and incarceration costs.

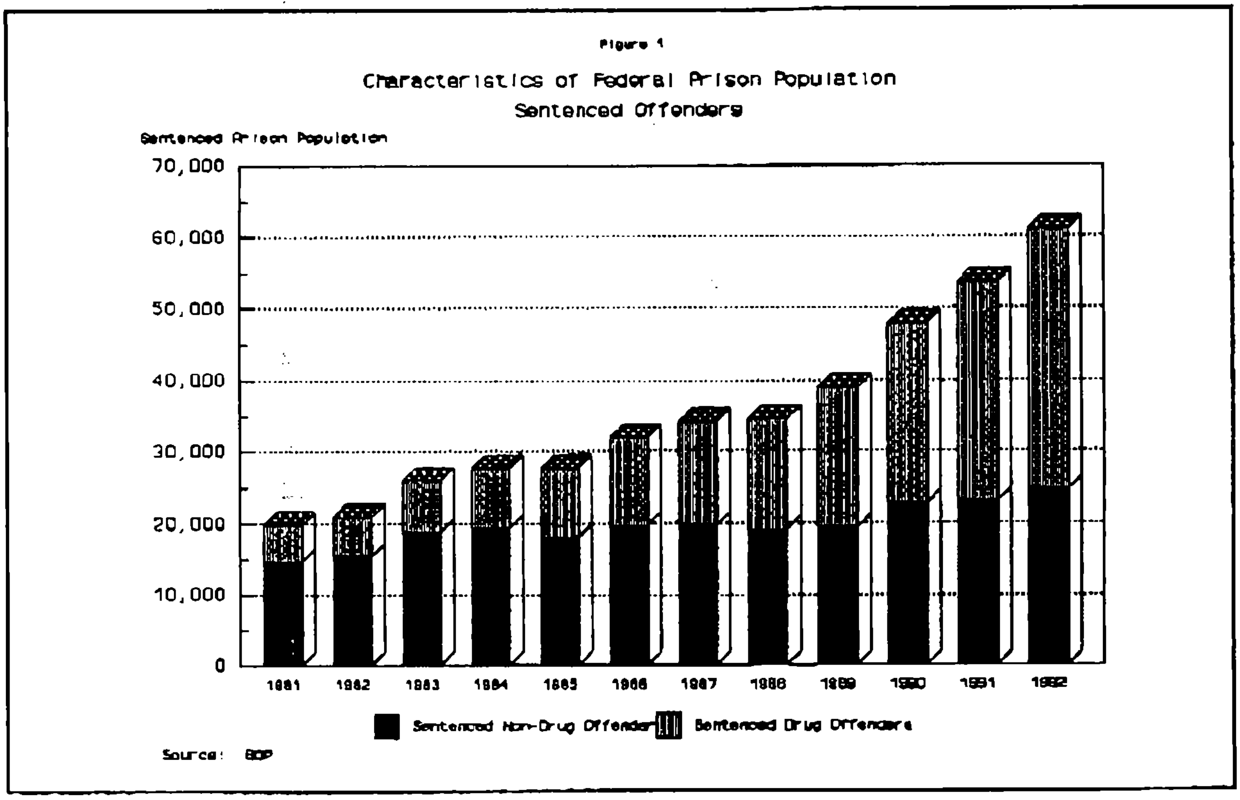
Mandatory minimum sentences for drug offenses were first established in 1956, but those established by Congress in 1984, 1986, and 1988 appear to have had the greatest impact on the Federal criminal justice system. Beginning in 1984, the mandatory minimums for drug offenses targeted crimes committed near schools and provided sentencing enhancements to drug crimes involving the use of a firearm. [1]

The 1986 Anti-Drug Abuse Act included stiffer penalties for drug dealing and possession of certain weapons in the commission of a drug offense. The 1986 Act also introduced non-parolable minimums that increased with the amount of the drug involved in the offense. These sentences were effectively targeted at traffickers and mid-level dealers, and removed them from the streets for as long a time as possible.[2]

