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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

Here are the
US Sentencing Commission
Candidates

Tommy Rogers
Will Rava
x2684
#143

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OFFICE OF DOMESTIC POLICY

THE WHITE HOUSE

FROM THE OFFICE OF: **CAROL H. RASCO**
ASSISTANT TO THE PRESIDENT
FOR DOMESTIC POLICY

TO: ____________________ ____________________

____________________ ____________________

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REMARKS:

Jose — Any comments? Whose tracking?

Email to Roz
12/6

DEC - 3 REC'D

December 3, 1993

MEMORANDUM FOR CHRISTINE VARNEY
CABINET SECRETARY

FROM: W. NEIL EGGLESTON *wne*
ASSOCIATE COUNSEL TO THE PRESIDENT

RE: DOJ MANDATORY MINIMUM SENTENCING REVIEW

The DOJ report will be viewed as an attack on mandatory minimum sentences for drug offenders. The report essentially concludes that for "low risk" drug offenders, the heavy reliance on drug quantity to determine the length of a defendant's sentence is inappropriate and that sentencing decisions should be based more on subjective factors such as characteristics of the defendant and role in the offense.

The problem with the report is that it will impact a number of policy issues currently under discussion in the Administration:

1. The Senate's crime bill contains a substantial number of mandatory minimum sentences, and has essentially looked to that tool as a way to enhance the federal commitment to law enforcement. This study is a pretty direct attack on the use of mandatory minimums for this category of offender.

2. The Administration has been under attack for failure to have an effective drug policy. This report could be seen as the first response to that attack, that is, to recommend that sentences be lowered for low risk drug offenders. In addition, during the last month, some members of Congress expressed concern that the Administration did not support Dr. Brown and the ONDCP. To the extent

this report is seen as a retreat from the war on drugs, that concern may be heightened.

3. The report is an extension of the recent change in plea policy at the DOJ, which got limited press attention a few weeks ago. The Attorney General changed the Department's charging and plea policy to permit prosecutors to accept a plea to less than the most serious provable count when such a plea would cause an unduly harsh sentence. This policy change was a method of avoiding the impact of mandatory minimum sentences and the Sentencing Guidelines.

That said, the report is probably accurate that the criminal justice system is spending too much money incarcerating low risk drug offenders and that the resources should be directed to violent and high risk offenders. In its current form, however, and without some substantial packaging of the product, that message will be lost, and the report will be completely misinterpreted.

W.N.E.

cc: David Gergen
Alexis Herman
Bernie Nussbaum
Leon Panetta
Howard Paster
Carol Rasco
Jenifer O'Conner
Jose Cerda

Office of Policy Development
United States Department of Justice

10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Date: 6/8/93

TO: ~~Jose Cerda~~ KEN SCHWARZ   FAX: 456-7739

VOICE:

FROM: ~~Grace Mastalli~~ Jose'   VOICE: (202) 514-4606

FAX: (202) 514-8639

Total Pages (excluding this cover): 13

Additional Message:

LIMITATION ON APPLICABILITY OF MANDATORY MINIMUM PENALTIES FOR CERTAIN OFFENDERS

(a) The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended by adding after section 102 the following new section 103:

"§103. Limitation on applicability of mandatory minimum penalties to certain offenders.

"(a) Notwithstanding any other law, a mandatory minimum term of imprisonment under this title or title III shall not be applicable if the court finds at sentencing that the defendant (1) has no prior conviction in any court for (i) a felony drug offense (as defined in section 401(b)(1)(A) of this title (21 U.S.C. 841(b)(1)(A)) or (ii) a violent felony, as defined in section 924(e)(2) of title 18, United States Code), (2) did not use violence or possess a firearm or other dangerous weapon (or direct that another participant do so) in connection with the offense, and (3) is not eligible for an aggravating role adjustment in the offense under section 3B1.1 of the guidelines promulgated by the United States Sentencing Commission.

"(b) Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines for sentencing persons described in subsection (a). Such guidelines shall apply retroactively.

"(c) This section shall take effect on the effective date of the guidelines promulgated under subsection (b) and, notwithstanding any other law, shall apply retroactively. A person previously sentenced to a mandatory minimum penalty under this title or title III whose sentence has not been served shall have the right upon motion to be resentenced under this section.

Explanation

This amendment would create a limited exception to the applicability of mandatory minimum sentences for certain first-time controlled substances offenders. Currently, 5-year and 10-year minimum sentences are applicable under the Controlled Substances Act and the Controlled Substances Import and Export Act for first-time violators depending solely on the quantity of drugs with which the person was involved. Role in the offense and the absence of a prior criminal record do not prevent the application of the mandatory minimum sentence. This scheme has been widely criticized, by judges, commentators, and the Sentencing Commission, as producing unduly harsh sentences when applied to first-time offenders whose role in the drug offense was relatively minor, such as a "mule" paid to carry drugs across the border or a lookout.

Under the proposed amendment, the existing minimum mandatory sanctions under the Controlled Substances Act and the Controlled Substances Import and Export Act would not apply if the court at sentencing found that the offender: (1) had no prior conviction in any court for a felony drug offense or a violent felony (as defined); (2) did not use violence or possess a dangerous weapon (or direct that another participant do so) in the instant offense; and (3) was not eligible for an aggravating role adjustment under the sentencing guidelines, i.e., was not a leader, manager, or organizer with respect to the instant offense.

As to this category of persons, the Sentencing Commission would be directed to promulgate appropriate guidelines, which would apply retroactively. Presumably, the guidelines would in most instances provide for a substantially lesser prison sentence than now mandated by the statutory minimum. However, there is no requirement that this be the case in all instances. For example, a first-time offender who, although not eligible for an aggravating role adjustment in this offense, is shown at sentencing to have been a part of a drug organization for a long time and to have committed many similar offenses may warrant a substantial prison term.

The exemption from the mandatory sentence only applies to the prison component. Some statutes contain mandatory provisions for terms of post-release supervision. These would continue to apply.

The entire section would apply retroactively and would take effect upon the taking effect of the new guidelines. Prisoners serving sentences under the mandatory minimums in the Controlled Substances Act and who were first-time offenders could move for resentencing. They would bear the burden, however, of showing that they did not use violence and did not receive an aggravating role adjustment. While such retroactive application may pose a one-time burden on the courts, the burden would be spread out among virtually all districts. Moreover, retroactive application is necessary to achieve fairness.

ADJUSTING THE PENALTY LEVEL FOR POSSESSION OF "CRACK" TO MAKE IT MORE PROPORTIONAL TO THAT WHICH APPLIES TO OTHER FORMS OF COCAINE, AND CLARIFICATION OF THE DEFINITION OF "CRACK".

(a) Section 401(b)(1)(B)(iii) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(B)(iii)) and section 1010(b)(2)(C) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(2)(C)) are each amended by striking "5 grams" and inserting "50 grams".

(b) Section 401(b)(1)(A)(iii) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)(iii)) and section 1010(b)(1)(C) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(C)) are each amended by striking "50 grams" and inserting "500 grams";

(c) Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended --

(1) by striking "5 grams" and inserting "50 grams";

(2) by striking "3 grams" and inserting "30 grams"; and

(3) by striking "1 gram" and inserting "10 grams".

(d) Section 102 of the Controlled Substances Act (21 U.S.C. 802) is amended by adding at the end the following:

"(42) The term 'cocaine base' means cocaine base which is designed for human consumption by being smoked.".

Explanation

Currently, possession of 5 grams of "cocaine base", or "crack", carries with it a 5-year minimum sentence under 21 U.S.C. 841(b)(1)(B), 844(a), and 960(b)(2)(C). Possession of other forms of cocaine carries a 5-year minimum prison term only if the amount possessed is 500 grams or more. 21 U.S.C. 841(b)(1)(B) and (960)(b)(2)(B). This 100-1 ratio has been widely criticized as disproportionately severe with respect to "crack" users. While "crack" is undeniably a more potent and dangerous form of cocaine than others, it is not 100 times as potent and dangerous. Accordingly, this proposal would amend the cited statutes to increase the amount of "crack", possession of which will trigger the application of the mandatory 5-year sentence, from 5 grams to 50 grams. [1] The 10-1 ratio thus created by the amendment is deemed to represent a far closer approximation of the relative degree of seriousness of "crack" as compared with other types of cocaine.

In addition, the amendment resolves a conflict in circuits and provides clarification as to the meaning of "cocaine base". Some courts have held that Congress intended "cocaine base" to mean only "crack", i.e. a form of cocaine that is scientifically a base rather than an acid and which is usually in rock-like form and can be smoked. E.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991). Other courts have held that "cocaine base"

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[1] Conforming amendments are also proposed to the provisions creating a 10-year minimum sentence, 21 U.S.C. 841(b)(1)(A) and 960(b)(1)(C).

includes all forms of cocaine that are scientifically a base. E.g., United States v. Jackson, 936 F.2d 158 (2d Cir.), cert. denied, 113 S. Ct. 664 (1992). This would include coca paste, a non-smokable intermediate step in the processing of coca leaves into cocaine hydrochloride, which is no more dangerous than other types of non-crack cocaine. Recently the Sentencing Commission sent to Congress a proposed amendment to the sentencing guidelines which would define "cocaine base" for guideline purposes as meaning only "crack". The Commission's amendment, however, does not affect the statutory meaning of "cocaine base" and thus does not resolve the present statutory ambiguity or conflict. The proposed amendment would do so by adopting a definition of "cocaine base" as including only cocaine base which is designed for human consumption by being smoked. Thus, coca paste which is merely a stage in the manufacturing process for cocaine hydrochloride would not qualify as "crack".

STRENGTHENED PENALTIES FOR TRAFFICKING IN FENTANYLS.

(1) Section 401(b) of the Controlled Substance Act (21 U.S.C. 841(b)) is amended--

(A) in paragraph (1)(A)(vi)--

(1) by striking "400 grams" and inserting "40 grams"; and

(ii) by striking "or 100 grams" and all that follows through the end of clause (vi) and inserting "(fentanyl) or any of its analogues;"; and

(B) in paragraph (1)(B)(vi)--

(i) by striking "40 grams" and inserting "4 grams", and

(ii) by striking "or 10 grams" and all that follows through the end of clause (vi) and inserting "(fentanyl) or any of its analogues;"; and

(2) section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended --

(A) in paragraph (1)(F)--

(1) by striking "400 grams" and inserting "40 grams"; and

(ii) by striking "or 100 grams" and all that follows through the end of clause (vi) and inserting "(fentanyl) or any of its analogues;"; and

(B) in paragraph (2)(F)--

(i) by striking "40 grams" and inserting "4 grams"; and

(ii) by striking "or 10 grams" and all that follows through the end of clause (vi) and inserting "(fentanyl) or any of its analogues;".