The 1988 Omnibus Anti-Drug Abuse Act not only increased the mandatory minimums established in 1986, but also targeted offenders charged with simple possession. More importantly, the 1988 Act included mandatory minimums for persons charged with conspiracy in the course of a drug offense. The expansion of mandatory minimums to co-conspirators meant that high-, mid-, and low-level felons were all equally subject to mandatory minimums.[3]

The mandatory minimums developed over the last decade, coupled with law enforcement strategies targeted at drug offenders, succeeded in putting growing numbers of drug offenders behind bars. From 1981 to 1992, total domestic drug arrests by the Drug Enforcement Administration increased at an annual rate of about 6 percent, from 13,266 to 23,154.[4]

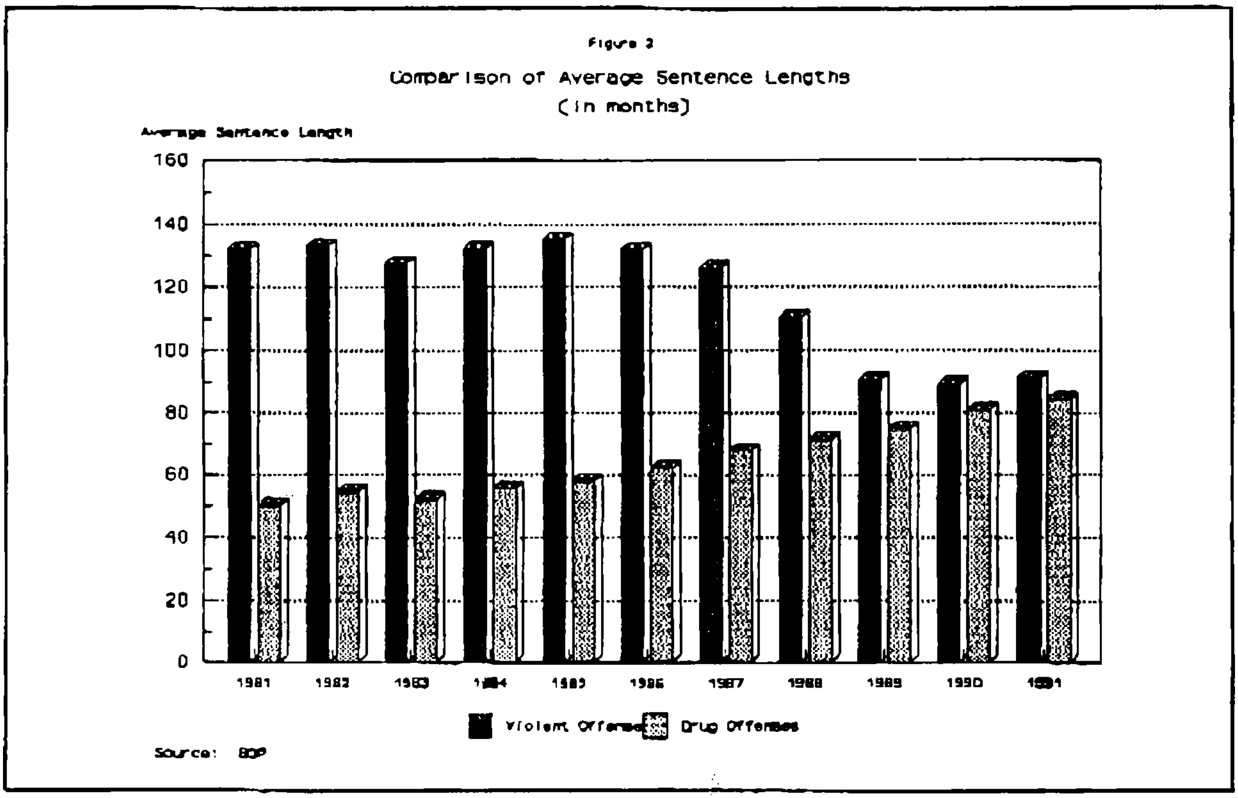
While the total Federal sentenced prison population grew at an annual rate of about 12 percent, the number of sentenced drug offenders grew at an annual rate of almost twice that rate, about 20 percent. Figure 1 shows that from 1981 to 1992, the proportion of drug offenders of the total Federal sentenced population increased from about 26 percent to about 60 percent in the same time period.[5]



The population of sentenced drug offenders increased an 616 percent from 1981 to 1992, from 5,076 to 36,349. In addition, the average sentence length for drug offenses also increased about 70 percent in the same time frame, from 50 months to about 85 months.

From 1981 to 1992, the average sentence length for <u>violent</u> offenses decreased 30 percent, from 132 to 91 months, and the average sentence length for property offenses likewise decreased about 28 percent from 30 months to 22 months.[6]

Figure 2 shows the trends of average sentence lengths for drug offenders compared with the trends of average sentence lengths for violent offenders.



The real costs of the increased sentenced population have also grown dramatically. In 1981, the cost of housing sentenced prisoners was $316 million; the cost of housing drug prisoners was $81 million (Table 1). In 1992, adjusting for inflation, it cost the Federal government about $1 billion to house all sentenced prisoners, an increase of 232 percent. The cost of housing sentenced drug offenders rose to $625 million, an increase of 671 percent.[7] In addition, the portion of the Federal prison budget spent on drug offenders increased over 1000 percent from 1981 to 1992, rising from 21 percent of the total prison budget, to 61 percent. Figure 3 shows how the proportion of the annual Federal prison budget for drug offenders has grown in recent years.

Table 1
Federal Prison System
(Dollars in Millions)

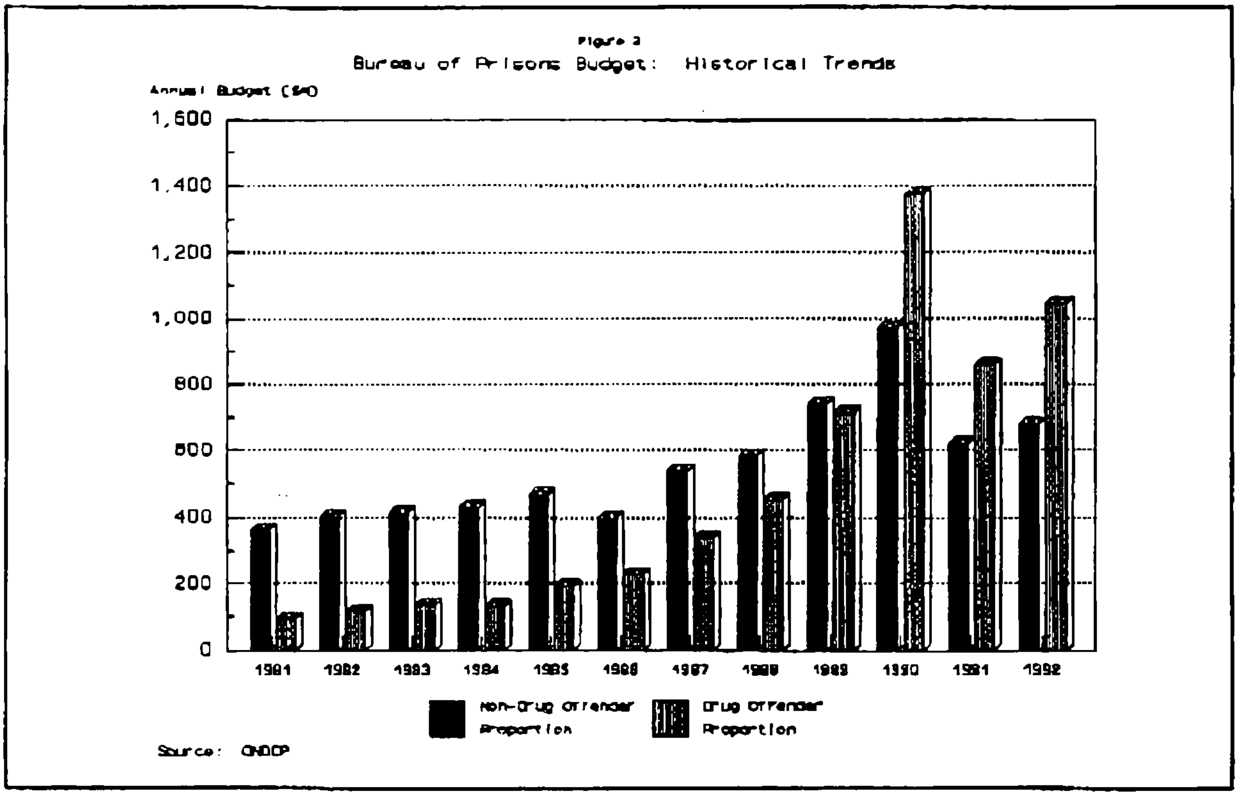
	FEDERAL PRISON BUDGET				FEDERAL DRUG BUDGET			
Year	Federal Prison System Budget (nominal $)	Federal Prison System Budget (1987 $)	Drug Portion of Prison Budget (nominal $)	Drug Portion of Prison Budget (1987 $)	Total Drug Budget (nominal $M)	Total Drug Budget (1987 $M)	Drug Prison Budget % of Total Prison Budget (1987 $)	Drug Prison Budget % of Total Drug Budget (1987 $)
1981	361.78	458.53	74.70	94.68	1,464.00	1,855.51	20.65	5.10