Explanation

This proposal would increase the penalties for trafficking in fentanyls, a particularly dangerous type of controlled substance which is presently severely underpunished. The proposal originated with the Drug Enforcement Agency and was introduced in 1992 in the House by a bipartisan group of Representatives and in the Senate by Senator D'Amato.

SEC. . LSD PENALTIES.

(a) Section 401(b)(1)(A)(v) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)(v)) is amended to read as follows:

"(v) 500 milligrams or more of lysergic acid diethylamide (LSD) or 100 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);"

(b) Section 401(b)(1)(B)(v) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(B)(v)) is amended to read as follows:

"(v) 50 milligrams or more of lysergic acid diethylamide (LSD) or 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);"

(c) Section 1010(b)(1)(E) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(E)) is amended to read as follows:

"(E) 500 milligrams or more of lysergic acid diethylamide (LSD) or 100 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);"

(d) Section 1010(b)(2)(E) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(2)(E)) is amended to read as follows:

"(E) 50 milligrams or more of lysergic acid diethylamide (LSD) or 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);"

SECTION .

This section amends the Controlled Substances Act and the Controlled Substances Import and Export Act with regard to quantities of lysergic acid diethylamide (LSD) that trigger mandatory minimum penalties. The purpose of the amendment is to ameliorate the effect of the current provision, which treats violations involving specified quantities of a mixture or substance containing a detectable amount of LSD in the same manner for mandatory penalty purposes regardless of whether the LSD is in pure form or on a carrier such as blotter paper.

Under current law a minimum five-year prison term must be imposed for trafficking or importing violations involving one gram or more of a mixture or substance containing a detectable amount of LSD. 21 U.S.C. §§841(b)(1)(B)(v) and 960(b)(2)(E). A minimum ten-year term must be imposed for such violations involving ten grams or more of a mixture or substance containing a detectable amount of LSD. 21 U.S.C. §§841(b)(1)(A)(v) and 960(b)(1)(E).

LSD is extremely potent, and a very small quantity can produce many doses. For example, one gram of LSD in liquid form, assuming a dose weighs .05 milligrams, would result in 20,000 doses of the substance. However, one gram of blotter paper containing LSD, assuming each blotter paper dose weighs 10 milligrams, would result in only 100 dosage units of the substance. The trafficker in one gram of either form of the substance is subject to the same mandatory five-year minimum term of imprisonment despite the widely different number of doses of LSD involved. (Blotter paper impregnated with LSD and sold as a single dose can weigh as much as

27 milligrams, while a typical single dose piece weighs only six to seven milligrams. Both may contain the same actual quantity of LSD.)

The amendment is based on an assumption that a typical dose of pure LSD is .05 milligrams. Under the amendment trafficking in 500 milligrams or more of LSD (10,000 dosage units) would trigger the ten-year mandatory prison term. The 500 milligrams could be in pure form or extracted from a mixture or substance of any greater weight for the mandatory penalty to apply. Trafficking in 100 grams or more of a mixture or substance containing a detectable amount of LSD would also trigger the ten-year mandatory minimum penalty. Assuming a dose of LSD on blotter paper weighed 10 milligrams, 100 grams of a mixture or substance containing LSD would also produce 10,000 dosage units of the substance. The proposal follows the same approach for the five-year mandatory penalties, except that the triggering quantities are one-tenth the above quantities, consistent with the current penalty structure.

In short, the amendment significantly raises the weight of a mixture or substance containing LSD subject to the five- and ten-year mandatory penalties. However, in order to equalize penalties for LSD whether in pure or near-pure form or on a carrier, the amendment creates a separate category of LSD not in mixed form and uses much smaller weights than under current law.

MANDATORY MINIMUMS

Issue

A growing number of federal judges -- and House and Senate Judiciary Committee members -- have vocally opposed the mandatory minimum sentences passed by Congress in recent crime bills. Limited in their sentencing discretion, many of these judges have argued that mandatory minimums are unduly harsh and unconstitutional, and senior judges, who have some control over their dockets, have refused to handle drug cases for the same reasons.

Background

Mandatory minimum federal sentences take into account the type and amount of drugs involved, aggravating circumstances, and the criminal history of the offender. However, the law does allow judges to impose sentences longer than the minimum, or a lesser sentence if recommended by the prosecutor. The law also establishes minimum periods of supervised release after the full prison sentence has been served.

Opponents of mandatory minimums argue two points: (1) that they take away a judge's discretion and have resulted in some minor offenders (e.g., drug mules) serving disproportionately harsh sentences; and (2) that mandatory minimums, along with the sentencing guidelines, have dramatically increased the number of drug offenders serving long sentences -- our resources our better spent on violent offenders.

Proponents of mandatory minimums, however, will say that most federal drug offenders are incarcerated for trafficking, money laundering, and other similar crimes -- not for simple possession. They will also argue that -- at least in the federal system -- violent offenders are not being let go to incarcerate drug offenders.

Administration Position

The Administration does not have a specific position on mandatory minimums. During the campaign, the President stated that mandatory minimums were not a panacea for the crime problem, that we needed to do much more. On separate occasions, he stated that he supported tough punishments for serious drug and violent offenders.

Short Answers

- I support long sentences for serious offenders, but I am concerned about the effects that mandatory minimums are having on the criminal justice system.

- Attorney General Reno has expressed an interest in looking at the mandatory minimum situation, and I would defer to her judgement on the issue.

Detailed Questions and Answers

Q: **Many people, including the Attorney General, have been critical of mandatory minimum sentences, particularly those for drug offenders. What is your position on mandatory minimums? Do you support them for certain drug-related offenses? Do you support repeal any that are now on the books?**

A: Senator, I think we should be very hesitant before proposing new or expanded mandatory minimums. We have a system in place, established by Congress -- the Sentencing Commission -- to study crime and punishments, and adopt guidelines for criminal sentencing. While there have been criticisms of this system too, I think it makes more sense that arbitrarily selecting some crimes, but not others, for mandatory minimum punishments.

That is not to say that for some offenses these punishments are not proper; there may be times where, after careful study, the Clinton Administration proposes a new or increased mandatory minimum sentence. But we will only do so after consulting with others in the criminal justice system, to determine the need -- and cost -- of such a punishment.

Given the limits on the number of prison cells, the number of potential trails, the number of prosecutors, and so on, what we have to have is a system that invests those resources in imposing the most severe punishments on the most severe crimes. To date, the Sentencing Commission is the only comprehensive scheme we have for doing that, and that should be our first option.

In the end, though, this Administration will continue to support efforts to punish drug and violent criminals.

Q: **Do you support alternatives to incarceration?**

A: Senator, the term I prefer is "certainty of punishment." Our current system has severity of punishment, but not certainty. We need more certainty of punishment if we are going to deter crime. By that I mean, insuring that every criminal receives some punishment for their crime -- no unrestricted probation, no revolving system of justice.

As a practical matter, given our resources, that means imposing non-traditional punishments on some of these offenders: assignments to drug treatment, to work programs, to community service, and to boot camps.

The point is simply this: people should know that in this country, if you commit a crime, you will be punished -- our lack of prison space or resources is not going to allow you to get off. And to achieve this goal, we have to be far more creative -- at the state and local level -- in designing potential punishments, particularly for youthful offenders.

93-539 GOV

CRS Report for Congress

Mandatory Minimum Sentencing For Federal Crimes: Overview and Analysis

Suzanne Cavanagh
Specialist in American National Government
David Teasley
Analyst in American National Government
Government Division

May 27, 1993

CRS

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MANDATORY MINIMUM SENTENCING: OVERVIEW AND ANALYSIS

SUMMARY

The Federal judicial system changed from indeterminate to determinate sentencing with the enactment of the Comprehensive Crime Control Act of 1984. Indeterminate sentencing allowed judges considerable discretion within certain parameters. Determinate sentencing narrows the discretion given to judges in setting sentences and relies on specific predetermined standards. This Act created a U.S. Sentencing Commission and charged it with promulgating guidelines for Federal sentencing, and provided for the phasing out of the U.S. Parole Commission. At the same time, Congress authorized a number of new mandatory minimum sentencing provisions directed at drug and firearm related crimes.

While Congress directed the Sentencing Commission to draft sentences guidelines appropriate for all Federal crimes, it also mandated that certain minimum sentences be required for certain categories of crimes and criminals. Some argue that mandatory minimum provisions complement the guidelines system, while others maintain that the former skews the guidelines system and allows greater prosecutorial discretion at the expense of the judiciary.

Sentencing guidelines at the Federal level have been in place since 1987. However, there still is no consensus about the extent to which the imposition of mandatory minimum sentencing on top of a sentencing guideline system either inhibits or assists in achieving the Commission's main goal of eliminating unwarranted disparity in sentencing.

The controversy about the possible effects of mandatory minimum sentences on the criminal justice system generally may be divided into five major questions. Do mandatory minimums: (1) aid in deterrence of crime, (2) substitute prosecutorial for judicial discretion, (3) eliminate unwarranted disparity, (4) result in inequitable sentencing for minorities, and (5) contribute to prison overcrowding?

Policymakers have taken various positions within the current debate about the possible effects of mandatory minimums on the criminal justice system. They generally have proposed one of three options: (1) maintain the status quo; (2) increase the number of mandatory minimum sentencing requirements; and (3) repeal existing mandatory minimum provisions. It appears that the 103rd Congress is likely to consider new legislation adding to the body of such statutes. Many legislators favor the maintenance of the status quo, and even the enactment of new mandatory minimum provisions, while others advocate the repeal of these penalties, in favor of greater emphasis on the use of guidelines or alternative sentencing.