1982	434.50	518.50	97.90	116.83	1,651.90	1,971.24	22.53	5.93
1983	478.80	549.08	118.10	135.44	1,934.70	2,218.69	24.67	6.10
1984	512.56	563.25	121.40	133.41	2,298.00	2,525.27	23.69	5.28
1985	622.98	659.94	182.10	192.90	2,679.60	2,838.56	29.23	6.80
1986	605.56	624.93	219.50	226.52	2,826.10	2,916.51	36.25	7.77
1987	876.18	876.18	339.10	339.10	4,786.70	4,786.70	38.70	7.08
1988	1,069.09	1,028.96	465.30	447.83	4,702.40	4,525.89	43.52	9.89
1989	1,574.93	1,451.55	772.10	711.61	6,592.30	6,075.85	49.02	11.71
1990	2,650.73	2,341.63	1,553.80	1,372.61	9,693.10	8,562.81	58.62	16.03
1991	1,738.00	1,475.38	1,011.00	858.23	10,841.40	9,203.23	58.17	9.33
1992	2,084.65	1,724.28	1,264.80	1,046.15	11,953.10	9,886.77	60.67	10.58
Yearly Growth	17.3%	12.8%	29.3%	24.4%	21.03%	16.40%	N/A	N/A

Source: ONDCP

Total Cost of Incarceration
Federal Sentenced Prison Population and Sentenced Drug Offenders

Year	Total Sentenced Population	Total Sentenced Drug Offenders	Average Annual Cost (nominal $)	Average Annual Cost (1987 $)	Drug Offenders Total Cost (nominal $M)	Drug Offenders Total Cost (1987 $M)	Total Sentenced Total Cost (nominal $M)	Total Sentenced Total Cost (1987 $M)
1981	19,765	5,076	12,618	15,992	64.05	81.18	249.39	316.09
1982	20,938	5,518	12,786	15,258	70.55	84.19	267.71	319.47
1983	26,027	7,201	12,939	14,838	93.17	106.85	336.76	386.20
1984	27,622	8,152	13,315	14,632	108.54	119.27	367.79	404.16
1985	27,623	9,491	14,428	15,284	136.94	145.06	398.54	422.19
1986	31,831	12,119	13,089	13,508	158.63	163.70	416.64	429.96
1987	34,163	14,354	14,147	14,147	203.07	203.07	483.30	483.30
1988	34,680	15,526	14,521	13,976	225.45	216.99	503.59	484.69
1989	38,969	19,459	16,987	15,656	330.55	304.65	661.97	610.11
1990	47,847	25,037	17,909	15,821	448.39	396.10	856.89	756.97
1991	53,526	30,498	20,072	17,039	612.16	519.66	1,074.37	912.03
1992	61,026	36,349	20,803	17,207	756.17	625.45	1,269.52	1,050.06
Yearly Growth	11.9%	19.6%	4.7%	.7%	25.2%	20.4%	15.9%	11.5%