CONTENTS

MANDATORY MINIMUM SENTENCING: OVERVIEW AND ANALYSIS

INTRODUCTION

The U.S. Sentencing Commission defines mandatory minimum sentencing provisions as "statutory provisions requiring the imposition of at least a specified minimum sentence when criteria specified in the relevant statute have been met."[1] Although Federal mandatory minimum penalties have been in effect since 1790, and there are approximately 100 such provisions in 60 separate criminal statutes, the greatest increase in Federal use of these penalties occurs in relatively few provisions, most of which were enacted after 1984.[2] The latter are concerned with the manufacture, distribution, or possession of controlled substances, and with the possession of a firearm during a drug-related or violent crime.

This report documents the growth in the use of mandatory minimum sentencing at the Federal level, and presents data regarding the impact of this trend on the criminal justice system. It provides a pro/con analysis of such sentences, and it offers a discussion of the range of available policy responses.

BACKGROUND

Sentencing Reform

Policymakers in the field of criminal justice recognize that sentencing serves four purposes: deterrence, retribution, incapacitation, and rehabilitation. To achieve these ends, two major sentencing systems, indeterminate and determinate, have been used intermittently at the Federal and State levels. Indeterminate sentencing allows judges considerable discretion within certain parameters. Determinate sentencing narrows the discretion given to judges in setting sentences and relies on specific predetermined standards, often established by a sentencing commission. While indeterminate sentencing emphasizes rehabilitation by providing for judicial discretion within a wide range of sentencing options defined by statute, determinate sentencing stresses

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[1] U.S. Sentencing Commission. Special Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System.* Washington, D.C. August 1991. p. 4. Hereafter referred to as U. S. Sentencing Commission, *Mandatory Minimum Penalties.*

[2] Ibid., pp. 5, 10, A1- A8. The Commission includes within its definition some of the capital punishment statutes whose only constitutionally enforceable penalty is life imprisonment; see Figure 2 appended.

deterrence and incapacitation by providing for the regulation or reduction of judicial discretion by statute or guidelines.

A mandatory minimum sentence may be set within either indeterminate or determinate sentencing systems by legislating an inflexible minimum amount of time to be served in prison for a selected offense or for certain types of offenders. In practice, mandatory minimum sentencing is often defined as "a form of statutory determinate sentencing," because mandatory minimum sentencing tends to be associated with deterrence and incapacitation rather than with rehabilitation.[3]

Between 1935 and 1975, most States and the Federal Government had indeterminate sentencing systems. Once viewed as a major reform designed to individualize the treatment of offenders and facilitate rehabilitation, indeterminate sentencing came under attack because it was perceived as promoting unwarranted disparity in sentences as well as uncertainty of punishment.[4] Changing attitudes about rehabilitating criminals, along with fears of a rising rate of violent crime, led to efforts to revise sentencing laws in most jurisdictions throughout the country. Beginning in the mid-1970s, many State and local jurisdictions turned to determinate sentencing.[5] Some

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[3] Tonry, Michael. Structured Sentencing. In Tonry, Michael and Norval Morris, eds. *Crime and Justice: A Review of Research.* Vol. 10. Chicago, University of Chicago Press, 1988. p. 331. Hereafter referred to as Tonry, Structured Sentencing.

[4] Indeterminate sentencing systems typically operate as follows: the legislature determines the outer limits or range of sentences for a particular crime (e.g., from 5 to 20 years); the judge may select any sentence from within that range (e.g., 12 years); and the parole board may at its discretion release an offender any time after some specified percentage of the sentence (often one-third) has been served, or it may require that the entire sentence be served. Under this system judges exercise considerable discretion in setting the outer limits of confinement. Parole boards determine the actual length of any offender's imprisonment, based upon their decision about the offender's progress toward rehabilitation.

[5] In a determinate sentencing system, a legislature or a commission establishes standards or guidelines that allow the judge some discretion within a predetermined range. Once adjudicated, the offender must serve the period of time determined by the judge, minus time off for good behavior. Wilson, Deborah G. The Impact of Federal Sentencing Guidelines on Community Corrections and Privatization. In Champion, Dean J., ed. *The U.S. Sentencing Guidelines: Implications for Criminal Justice.* New York, Praeger Press, 1989. p. 165. See also Hepburn, John R. and Lynne Goodstein. Organizational Imperatives and Sentencing Reform Implementation: The Impact of Prison Practices and Priorities on the Attainment of the Objective of Determinate Sentencing. *Crime and Delinquency.* Vol. 32, July 1986. pp. 339-65.

policymakers favored determinate sentencing as a means of fighting crime and getting "tough" on criminals, while others saw it as a means to protect the rights of convicted offenders affected by sentencing disparity under the former indeterminate sentencing system.

The switch from indeterminate to determinate sentencing occurred at the Federal level with the enactment of the Comprehensive Crime Control Act of 1984.[6] This Act created a U.S. Sentencing Commission and charged it with promulgating guidelines for Federal sentencing, and provided for the phasing out of the U.S. Parole Commission. Meanwhile, Congress passed a number of new mandatory minimum sentencing provisions directed at drug and firearm related crimes.[7]

Sentencing guidelines have been in place at the Federal level since 1987. However, there is still no consensus about the extent to which the imposition of mandatory minimum sentencing requirements either inhibits or assists in achieving the Commission's main goal of eliminating unwarranted disparity in sentencing.

Many argue that mandatory minimum sentencing complements the sentencing guidelines, and that together they prevent disparity in sentencing. Advocates maintain that mandatory minimums establish baselines for guideline sentences. Also, both mandatory minimums and the guidelines satisfy the need for certainty in punishment.

Others believe that mandatory minimum sentencing has led to imbalance within the present determinate sentencing system as well as overcrowded prisons. Critics argue that the minimums required by Congress become the base sentence for certain offenses, thus skewing the efforts of the Sentencing Commission to achieve equitable sentencing and increasing prosecutorial discretion at the expense of the judiciary.[8]

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[6] P.L. 98-473; 98 Stat. 1987.

[7] The major acts were the Comprehensive Crime Control Act of 1984 (P.L. 98-473), the Anti-Drug Abuse Act of 1986 (P.L. 99-570), the Firearm Owners' Protection Act of 1986 (P.L. 99-308), and the Omnibus Anti-Drug Abuse Act of 1988 (P.L. 100-690). For a discussion of this trend, see U.S. Sentencing Commission, *Mandatory Minimum Penalties*, pp. 7-10.

[8] Lowenthal, Gary T. Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform. *California Law Review*. Vol. 81. January 1993. p. 65. Critics note that Federal prosecutors, working within constitutional limitations, enjoy wide latitude when charging an individual, plea bargaining, and even in the determination of a sentence. See, Bennett, Robert S. Foreward to the Eighth Survey of White Collar Crime. *American Criminal Law Review*. Vol. 30. Spring 1993. p. 443.

Recently, several Federal judges of the U.S. District Courts of the District of Columbia and the Eastern District of New York announced their reluctance to hand down stiff mandatory sentences for m' ıor drug offenders. They have made known their request not to hear such drug cases.[9] Responding to these and similar criticisms, the U.S. Sentencing Commission and Attorney General Janet Reno have agreed to review Federal sentencing policy.[10] Proponents of mandatory minimums have expressed growing concern with signs that there is decreasing support for mandatory minimum sentences. They question the propriety of certain Federal judges' decisions to refuse cases requiring the imposition of mandatory minimum sentences, and express alarm that the Clinton Administration appears to be considering the elimination of such sentences.[11]

The Problem of Statistics

Precise data on the impact of mandatory minimum sentencing on the Federal criminal justice system have been difficult to compile and interpret. Federal agencies such as the U.S. Sentencing Commission have been hampered by the inability to isolate data prior to 1989 that link specific convictions to mandatory minimum provisions within statutes.[12] Interpreting the data presents additional problems. For example, the Federal Judicial Center noted in its study of the impact of mandatory minimum sentencing on prison terms that:

> There is a danger in attributing any change in sentences imposed over time solely to the enactment of new [mandatory minimum sentencing] laws: many other changes were also going on (for example, the "war" on drugs, the proliferation of "designer" drugs, and the

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[9] Himelstein, Linda and Eva M. Rodriguez. Panel Approves More Leeway in Drug Sentencing. *Legal Times.* April 26, 1993. p. 17.

[10] Ibid. Isikoff, Michael. Reno Orders Review of Prosecution, Sentencing of Minor Drug Offenders. *Washington Post.* May 4, 1993. p. A9.

[11] Statement of the Hon. Phil Gramm. *Congressional Record.* Daily Edition, Vol. 139, May 11, 1993. p. S5729.

[12] In its August 1991 Special Report to Congress, the U.S. Sentencing Commission provided selected data on the number of defendants sentenced under statutes with mandatory minimum provisions from January 1984 through August 1990. It cautioned that sentencing data were compiled from statutes that might contain both mandatory minimum and non-mandatory minimum provisions. Though the Commission recognized that not all cases compiled were the result of mandatory minimum sentences, it argued that this data offer "a general means of gauging the frequency with which various mandatory minimum statutes are used." U.S. Sentencing Commission, *Mandatory Minimum Penalties*, p. 10, fn. 41.

> changing composition of the federal judiciary). The implications from this work should be viewed as interesting questions for more detailed study, rather than conclusive evidence that the laws or the guidelines *caused* whatever changes are observed.[13]

Also, critics of the findings of these studies have questioned both the methodology used to compile the data and its interpretation. Responding to the findings of the U.S. Sentencing Commission's August 1991 report, Robert S. Mueller, III, the former Assistant Attorney General for the Criminal Division, argues that "the data [of the Commission's study] were not adequate to permit a full assessment of the status of reviewed cases." In addition, he questioned many of the Commission's conclusions about the failure to sentence those deemed eligible for mandatory minimum sentences. He found that a substantial number of these defendants were in fact, ineligible because of evidentiary requirements.[14]

THE CURRENT DEBATE ABOUT MANDATORY MINIMUMS

The controversy about the possible effects of mandatory minimum sentences on the criminal justice system generally may be divided into five major questions. Do mandatory minimums: (1) aid in deterrence of crime, (2) substitute prosecutorial for judicial discretion, (3) eliminate unwarranted disparity, (4) result in inequitable sentencing for minorities, and (5) contribute to prison overcrowding?

Do Mandatory Minimums Aid In Deterrence of Crime?

Most criminal justice researchers agree that a decline in belief that violent criminals could be rehabilitated, heightened public concern about the rising crime rate, and the desire of many policymakers to secure swift and certain punishment for selected offenses, were the major catalysts for the enactment of a series of mandatory minimum sentencing provisions si ce the mid-1980s. Though proponents favor the continued or even increased use of such statutes, opponents assert that they have not proven to be an effective deterrent to crime.

The arguments concerning the use of mandatory minimum to deter crime fall into three general categories. Do these statutes: (1) send a clear message to potential offenders that they will spend time in prison if they commit a crime;

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[13] Meierhoefer, Barbara S. *The General Effect of Mandatory Minimum Prison Terms.* Federal Judicial Center. 1992. p. 2. Hereafter referred to as Meierhoefer, *General Effect.*

[14] Mueller, Robert S., III. Mandatory Minimum Sentencing. *Federal Sentencing Reporter.* January/February 1992. pp. 231-32. Hereafter referred to as, Mueller, Mandatory Minimum Sentencing.

(2) ensure swift, certain, and appropriate punishment; and (3) guarantee the incapacitation of dangerous offenders?

One proponent, former Assistant Attorney General Mueller, answers affirmatively on all counts:

> By enacting mandatory minimum sentence statutes, Congress has been sending a strong message that our society will not tolerate certain forms of criminal behavior. Mandatory minimum sentences deter criminal activity by maximizing the certainty and predictability of incarceration for crimes that pose serious threats to the nation's quality of life, such as drug trafficking near schools. Because mandatory minimum provisions are set forth in clear and unambiguous language, they are easily understood and provide effective disincentives for potential offenders.[15]

Mandatory minimums have been applied to selected offenses, mainly to drug and gun violations, as well as to types of offenders, especially to career criminals. Senator Arlen Specter, a longtime advocate of mandatory minimum sentencing for repeat offenders (those who have committed three or more major crimes), provided statistics in the late 1980s suggesting that there were approximately 200,000 to 400,000 repeat offenders in the United States; that each was believed to commit approximately 300 to 700 crimes per year; and that 10 percent of all persons arrested (those designated as repeat offenders) committed 70 percent of all offenses. He asserted that mandatory minimums are necessary to incapacitate these career criminals.[16]

Critics of mandatory minimum sentencing argue that these provisions are not heeded by potential offenders; do not ensure swift, certain, and appropriate punishment; and do not incapacitate the more dangerous classes of offenders. Stuart Taylor, Jr., a senior writer with *The American Lawyer* magazine, questions the effectiveness of mandatory minimums in deterring crime. He notes that the violent crime rate continues to grow, and that the number of those who used cocaine at least once a week in 1991 increased by 29 percent over 1990.[17] In one case at the State level during the late 1970s, authorities

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[15] Mueller, Mandatory Minimum Sentencing, p. 230.

[16] Statements of Sen. Arlen Specter, *Congressional Record,* Daily Edition, Vol. 136, May 22, 1990, p. S6705; Vol. 135, April 11, 1989, p. S3624; Vol. 134, June 23, 1988, p. S8493.

[17] Taylor, Stuart, Jr. A Quiet Crisis in the Courts. *Legal Times.* January 20, 1992. p. 23. Hereafter referred to as Taylor, Crisis. At the time Stuart wrote this article, FBI violent crime data for 1991 were not available. The yearly rate of increase in violent crime per 100,000 Americans from 1988 to 1991 is as follows: 4.5 percent in 1988; 4.1 percent in 1989; 10.4 percent in 1990; and

launched a campaign to inform the public about a handgun related mandatory minimum statute, in the hope of deterring those prone to such crimes. Subsequent surveys suggested that social pressure and perceived need for protection greatly outweighed respondents' fear of punishment under the statute.[18]

Furthermore, critics maintain that these provisions are arbitrary and result in an overloading of the court system. At least two judges, one Federal and one on the bench of the Court of Common Pleas of Philadelphia, have resigned protesting the arbitrary nature of mandatory minimum sentencing.[19] Taylor notes: "The courts have been deluged by criminal trials and appeals, in large part because harsh penalties have increased defendants' incentives to go to trial rather than plead guilty."[20] Another Federal judge recently refused to impose a mandatory 30-year sentence on a 25-year old career criminal. Judge Harold H. Greene ruled that the minimum sentence required by the sentencing guidelines for repeat offenders was "grossly out of proportion to the crime."[21] Others charge that mandatory minimum sentencing requirements often result in incarceration of lesser offenders, while major drug kingpins, who can provide information to prosecutors, receive reduced sentences in exchange for their cooperation.[22]

Do Mandatory Minimums Substitute Prosecutorial for Judicial Discretion?

3.6 percent in 1991.

[18] Among incarcerated offenders, 69 percent of those serving time for first offenses indicated that they would, upon release, continue to violate the law, and of the repeat offenders, 76 percent said they would not be deterred by the statute. U.S. Department of Justice. National Institute of Justice. *American Prisons and Jails.* Vol. IV. Supplemental Report, Case Studies of New Legislation Governing Sentencing and Release. Washington, U.S. Govt. Print. Off., 1980. p. 42.

[19] Criticizing Sentencing Rules, U.S. Judge Resigns. *New York Times.* September 30, 1990. p. 22. (Federal District Judge J. Lawrence Irving); Forer, Lois G. Justice By Numbers: Mandatory Sentencing Drove Me From the Bench. *The Washington Monthly.* Vol. 24, April 1992. pp. 12-18.

[20] Taylor, Crisis, p. 23.

[21] York, Michael. Judge Rejects Federal Sentencing Guidelines. *Washington Post.* April 30, 1993. p. D5.

[22] Moore, W. John. Mindless Minimums. *National Journal.* Vol. 23, June 1, 1991. p. 1310.

With the establishment of determinate sentencing at the Federal level in 1984, critics argued that "structured judicial discretion would shift power to prosecutors unless their discretions were also structured."[23] In other words, in the case of mandatory minimum sentencing, judges would be limited in terms of the minimum sentence they may hand down, but prosecutors would have greater freedom to plea bargain with offenders' counsels and perhaps reduce the charge to a lesser offense. Meanwhile, the number of statutes carrying mandatory minimum penalties, especially in the areas of drug and gun violations, have increased since the late 1980s. Those chary about the impact of mandatory minimum sentences on judicial discretion have expressed even greater doubts about the expanded use of these provisions within the criminal justice system.

Perhaps the most significant criticism to date regarding the transfer of discretion from judges to prosecutors appeared in the U.S. Sentencing Commission's 1991 Special Report to Congress:

> The Sentencing Reform Act [1984] was meant to structure and curtail the pre-guidelines pattern of unfettered judicial discretion. Congress, however, expressed a concern that judicial discretion not be transferred to federal prosecutors in a manner that would undermine the benefits expected to be gained from the guidelines system. The guidelines structure attempts to strike an appropriate balance by implementing a modified real offense system. Mandatory minimums, in contrast, are wholly dependent upon defendants being charged and convicted of the specific offense under the mandatory minimum statute. Since the power to determine the charge of conviction rests exclusively with the prosecution for the 85 percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution. To the extent that prosecutorial discretion is exercised with preference to some and not to others, and to the extent that some are convicted of conduct carrying a mandatory minimum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced.[24]

The Commission's report suggests that mandatory minimums should be repealed, a position shared by the Judicial Conference of the United States, the special Federal Courts Study Committee, 12 Federal Circuit Courts, the

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[23] Tonry, Structured Sentencing, p. 324.

[24] U.S. Sentencing Commission, *Mandatory Minimum Penalties*, p. iii.

American Bar Association, and the National Association of Criminal Defense Lawyers.[25]

Specifically, the Commission reportedly found strong evidence that mandatory minimums encouraged a shift from judicial discretion to prosecutorial discretion in two ways. First, they suggested that prosecutors often charge cooperating offenders with lesser offenses though the evidence would warrant a charge for a more serious offense. Using data from the total population of those defendants whom they believed warranted a mandatory minimum sentence, the Commission reported that 74.3 percent of all defendants were actually charged with the offense carrying the greatest penalty under existing statutes; 45 percent of drug defendants who could have qualified for a penalty enhancement for weapons related offenses were not so charged; and similarly, 63 percent of defendants who could have qualified for penalty enhancement for prior felony convictions were not so charged.[26]

Second, the Commission suggested that prosecutors often use the threat of a mandatory minimum sentence to obtain guilty pleas. Using data on plea/conviction patterns in the same set, the Commission reported that for those charged with the highest mandatory minimum available and *who were convicted at trial*, 96 percent received the full sentence; for those eligible to be charged with an offense carrying the highest mandatory minimum applicable, *but who pleaded guilty*, 27 percent were permitted to plead guilty to lesser charges.[27]

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[25] DeBenedictis, Don J. Mandatory Minimum Sentences Hit. *American Bar Association Journal.* Vol. 77. Dec. 1991. p. 36.

[26] The U.S. Sentencing Commission relied upon a number of data sets, including the Federal Probation Sentencing and Supervision Information System (FPSSIS) of the Administrative Office of the U.S. Courts, the U.S. Sentencing Commission Monitoring Data for FY1990, and a survey of approximately 12.5 percent of the Commission's files on defendants sentenced in FY1990. The Commission conducted a special study, with a sample set of 1,165 defendants who were convicted and sentenced in the Federal system in FY1990, and whose offense conduct was determined to warrant a mandatory minimum sentence, regardless of whether the defendant was actually charged or convicted under such a provision. Eighty-one cases of this sample were excluded because of a lack of information on the indictment, conviction, departure, or sentence. U.S. Sentencing Commission, *Mandatory Minimum Penalties*, pp. 36, 55-57.

[27] The U.S. Sentencing Commission found three additional patterns: significant unwarranted disparities among the Federal Judicial Circuits in the application of mandatory minimum sentences; judges frequently hand down lighter sentences than those required by mandatory minimum provisions; and mandatory minimum provisions lead to a larger number of cases actually going to trial, increasing the judicial workload.