Source: Bureau of Prisons



<u>Reductions in the Average Sentence Length for Drug Offenders: Estimated Savings</u>

The overwhelming impact mandatory minimums for drug offenses have had on the Federal criminal justice system has prompted discussion of the utility of the present penalty structures for drug offenses. Many issues come to mind; however, we examined only the impact of reducing the average sentence length for drug offenses -- for sentenced offenders currently incarcerated and those who will be sentenced -- on the total Federal sentenced prison population and the attendant cost savings.

To estimate the effect of sentence length on the total Federal sentenced drug offender population, we regressed the number of sentenced drug offenders on average sentence length and the number of DEA arrests for the period 1981 through 1991. After some experimentation with regression forms and independent variables, we chose a log-linear model (equation 1). The estimated equation explains 96 percent of the variability in the dependent variable and has the expected signs.

The results of equation (1) indicate that an increase of 1 percent in the average sentence length for drug offenders (holding all other variables constant) will increase the total drug offender population by approximately 3.1 percent. In addition, a 1 percent increase in the number of DEA arrests will increase the drug offender population by about .1 percent:

Equation (1), with standard errors shown below the estimated coefficients, is:

$$(1):\quad \ln(p) = -4.46 + \underset{(.54)}{3.06 * \ln(1)} + \underset{(.33)}{.11 * \ln(a)}$$

$$\textit{adjusted } R^2 = .96$$

where

p = Federal sentenced drug offender prison population;

1 = average sentence length for drug offenders; and,

a = number of DEA drug arrests.

We used equation (1) to estimate the sentenced drug offender population for the period 1993 through 2000 assuming a 10 percent reduction in the average sentence length each year for incoming prisoners and the current population. We also assumed that DEA arrests would continue to expand at the average historical rate through the period. With these assumptions, our analysis shows that the Federal sentenced drug offender population decreases from about 24,900 in 1993 to about 2,700 in 2000 (Table 2). This compares to a BOP estimate of Federal sentenced drug offender population of 47,900 in 1993 and 88,600 in 2000 (Table 3).

To calculate present value savings of the reduced prisoner population, we multiplied the average cost per prisoner for 1992 (in 1987 dollars) by the number of beds saved in each year (Table 4). The stream of savings for the period was then collapsed to a point estimate using 4 percent as the social opportunity cost of capital. The real discount rate of 4 percent was derived by subtracting the historical rate of inflation (about 3 percent) from the 30-year government bond rate of approximately 7 percent. For the period 1993 through 2000, the estimated present value savings in 1987 dollars is **$6.4 billion**

TABLE 2: Projected Drug Offender Population Reducing Average Sentence Length 10% and Increasing Drug Arrests 6%