On the other hand, some observers have taken issue with the findings of the U.S. Sentencing Commission that mandatory minimum sentences shift discretion from the judge to the prosecutor. Former Assistant Attorney General Robert S. Mueller, III offers a variety of explanations to defend the present application of mandatory minimums within the Federal criminal justice system. In some cases, he argues that the judges themselves reduced sentences based upon a defendant's cooperation and assistance in the prosecution of others. In other cases, he points out that defendants did not receive the most severe sentence applicable to their offense *at trial.* In still other cases, defendants received sentences more severe than their pleas negotiated with the prosecutors.[28]

For those cases in which the Commission believed either lower or no mandatory minimum sentences were charged even though the offense warranted the highest applicable mandatory minimum, Mueller argues that the validity of the data upon which this finding was based is dubious:

> in the view of the Department [of Justice] many of the Commission's findings are subject to question because a substantial number of the defendants included by the Commission in its sample of 1,165 deemed eligible for mandatory sentences did not belong in this category.
>
> Specifically, because of proof problems, mandatory minimum charges appropriately were not brought in many of the cases that the Commission claimed were eligible for such charges. Although the Commission chose to disregard questions of evidence, evidentiary issues are an integral aspect of the prosecutorial decision making throughout each case.[29]

Moreover, he questions the methodological standard used by the Commission in selecting cases for this study, namely the Commission's statement: "case review decisions were guided by a criterion of 'reasonableness,' rather than 'beyond a reasonable doubt,' in the search for indications of [chargeable] mandatory minimum behavior."[30] He argues under evidentiary rules, the use of a criterion of reasonableness may be insufficient to merit bringing a case to trial. He

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[28] Mueller, Mandatory Minimum Sentencing, p. 231.

[29] Mueller notes that his conclusion is based upon DoJ's review of only 83 cases, supplied by the Commission, rather than the total sample of 1,165 defendants. Ibid.

[30] U.S. Sentencing Commission, *Mandatory Minimum Penalties*, p. D-5; Mueller, Mandatory Minimum Sentencing, p. 231.

reminds the reader that it is DoJ policy "only to bring charges that the government should win if there were a trial."[31]

In addition, Mueller provides other examples in which there may be valid reasons for prosecutors' failure to charge offenders under the most stringent standards. He cites those cases in which prosecutors may opt for a lesser charge in order to ensure the continued cooperation of an informant at subsequent trials. Other examples might include DoJ's policy mandating that Federal prosecutors should not initiate a case if the offender had been tried at the State level for the same offense.[32]

The U.S. Sentencing Commission recognized many of the limitations to which Mueller draws attention. For example, in its study of those defendants whose behavior warranted the highest mandatory minimum sentence, the Commission emphasized that the data were based solely on information in presentence reports rather than data on the strength of evidence. Also, the Commission allowed that the indictment stage [within the case processing evolution] for these cases was not "fully documented," such that the study could not provide any assessment of prosecutor's reasons for not charging the most severe mandatory minimums in over 25 percent of all cases studied.[33] Likewise, Mueller acknowledges that "not every prosecutorial decision was appropriate . . . . [and that DoJ's Criminal Division staff] are keenly interested in correcting any problems that exist."[34]

Do Mandatory Minimums Eliminate Unwarranted Disparity?

The issue of disparity raises a number of questions in several areas. First, how effective in reducing disparity in sentencing is the present system using both mandatory minimums and sentencing guidelines? How well do mandatory minimums meet the specifications set up in the Sentencing Reform Act of 1984 regarding proportionality? [35]

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[31] Ibid.

[32] Ibid.

[33] U.S. Sentencing Commission, *Mandatory Minimum Sentencing*, pp. 55-57.

[34] Mueller, Mandatory Minimum Sentencing, pp. 231-32.

[35] Whereas the issue of disparity is concerned with treating like offenders in an equal fashion, proportionality seeks to ensure that the punishment is commensurate with the offender's participation in the crime.

For a discussion of recent Supreme Court decisions regard mandatory minimums enacted at the State level and proportionality, see U.S. Library of Congress. Congressional Research Service. Mandatory Sentencing and the Requirements of the Eighth Amendment After *Harmelin v. Michigan*. Report

One of the motivating factors for sentencing reform legislation was the concern about unwarranted disparity in Federal sentencing under the indeterminate sentencing system. With the introduction of sentencing guidelines at the Federal level, in place by 1987, policymakers hoped to reduce, if not eradicate, such disparity. In addition, Congress enacted a series of mandatory minimum sentencing provisions designed to remove all discretion from Federal judges in sentencing for certain types of offenses or offenders.

There is still no consensus on the extent to which the simultaneous use of mandatory minimum sentencing with the guidelines either inhibits or assists in achieving the guidelines' main goal of eliminating unwarranted disparity in sentencing. On the one hand, former Assistant Attorney General Mueller reports: "The Department views mandatory minimums as complements to sentencing guidelines, both because they set important baselines for guideline sentences and because they reinforce the concepts of certainty and predictability of punishment upon which the guidelines are built."[36] On the other hand, the U.S. Sentencing Commission finds evidence that the sentencing guidelines are better structured to eliminate disparity than are mandatory minimums:

> The guidelines are potentially superior to mandatory minimums in reducing unwarranted disparity for two interrelated reasons. First, because they operate with far greater specificity, the guidelines are better able to identify and categorize similarly-situated offenders. Mandatory minimums often have the contrary effect of adjudging the same penalty for quite different offenses and offenders. Second, because the guidelines depend less on the prosecutor's charging decision, they are better able to assure that similarly-situated offenders receive similar sentences.[37]

The debate over proportionality overlaps with the issue of unwarranted disparity in sentencing. The Sentencing Commission argues that "mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act."[38] For example, the Commission found that mandatory minimums undermine proportionality especially between defendants whose offenses either fell just above or just below the threshold for imposing a mandatory minimum.[39] Mueller questions the

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Number 91-749 A, by Charles Doyle. Washington, 1991.

[36] Mueller, Mandatory Minimum Sentencing, p. 232.

[37] U.S. Sentencing Commission, *Mandatory Minimum Penalties,* pp. ii-iii, 34.

[38] U.S. Sentencing Commission, *Mandatory Minimum Penalties,* p. iii.

[39] Ibid., pp. 30-31.

methodology and analysis used in the Sentencing Commission study's conclusions regarding problems of proportionality, just as he did in the case of unwarranted disparity in sentencing.[40]

Have Mandatory Minimums Resulted in Inequitable Sentencing for Minorities?

The controversy concerning the possibility of mandatory minimums causing inequity in sentencing of minorities may be divided into two areas: is inequity built into the language of mandatory minimum sentencing laws, and do they encourage discrimination as they are applied?

Critics argue that laws carrying mandatory minimum sentences for certain drug related violations often result in racial and ethnic minorities receiving a sentence disparate to the crimes they commit. For example, Stuart Taylor, Jr., a senior writer with *The American Lawyer* magazine, concludes that these laws have encouraged a racial imbalance in sentencing:

> One reason is that Congress has set the same minimums for selling small quantities of crack cocaine (the drug of choice in black inner cities) as for selling 100 times as much powdered cocaine (preferred by white suburbanites). For example, 50 grams (two ounces) of crack brings the same 10-year minimum as 5 kilograms (11 pounds) of powered cocaine.[41]

One response to this criticism is that policymakers generally agree that crack offenses deserve more severe sentences since the drug is more potent and has a more immediately damaging effect of the user.

With respect to perceived inequities in the application of mandatory minimums, the U.S. Sentencing Commission's report suggests that minority defendants may be treated inequitably during sentencing:

> The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum;. . . . This differential application on the basis of race . . . reflects the very kind of disparity and

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40 Mueller, Mandatory Minimum Sentencing, p. 232.

41 Taylor, Crisis, p. 23.

> discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce.[42]

In the cases examined, the Commission found that black defendants composed the largest group (67.7 percent), followed by Hispanics (57.1 percent), and whites (54 percent) to be sentenced at or above the indicated mandatory minimum. White defendants were the largest group (25 percent) receiving downward departures (sentences less than those prescribed in the guidelines), followed by blacks (18.3 percent) and Hispanics (11.8 percent).[43]

In a Federal Judicial Center study, based upon research undertaken as an independent part of the Commission's larger research effort, selected data were compiled on mandatory minimum provisions for drug trafficking offenses, and possession or use of a firearm during a drug trafficking felony or a crime of violence. The study's author, Barbara S. Meierhoefer, discusses the possible impact of race on mandatory minimum sentencing. She finds in general that sentences for whites have tended to be lower than those for non-whites. She reported that blacks received an average sentence 28 percent higher than whites in 1984, 11 percent higher in 1986, and 49 percent higher in 1990. Hispanics received an average sentence just over 10 percent higher in 1984, 35 percent higher in 1988, and down to the same rate as 1984 for 1990.[44]

In addition, Meierhoefer finds that a greater proportion of black and Hispanic offenders than whites were sentenced to *at least* the mandatory minimum prison term. Initially, the statistics revealed a decline, with the former groups 12 percent more likely than whites to receive this sentence in 1984, and with the rate for all three groups fairly equal in 1986. By 1990, however, blacks were 21 percent more likely and Hispanics were 28 percent more likely than whites to receive this sentence. Though she is aware that other factors may have influenced sentencing outcomes, she concludes that "the timing of the increased divergence in sentencing based on race implicates the mandatory minimum laws."[45]

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[42] U.S. Sentencing Commission, *Mandatory Minimum Penalties*, p. ii.

[43] Ibid., pp. 76, 82.

[44] Meierhoefer, *General Effect*, p. 20.

[45] Ibid. Court of Appeals Judge Gerald W. Heaney authored a third study of disparities in sentencing. He analyzed sentencing information for over 800 cases in three midwestern States, and found that blacks were more likely to receive tougher sentences than whites. He urged Congress to repeal mandatory minimum sentencing provisions because they:

> promote litigation by convincing defendants that they have nothing to lose by going to trial . . . . [they] encourage hidden plea bargaining, a practice in which a defendant is

On the other hand, former Assistant Attorney General Mueller argues that the study's "serious methodological limitations . . . may have led to a distortion in subsequent analyses, including those pertaining to variations across races. . . ."[46] In support of his conclusion, he emphasizes that the authors of the study regarded their sample size and time available insufficient to produce conclusive findings.

In the Federal Judicial Center study mentioned earlier, Meierhoefer notes that non-whites have tended to receive more severe sentences than whites, even before many drug and gun related mandatory minimum sentences were enacted in the late 1980s.[47] Patrick A. Langan, a statistician at the Bureau of Justice Statistics, agrees with Meierhoefer that minorities were overrepresented among the prison population even before the enactment of many drug and gun related mandatory minimum sentences.[48]

Have Mandatory Minimum Sentencing Laws Contributed to Prison Overcrowding?

The Bureau of Justice Statistics (BJS) reported that the number of Federal and State prisoners reached a record high in 1991. The number of Federal prisoners rose from 67,432 in 1990 to approximately 71,600 in 1991; State

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> undercharged to avoid the imposition of a mandatory minimum sentence. Such practices gnaw at the integrity of the criminal justice system. Mandatory minimums also contradict the rationale of the guidelines.

Judge Heaney stated that differences in sentences for minorities may be due to the difference in the willingness of black and Hispanic offenders to cooperate with the authorities, or, in some cases, it may suggest racism or ethnic prejudice. See Heaney, Gerald W. The Reality of Guidelines in Sentencing: No End to Disparity. *American Criminal Law Review*. Vol. 28, 1991. p. 231. Hereafter referred to as Heaney, Reality of Guidelines Sentencing.

[46] Mueller, Mandatory Minimum Sentencing, p. 232.

[47] Meierhoefer, *General Effect*, p. 20.

[48] Langan, Patrick A. America's Soaring Prison Population. *Science*. Vol. 251, March 29, 1991. pp. 1569-70. Hereafter referred to as Langan, America's Soaring Prison Population. The debate about the causes of minority overrepresentation in the criminal justice system transcends that of the impact of mandatory minimum sentencing. For a discussion of the pros and cons on this debate, see Langan, Patrick A. Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States. *The Journal of Criminal Law and Criminology*. Vol 76, Fall 1985. 14 p.; and Anderson, George M. Sentencing, Race and the Poor. *America*. Vol. 163, December 29, 1990. 4 p.

inmates numbered 707,598 in 1990, and approximately 751,800 in 1991. BJS tempered this report of prison population growth by noting that the *rate of growth* for Federal and State prison populations in 1991 reached its lowest point since 1984.[49] Federal prisons have been operating at 46 percent above their capacity, and State prisons at approximately 16 to 31 percent above their capacity. According to former BJS Director Stephen D. Dillingham: "The increased number of drug-law convictions during the last decade has had a dramatic impact on the nation's prisons. . . . Although about one out of every 13 new prisoners had been convicted of a drug offense during 1981, by the end of the decade almost one in three new admissions was for a drug-law violation."[50]

The Sentencing Reform Act of 1984 and the Crime Control Act of 1990 directed the Sentencing Commission to study the impact of sentencing guidelines and mandatory minimums, respectively, on the Federal prison population. Using existing data, the Commission projected under a low growth scenario that prison population due to mandatory minimum provisions in the Anti-Drug Abuse Act of 1986 would rise from an estimate of 67,000 in 1992 to an estimate of 93,000 in 2002. Under a high growth scenario, the Commission projected that prison population under such provisions would increase from an estimate of 73,000 in 1992 to 138,000 in 2002. Also, the Commission reported that mandatory minimum provisions added between $79 to $125 million in additional costs for offenders sentenced in fiscal year 1990.[51] In addition, the studies produced by the U.S. Sentencing Commission and Judge Heaney assert that Federal judges are sentencing offenders for longer prison terms, a development that both studies agree is due in part to the enactment of tough mandatory drug penalties.[52]

On the other hand, BJS statistician Patrick Langan suggests that mandatory minimum sentencing laws are not responsible for a growth in prison admissions:

> . . . if mandatory sentencing laws were the reason for the increased chances of a prison sentence, the composition of the prison population would have changed after 1973 [when the upward trend in prison population began], with repeat offenders and offenders convicted of targeted offenses becoming a larger fraction of the prison population. For the

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[49] U.S. Bureau of Justice Statistics. U.S. Department of Justice. Prisoners in 1991. *BJS Bulletin.* May 1992. pp. 1-2.

[50] U.S. Bureau of Justice Statistics. U.S. Department of Justice. Press Release on Federal and State Prisoners in 1991. May 28, 1992. p. 1.

[51] U.S. Sentencing Commission, *Mandatory Minimum Penalties*, pp. 115-17.

[52] Ibid., p. 113; Heaney, Reality of Guideline Sentencing, p. 176-78, 198.

> most part, that has not occurred. . . . Furthermore, violent offenses and other offenses targeted by mandatory sentencing laws have not grown as a percentage of prison admissions, according to the admission census. The one exception is growth in drug offenders. Again, however, it is not clear that mandatory sentencing laws were responsible. The trend toward growing percentages of drug offenders among admissions actually began before 1973, in the 1960s, and largely reflects increases in drug offense arrests since the 1960s.[63]

Langan finds that the leading cause for the increase in prison population is the greater certainty that those arrested and convicted will serve time in prison. For example, the statistician points to tougher parole policies as a significant contributor to prison population growth. In addition, he argues that the rise in prison admissions has occurred for all types of offenses, not just those designated by mandatory minimum provisions. Even so, he notes that the length of time actually served in prison has not increased since 1973, although mandatory sentencing provisions have tended to require longer sentences.[64]

James Austin, a corrections researcher, disagrees with Langan's thesis that "the current and projected growth in the nation's prison population is not due to the 'war on drugs,' longer sentences, or mandatory prison terms." Instead, he points out that most of Langan's data involve 1986 prison exit samples. Thus, Austin states:

> Given that the median length of stay in prison is 14-18 months, plus an average of three months spent in jail prior to sentencing, and that changes in sentencing laws are not felt for at least six months after implementation, a 1986 prison exit sample, at best, will reflect 1984 sentencing laws. Since a large number and the most severe mandatory prison laws were passed after 1984, an exit sample cannot be used to reach conclusions on whether future prison population growth is being affected by mandatory prison terms.[65]

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[63] Langan, America's Soaring Prison Population, pp. 1569-70.

[64] Ibid., pp. 1569-70, 1572. LaFraniere, Sharon. Prison Term Now More Likely for Most Crimes. *New York Times*. March 29, 1991. p. A6.

[65] Austin, James. The Consequences of Escalating the Use of Imprisonment. *Corrections Compendium*. Vol. 16, September 1991. p. 8, note 3.

Using data sets for Florida and nationwide, Austin emphasizes that drug offenses accounted for an average of 8 percent of prison admissions after 1974, a proportion which has doubled to 16 percent since 1984.[56]

MANDATORY MINIMUMS: POLICY OPTIONS

Depending upon the positions policymakers have taken within the current debate about the possible effects of mandatory minimums on the criminal justice system, they generally have proposed one of three options: (1) maintain the status quo; (2) increase the number of mandatory minimum sentencing statutes; and (3) repeal existing mandatory minimum provisions.

Judge Williams Wilkins, Jr., Chairman of the U.S. Sentencing Commission, stated in May 1991, that he doubted that any mandatory minimums would be repealed in the near future. His goal was to urge that no additional mandatory minimum provisions be added to the U.S. Code.[57] Attorney General Janet Reno has called for a "balanced approach" on mandatory minimum sentencing. In her confirmation hearing, the Attorney General designate expressed limited support for these provisions but noted some of the problems caused by their enactment in her home State of Florida:

> A lot of minimum mandatory sentences have been passed [in Florida]. Many people have gone to prison. There are now dangerous offenders who were not the subject of a minimum mandatory sentence, who face release from prison because we have too many people on minimum mandatory sentences . . . . One of your former colleagues, who used to argue for minimum mandatory sentences, Sen. Lawton Chiles [now Governor of Florida], is now faced with what he calls gridlock in Florida's prisons. . . .[58]

Meanwhile, the Clinton administration has introduced a new Justice/Crime initiative, that calls for "increased funds to meet costs associated with detaining and incarcerating the growing Federal prison population, which has resulted from increased arrests and the imposition of minimum mandatory sentences."[59]

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[56] Ibid., p. 6.

[57] Sturgess, Garry. The Case Against Fixed Time. *Legal Times*. Vol. XIII, May 6, 1991. p. 15.

[58] Confirmation Hearings Produce Picture of Reno As Moderate. *Criminal Justice Newsletter*. Vol. 24, February 16, 1993. p. 2.

[59] Executive Office of the President of the United States. *A Vision of Change for America*. February 17, 1993. p. 60.

The introduction of several anti-crime bills in the 103rd Congress by Members of both parties, most containing new mandatory minimum provisions, would seem to indicate that a maintenance of the status quo is unlikely. Among these are H.R. 388 (Solomon), that would impose mandatory minimum sentences for violent felonies committed against the elderly; H.R. 439 (Zimmer), that would increase penalties for adults who use children to commit Federal offenses; S. 8 (Hatch et al.), The Crime Control Act of 1993, an omnibus measure containing mandatory minimum provisions; S. 11 (Biden) and S. 470 (Boxer/Kreuger), that contain mandatory minimum provisions against rapists and stalkers respectively; and S. 499 (Lott), that would provide for mandatory life imprisonment for those convicted of a third violent felony.

In addition, the 102nd Congress reached conference agreement on an omnibus anti-crime package, H.R. 3371, that failed to pass in the Senate. This bill would have enacted several new mandatory minimum provisions, including heightened penalties for drug dealing in prisons and drug-free zones, and for firearm possession by violent felons and serious drug offenders. Senator Joseph Biden, the Judiciary Committee chairman, is expected to introduce in the 103rd Congress a crime bill containing similar provisions. President Clinton has expressed the administration's willingness to actively support such a measure.[60]

One researcher has explained the desire of legislators to increase the number of mandatory minimum provisions by outlining the history of what she calls "the politicization of sentencing policy":

> Once the public lost confidence in rehabilitation, politicians were less willing to defer to criminal justice professionals' judgments on how to reduce crime and, in response to perceived public demands for a tougher approach, began enacting mandatory minimum prison sentences and increasing sentence lengths for many offenses.[61]

Others argue that mandatory minimum penalties are necessary, especially for many drug and gun related offenders, who appear to be increasingly more violent.

A third position taken by some policymakers calls for the repeal of mandatory minimum statutes in conjunction with alternate sentencing policies. For example, the proposed Sentencing Uniformity Act of 1993, H.R. 957, would

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[60] Barrett, Paul M. Clinton Wants to Broaden Federal Fight Against Crime, but Strategy Has Critics. *Wall Street Journal*. March 12, 1993. p. A10.