Year	Total Federal Sentenced Population	Total Sentenced Drug Offenders	Percent Drug Offenders of Total	Avg Sentence Length Drug Offenders	Federal Drug Arrests
1981	19,765	5,076	25.7%	50.0	13,266
1982	20,938	5,518	26.4%	54.6	12,166
1983	26,027	7,201	27.7%	52.2	12,981
1984	27,622	8,152	29.5%	55.7	13,118
1985	27,623	9,491	34.4%	58.2	15,704
1986	31,831	12,119	38.1%	62.2	18,985
1987	34,163	14,354	42.0%	67.8	22,214
1988	34,680	15,526	44.8%	71.3	24,652
1989	38,969	19,459	49.9%	74.9	25,352
1990	47,847	25,037	52.3%	80.9	23,102
1991	53,526	30,498	57.0%	84.5	23,154
1992	61,026	36,349	59.6%	89.1	24,590
1993	**54,250**	**24,942**	**46.0%**	**80.2**	**26,114**
1994	**47,528**	**18,199**	**38.3%**	**72.2**	**27,733**
1995	**42,235**	**13,279**	**31.4%**	**65.0**	**29,453**
1996	**37,959**	**9,690**	**25.5%**	**58.5**	**31,279**
1997	**34,349**	**7,070**	**20.6%**	**52.6**	**33,218**
1998	**31,195**	**5,159**	**16.5%**	**47.4**	**35,277**
1999	**28,299**	**3,764**	**13.3%**	**42.6**	**37,465**
2000	**25,516**	**2,747**	**10.8%**	**38.4**	**39,788**

TABLE 3: Bureau of Prisons Forecasts of Federal Sentenced Prison Population

Year	Total Federal Sentenced Population	Total Sentenced Drug Offenders	Percent Drug Offenders of Total
1981	19,765	5,076	25.7%
1982	20,938	5,518	26.4%
1983	26,027	7,201	27.7%
1984	27,622	8,152	29.5%
1985	27,623	9,491	34.4%
1986	31,831	12,119	38.1%
1987	34,163	14,354	42.0%
1988	34,680	15,526	44.8%
1989	38,969	19,459	49.9%
1990	47,847	25,037	52.3%
1991	53,526	30,498	57.0%
1992	61,026	36,349	59.6%
1993	**77,255**	**47,947**	**62.1%**
1994	**82,762**	**53,434**	**64.6%**
1995	**87,912**	**58,957**	**67.1%**
1996	**92,878**	**64,609**	**69.6%**
1997	**97,644**	**70,365**	**72.1%**
1998	**102,356**	**76,320**	**74.6%**
1999	**106,966**	**82,431**	**77.1%**
2000	**111,411**	**88,642**	**79.6%**

Table 4
Projected Cost Savings by Reducing Average Sentence Length (ASL) for Drug Offenders
(1987 $ in millions)

Year	Total Sentenced Drug Offenders (BOP Estimate)	Total Sentenced Drug Offenders (Reduced ASL)	Total Sentenced Population (BOP Estimate)	Total Sentenced Population (Reduced ASL)	Reduced Demand for Bed Space	Reduced Cost ($)
1993	47,947	24,942	77,255	54,250	23,005	395.85
1994	53,434	18,199	82,762	47,527	35,235	606.29
1995	58,957	13,279	87,912	42,234	45,678	785.98
1996	64,609	9,690	97,878	42,959	54,919	944.99
1997	70,365	7,070	97,644	34,349	63,295	1,089.12
1998	76,320	5,159	102,356	31,195	71,161	1,224.47
1999	82,431	3,764	106,966	28,299	78,667	1,353.62
2000	88,642	2,747	111,411	25,516	85,895	1,478.00

Present Value Savings from Reducing Average Sentence Length for Drug Offenders: $6,434.41

The Tradeoff Between Average Sentence Length for Drug Offenders and Sentence Lengths for Other Crimes

In the short-term -- given the constraints on existing prison resources -- judges who must impose mandatory minimum sentences on drug offenders may tend to reduce sentences for other types of crimes to alleviate the problem of overcrowding in the system.[8] To test our hypothesis we estimated two equations using data for the period 1981 through 1991, which show the relationship between the average sentence length for violent offenders and property crime offenders and the average sentence length for drug offenders.