[61] Petersilia, Joan. Crime and Punishment in California: Full Cells, Empty Pockets, and Questionable Benefits. In Steinberg, James B., David W. Lyon, and Mary E. Vaiana, eds. *Urban America: Policy Choices for Los Angeles and the Nation*. Santa Monica, CA, RAND, 1992. p. 187.

abolish mandatory minimum sentences throughout the Federal criminal code. The bill's sponsor, Representative Don Edwards, urges a greater emphasis on the use of sentencing guidelines and posits that:

> . . . mandatory minimum sentences are inherently incompatible with the mandate of the U.S. Sentencing Commission. The Commission's purpose is to create sentencing guidelines directed toward the specifics of the offender and the offense, to reduce disparities and inequities in sentencing, and to create certainty of punishment.[62]

The U.S. Sentencing Commission reports that the guidelines system, as established by Congress in 1984, is superior to the use of mandatory minimums in terms of effectiveness and efficiency.[63]

Others agree that mandatory minimums should be repealed, but they do not favor a greater reliance on the sentencing guidelines. Michael Tonry, the editor of *Crime and Justice–A Review of Research*, argues that the Sentencing Commission's report offers a convincing argument for repeal of mandatory minimums. At the same time, he believes that the Commission's study reveals that the guidelines are almost as mandatory as the mandatory minimum statutes, and that the Sentencing Commission's guidelines are likely to meet with "judicial hostility, prosecutorial ambivalence, and wholesale circumvention."[64] Stuart Taylor and Judge Heaney also favor the repeal of mandatory minimums and criticize the guidelines system. Taylor favors a return to greater *judicial* discretion over sentencing, with continued use of appellate review of sentences prescribed in the 1984 Act.[65] Judge Heaney urges a change from compulsory to voluntary use of the guidelines, and a study of inequities within the present guidelines system with respect to the sentencing of minority males.[66]

Others urge the use of voluntary sentencing guidelines in conjunction with alternative sentencing strategies. Following the establishment of programs in Alabama and Delaware that created voluntary sentencing guidelines with intermediate sanctions, public opinion surveys showed an agreement among the public that violent offenders should be incarcerated, but found that public support for the incarceration of non-violent offenders fell after the public had

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[62] Statement of the Hon. Don Edwards. *Congressional Record*. Daily Edition, Vol. 139, February 17, 1993. p. E359.

[63] U.S. Sentencing Commission, *Mandatory Minimum Penalties*, pp. iii-iv.

[64] Tonry, Mandatory Minimum Penalties, p. 132.

[65] Taylor, A Quiet Crisis, p. 23.

[66] Heaney, Reality of Guidelines Sentencing, pp. 228, 232.

learned about alternatives to incarceration. These alternatives included strict probation, community service, restitution, house arrest, and boot camps. Public support for these alternatives was contingent upon the assurance that these programs would be strictly enforced.[67]

Those who express concern that the use of mandatory minimum sentences in conjunction with sentencing guidelines are responsible for the problem of prison overcrowding suggest that the present system be modified. They point to the use in some States of sentencing strategies that take into account the impact of the system on prison populations. For example, Minnesota, the first State to implement sentencing guidelines (1980), opted for a system that emphasized prison commitment for violent crimes and de-emphasized it for property offenses. The Minnesota system does not permit an increase in the prison population beyond existing capacity, and thus reserves its prison resources for more violent offenders.[68]

CONCLUSION

Since the enactment of a series of mandatory minimum sentencing statutes in the late 1980s, policymakers and researchers have debated their impact and effectiveness. The recent publication of the U.S. Sentencing Commission's report on mandatory minimum penalties served to heightened the controversy, because the Commission suggested that these statutes have tended to warp the guidelines system, led to inequitics in the treatment of minorities, and caused first time offenders to receive longer sentences than those with extensive criminal records. In addition, the Attorney General's call for a review of Federal prosecution and sentencing policies focuses additional attention on the debate.

However, it appears that the 103rd Congress is likely to consider new legislation adding to the body of such statutes. Meanwhile, there also appears to be a growing and increasingly vocal element, including Members of Congress, Federal judges, and criminal justice professionals, who advocate the repeal of mandatory minimum penalties, in favor of greater emphasis on the use of guidelines or alternative sentencing.

SC/DT/ds

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[67] Hunzeker, Donna. Bringing Corrections Policy into the 1990s. *State Legislative Report.* Vol. 17, March 1992. p. 4.

[68] U.S. Library of Congress. Congressional Research Service. Federal Sentencing Guidelines. Report Number 91-499 GOV, by Suzanne Cavanagh. Washington, 1991. pp. 3-4.

Figure 1: Number of Defendants Sentenced Under Statutes With Mandatory Minimum Provisions[1] January, 1984 Through August, 1990

Statute	1984	1985	1986	1987	1988	1989	1990 (Jan-Aug)	Total
7 USC § 2024	227	83	37	23	253	218	148	989
8 USC § 115	0	0	1	8	9	9	10	37
18 USC § 844(h)	6	4	2	1	4	7	4	28
18 USC § 924(c)[2]	51	85	97	144	302	515	590	1,784
18 USC § 924(e)	-	-	0	4	22	46	37	109
18 USC § 1111	52	42	40	36	31	26	17	244
18 USC § 1114	0	1	6	3	8	13	2	33
18 USC § 2113(e)	11	9	9	8	7	11	2	57
18 USC § 2251	1	8	14	12	17	18	9	79
18 USC § 2252	16	68	90	139	183	86	80	662
21 USC § 841[2]	3,620	4,509	5,302	5,892	5,959	7,445	5,487	38,214
21 USC § 844[2]	1,239	1,246	1,240	1,813	1,882	1,799	999	10,218
21 USC § 845	4	4	34	69	28	13	16	168
21 USC § 845a	0	2	0	7	50	124	100	283
21 USC § 845b	-	-	0	0	3	16	17	36
21 USC § 848	51	101	107	121	121	129	59	689
21 USC § 960[2,3]	1,086	815	953	902	759	936	684	6,135
Other statutes	5	2	1	3	1	2	1	15
Grand Total	6,369	6,979	7,933	9,135	9,639	11,413	8,262	59,780

[1] This chart includes cases for which the statute refers to primary or secondary charge of conviction. These statutes contain both mandatory and non-mandatory sentencing provisions; therefore, mandatory minimum penalties do not necessarily account for all of the cases counted above.
[2] These four statutes, all involving drug and weapons violations, comprise approximately 94 percent of all cases in this sample.
[3] 21 USC § 960 is the penalty statute for 21 USC §§ 952, 953, 957, 959, and 960.
SOURCE: U.S. Sentencing Commission. *Mandatory Minimum Penalties*, pp. 11-12.

Figure 2: Selected Sections of the U. S. Code Containing Mandatory Minimum Provisions[1]

U.S. Code Section	Description of Crime	Date*	Minimum Term
7 USC § 2024	Second illegal food stamp activity; value of $100 or more	1981	6 months
18 USC § 115	First degree murder of Federal official's family member	1984	Life
18 USC § 844(h)	Second offense, use of fire or explosives to commit a felony, penalty enhancement provision	1970	10 year determinate enhancement
	First offense, use of fire or explosives to commit a felony, penalty enhancement provision	1970	5 year determinate enhancement
18 USC § 924(c)	Second offense, using or carrying a machine gun, silencer, or destructive device during a crime of violence or drug trafficking crime	1986	Life
	First offense, using or carrying a machine gun, silencer, or destructive device during a crime of violence or drug trafficking crime	1986	30 year determinate enhancement
	Second and all subsequent offenses, using or carrying a firearm during a crime of violence or drug trafficking crime	1968	20 year determinate enhancement
	First offense, using or carrying a firearm during a crime of violence or drug trafficking crime, penalty enhancement provision	1968	5 year determinate enhancement
18 USC § 924(e)	Possession of a firearm or ammunition by a fugitive or addict who has three convictions for violent felonies or drug offenses	1986	15 years
18 USC § 1111	First degree murder	1790	Life
18 USC § 1114	First degree murder of Federal officers	1934	Life
18 USC § 2113(e)	Homicide or kidnapping during bank robbery or larceny	1934	10 years
18 USC § 2251	Second offense of sexual exploitation of children	1978	5 years
	Sale or transfer of custody of minor, knowing minor will be sexually exploited	1988	20 years

Figure 2: Selected Sections of the U. S. Code Containing Mandatory Minimum Provisions[1]

U.S. Code Section	Description of Crime	Date*	Minimum Term
18 USC § 2252	Second offense, distribution or receipt of visual depictions of minors engaging in sexually explicit conduct	1978	5 years
	Second offense, distributing or possessing with intent to distribute child pornography	1990	5 years
	Second offense, possessing three or more pieces of child pornography	1990	5 years
21 USC § 841(b)(1)(A)	Third offense, manufacturing, distributing, or possessing with intent to distribute	1986	Life
	Second offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results from the use	1986	Life
	Second offense, manufacturing, distributing, or possessing with intent to distribute; no death or serious bodily injury	1986	20 years
	First offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results from the use	1986	20 years
	First offense, manufacturing, distributing, or possessing with intent to distribute; no death or serious bodily injury	1986	10 years
21 USC § 841(b)(1)(B)	Second or any subsequent offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results	1984	Life
	Second and all subsequent offenses, manufacture, distribution, or possession with intent to distribute; no death or serious bodily injury	1984	10 years
	First offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results	1984	20 years
	First offense, manufacture, distribution, or possession with intent to distribute; no death or serious bodily injury results	1984	5 years

Figure 2: Selected Sections of the U. S. Code Containing Mandatory Minimum Provisions[1]

U.S. Code Section	Description of Crime	Date*	Minimum Term
21 USC § 841(b)(1)(C)	Second or any subsequent offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results	1986	Life
	First offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results	1986	20 years
21 USC § 844(a)	First offense, simple possession of a controlled substance, substance contains cocaine base and weighs more than 5 grams	1988	5 years
	Second offense, simple possession of a controlled substance, substance contains cocaine base and weighs more than 3 grams	1988	5 years
	Third and all subsequent offenses, simple possession of a controlled substance, substance contains cocaine base and weighs more than 1 gram	1988	5 years
	Third and all subsequent offenses, simple possession of a controlled substance, all substances other than those containing cocaine base but weighing 1 gram or less	1986	90 days
	Second offense, simple possession of a controlled substance, all substances other than those containing cocaine base but weighing 3 grams or less	1986	15 days
21 USC § 845 [transferred to 21 USC § 859, see P.L. 101-647]	First offense, distribution to persons under age 21	1986	1 year or the applicable minimum from 841(b), whichever is the greater
	Second offense, distribution to persons under age 21	1986	1 year or the applicable minimum from 841(b), whichever is the greater
	Third offense, distribution to persons under age 21	1988	Life