Both equations show an inverse relationship between average sentence length for drug offenders and average sentence length for violent crimes and property crimes. In addition, in both equations, the average sentence length for drug offenders explains a relatively large percentage of the variability in the dependent variables. The equations indicate that a 1 percent increase in the average sentence length for drug offenders -- all other things being equal -- will reduce the average sentence for violent offender by .8 percent and the average sentence length for property crime offenders by .6 percent. These relationships clearly support our hypothesis that tradeoffs are being made among sentence lengths for various felonies. The equations, with standard errors show below the coefficients, have the following forms:

$$(2): \quad v = 212.18 \; - \underset{(.23)}{1.45}{*}l$$

$$\textit{adjusted } R^2 = .82$$

$$(3):\ c = 47.34 - .28{*}1 \atop \qquad\qquad (.08)$$

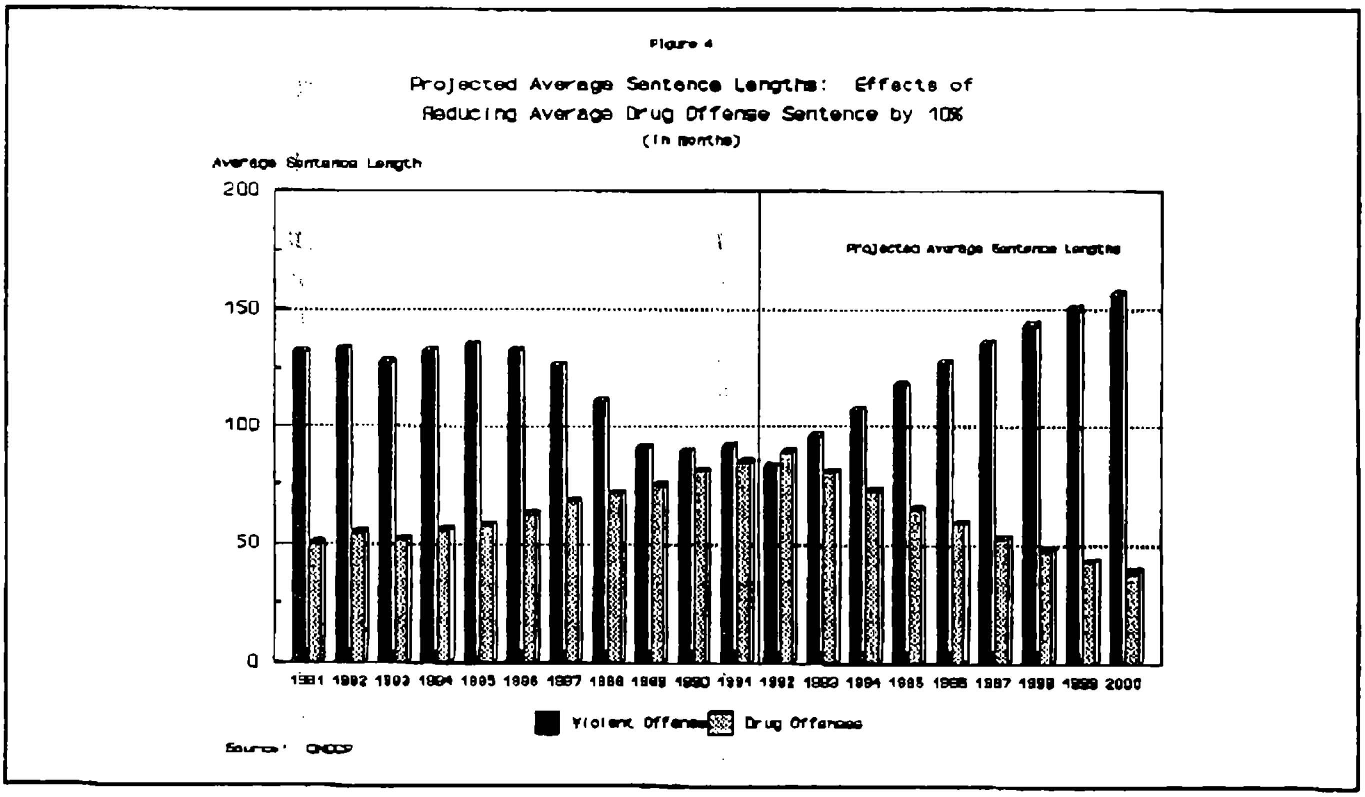
$$adjusted\ R^2 = .56$$

where

v = average sentence length for violent crimes; and

c = average sentence length for property crimes.

We used these equations to estimate potential increases in sentence lengths that could be achieved for violent crime and property crime offenders by reducing the average sentence length for drug offenders. These increases could be achieved without additional prison resources. The analyses show that -- holding all other variables constant -- decreasing the average sentence length of drug offenders by 10 percent through the period could result in an increase in the average sentence length for violent offenders from 91.2 months in 1991 to 156.6 months in the year 2000.



The results for both violent offenders and property offenders are shown in Table 5.

TABLE 5: Projected Sentence Lengths for Violent and Property Offenses Given Increases/Decreases in Sentence Length for Drug Offenses
Sentence Length for Drug Offenses Reduced 10%
(in months)

Year	Avg Sentence Length Property Offenders	Avg Sentence Length Drug Offenders
1981	29.8	50.0
1982	31.1	54.6
1983	32.3	52.2
1984	31.2	55.7
1985	33.0	58.2
1986	34.3	62.2
1987	32.5	67.8
1988	31.5	71.3
1989	26.0	74.9
1990	22.0	80.9
1991	21.6	84.5
1992	**22.8**	**89.1**
1993	**25.3**	**80.2**
1994	**27.5**	**72.2**
1995	**29.5**	**65.0**
1996	**31.3**	**58.5**
1997	**32.9**	**52.6**
1998	**34.3**	**47.4**
1999	**35.6**	**42.6**
2000	**36.8**	**38.4**

Year	Avg Sentence Length Violent Offenders	Avg Sentence Length Drug Offenders
1981	132.0	50.0
1982	133.3	54.6
1983	127.5	52.2
1984	132.2	55.7
1985	135.4	58.2
1986	132.0	62.2
1987	126.2	67.8
1988	110.7	71.3
1989	90.6	74.9
1990	89.2	80.9
1991	91.2	84.5
1992	**82.9**	**89.1**
1993	**95.9**	**80.2**
1994	**107.5**	**72.2**
1995	**118.0**	**65.0**
1996	**127.4**	**58.5**
1997	**135.9**	**52.6**
1998	**143.5**	**47.4**
1999	**150.4**	**42.6**
2000	**156.6**	**38.4**

Policy Implications

Our analysis of the impact of reducing average sentence lengths deals only with the potential benefits to the Federal criminal justice system. Clearly, reductions in sentence lengths for drug offenders have far-reaching policy implications. This analysis projects a savings of $6.4 billion in the Federal prison system, assuming that the reduced sentence length is retroactive. Further analysis is necessary before the true payoffs of reducing average sentence length may be understood. If the reduction in average sentence lengths is not retroactive -- that is, does not apply to those drug offenders already incarcerated -- then the projected decreases in the Federal sentenced prison population and associated cost savings would not be realized for many years. In addition, analyses of the potential costs to society incurred from releasing these offenders must be performed to determine the most cost-effective course of action. These costs may be tangible, such as increased costs for treatment or community-based programs to help integrate the offender back into society, or intangible, such as the potential for increased crime or increases in the demand for certain drugs.

1. United States Sentencing Commission, "Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System," August, 1991.

2. ibid.

3. ibid.

4. Source: Drug Enforcement Administration

5. Source: Bureau of Prisons

6. Source: Bureau of Justice Statistics

7. Source: Bureau of Prisons

8. Because the rate of violent and property crimes has increased over the last decade, we don't believe the number or mix of those crimes has resulted in reduced sentence lengths. However, we recommend additional analysis of the mix of crimes over time be conducted in the future.