Figure 2: Selected Sections of the U. S. Code Containing Mandatory Minimum Provisions[1]

U.S. Code Section	Description of Crime	Date*	Minimum Term
21 USC § 845a [transferred to 21 USC § 860, see P.L. 101-647]	First offense, distribution of a controlled substance near a school or similar facility	1986	1 year or the applicable minimum from 841(b), whichever is the greater
	Second offense, distribution of a controlled substance near a school or similar facility	1984	3 years or the applicable minimum from 841(b), whichever is the greater
	Third offense, distribution of a controlled substance near a school or similar facility	1988	Life
21 USC § 845b [transferred to 21 USC § 861, see P.L. 101-647]	First offense, employing, etc., a person under age 18 to engage in a controlled substance offense	1986	1 year or other applicable minimum, whichever is the greater
	Second offense, employing, etc., a person under age 18 to engage in a controlled substance offense	1986	1 year or other applicable minimum, whichever is the greater
	Third offense, employing, etc., a person under age 18 to engage in a controlled substance offense	1988	Life
21 USC § 848	Second and all subsequent offenses, continuing criminal enterprise	1970	30 years
	First offense, continuing criminal enterprise	1970	20 years
	First offense, qualifying kingpins	1986	Life

Figure 2: Selected Sections of the U. S. Code Containing Mandatory Minimum Provisions[1]

U.S. Code Section	Description of Crime	Date*	Minimum Term
21 USC § 960(b)(1)	Second or any subsequent offense, unlawful import or export; death or serious bodily injury results	1986	Life
	Second or any subsequent offense, unlawful import or export; no death or serious bodily injury	1986	20 years
	First offense, unlawful import or export; death or serious bodily injury results	1986	20 years
	First offense, unlawful import or export; no death or serious bodily injury results	1986	10 years
21 USC § 960(b)(2)	Second or any subsequent offense, unlawful import or export; death or serious bodily injury results	1986	Life
	Second and all subsequent offenses, unlawful import or export; no death or serious bodily injury	1986	10 years
	First offense, unlawful import or export; death or serious bodily injury results	1986	20 years
	First offense, unlawful import or export; no death or serious bodily injury results	1986	5 years
21 USC § 960(b)(3)	Second or any subsequent offense, unlawful import or export; death or serious bodily injury results	1986	Life
	First offense, unlawful import or export; death or serious bodily injury results	1986	20 years

*First year that the mandatory minimum was applied to the particular offense.

[1] Figure 2 lists all statutes found in Figure 1, but does not include the category of "Other statutes" found in Figure 1.

SOURCE: U.S. Sentencing Commission. *Mandatory Minimum Penalties*, Appendix A, pp. A1-A8.

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TO: Jose Cerda

FROM: Marianela Peralta

Date: August 20, 1993

RE: Overview of Mandatory Minimums

Brief History

Although the issue of mandatory minimums is just now getting widespread attention, mandatory minimums have been part of criminal law for some time. Mandatory minimum penalties go back as far as 1790 when they were implemented for capital offenses. Until the passage of the Narcotic Control Act of 1956 mandatories were rare in the federal system. These stiff mandatory minimum sentences for drug importation and distribution, however, were repealed in 1970 (Congressman George Bush then supported their repeal).

According to the report "Mandatory Minimum Penalties in the Federal Criminal Justice System" (hereafter, Report), published by the U.S. Sentencing Commission in 1991, the dominant view in the field of corrections had been that prisons existed to rehabilitate inmates. The result was that courts and parole boards had control over the amount of time spent in prison by inmates. This approach came under heavy fire and a movement to make sentences more certain, less disparate and more punitive led to a shift that brought us to the current system.

In 1984 Congress enacted the Sentencing Reform Act as part of the Comprehensive Crime Control Act. The Crime Act's purpose was to address the problem of crime in society. The goals of the Sentencing Reform Act were to reduce unwanted disparity, to increase uniformity and correct past patterns of leniency for certain crimes. (U.S. Sentencing Report 1991)

As part of the Sentencing Reform Act a bipartisan Congress called on the President to appoint an expert seven-member commission to create sentencing guidelines that would curb the discretion of the federal courts. The Commission's mandate was to produce fair sentences that would "curtail unwanted disparity". In addition, Congress enacted certain offense-specific mandatory minimum statutes. Every two years thereafter Congress enacted additional mandatory minimum penaties specifically targeted at drugs and violent crime.(See pp. 9-10 in Report) The federal code now contains more than 100 separate mandatory minimum sentence provisions, located in 60 different statutes.

Mandatory Minimums Today

According to the Sentencing Commission's Report, just four of the mandatory minimum statutes accounted for ninety-four percent of the approximately 60,000 cases the Commission studied. Those four statutes cover possession, manufacture, importation and distribution of controlled substances.

The four statutes are 21 U.S.C. sec. 841 (manufacture and distribution of controlled substances), 21 U.S.C. sec. 844 (possession of controlled substances), 18 U.S.C. sec. 924(c) (minimum sentence enhancements for carrying a firearm during a drug or violent crime) and 21 U.S.C. sec. 960 (penalties for importation/exportation of controlled substances.

One of the arguments in the current debate over mandatory minimum sentences is that the guidelines, as created by the United States Sentencing Commission, and the mandatory minimums are not consistent with each other and that they often work at cross purposes. The guidelines method of sentencing involves the evaluation of several factors. Those factors include:

- Determining the Base Offense Level
- Examining Specific Offense Characteristics
- Applying Chapter Three Adjustments (Court considers the defendant's role in the offense; found in Chapter Three of the Guidelines).
- Counting Multiple Counts
- Acceptance of Responsibility
- Assessment of the Defendant's Criminal History
- Determining the Applicable Sentencing Range

By using the above factors the guidelines were intended to provide sentences that are substantial, proportionate and fair, but with a margin of flexibility. Mandatory minimums are structurally and functionally at odds with the guidelines. Whereas the guidelines provide a substantial degree of individualization in determining the appropriate sentencing range, mandatory minimums typically focus on one factor of offense seriousness such as the weight of the drug or drug mixture. The result is equal treatment of unlike offenders that leads to excessive uniformity.

A second difference between the guidelines and mandatory minimums is that mandatory minimums tend to result in sharp differentials or "cliffs". A cliff results when an offender's conduct just barely brings him within the terms of a mandatory minimum. The result is that small drug quantities have enormous importance while other factors bearing on culpability and dangerousness have no importance at all. The guidelines on the other hand, provide graduated proportional increases. Another difference between the two methods is that mandatory minimums are charge-specific and thus, rely on whether the prosecutor makes the charge and whether the defendant is convicted of that charge. Enhancement under the guidelines is required whenever there is an aggravating factor present.

Comment: One critique that is made of the U.S. Sentencing Commission's Report is that there are methodological problems that limit the usefulness of the Commission's figures. The reason being that its review of case files relied on the presentence report and other records that did not afford access to the prosecutor's reasoning for choosing a particular way of handling the case.

The arguments that comprise the "Mandatory Minimum Debate" include several other issues as well. One is the argument that mandatory minimums are too harsh on first time offenders who have minimal participation in the crime, that incarcerating people as a method of waging the "war on drugs" has not proven effective, that the cost of incarcerating people for such long periods of time is more than prison and court budgets can handle, that the guidelines are effective and should be the sentencing method used.

Other issues include the arguments that mandatory minimums have not led to increased uniformity because prosecutors are given wide discretion in their charging practices and yet another criticism is that as a result of mandatory minimums, prisons that are overcrowded are releasing violent offenders to make room for those sentenced under mandatory minimums. This last attack on mandatory minimums is not a concern on the federal level.

To begin, federal law does not allow for parole so people are not being let out on that count. Inmates are being let out to make room for offenders sentenced under mandatories on the state level. States, however, have their own sets of mandatory minimum laws that are separate from the federal ones. When the state sentencing commissions met at a recent conference, the issue of federal mandatory minimums was not mentioned. Many of the representatives went so far as to say that states worked hard not to copy the federal mandatory minimum sentences. These same states are now taking a second look at what they have created because the costs of building and maintaining prisons is taking a toll on their budgets.

The Structure of Federal Mandatories

Mandatories require judges to impose a given minimum sentence upon conviction under a specified charge, but they do not necessarily obligate prosecutors to bring such a charge just because the facts support it. The most important question in any mandatory minimum statute concerns the prosecutor's role: Does the statute entail a mandate to prosecute or merely an option to bargain? According to Stephen Schulhofer's article, "Rethinking Mandatory Minimums", this is a question that is rarely addressed by legislatures explicitly. Prosecutors assume that the statute imposes no mandate on them. The result is that "mandatories then become little more than a bargaining chip, a 'hammer' which the prosecutor can invoke at her option, to obtain more guilty pleas under more favorable terms".

At the federal level most mandatories have traditionally been treated as bargaining chips. Recently, Congress and the Department of Justice have attempted to move away from this approach. The gun and drug provisions illustrate this development. For example, the principal drug mandatory, 18 U.S.C. sec. 924(c), provides that a person "who uses or carries a firearm" in committing a federal crime of violence or drug offense "shall, in addition to the punishment provided for such a crime...be sentenced to imprisonment for five years without parole.

Courts have assumed that the five year sentence can be imposed under this provision <u>only if the defendant is indicted under sec. 924(c) and found beyond a</u>

reasonable doubt to have violated its terms. The result is that sec. 924(c) creates a charge-based mandatory which becomes inapplicable at the prosecutor's discretion. Recent directive's from the Department of Justice have sought to fill in this gap by adopting something close to a regime of mandatory prosecution for "readily provable" sec. 924(c) violations.

Section 841 involves manufacturing and distribution of controlled substances. Courts have uniformly held that drug quantities specified in sec. 841 are not elements of the offense but sentencing factors to be considered by the judge. In this regime the drug quantity that the prosecutor elects to charge is formally almost irrelevant. There is, however, a different kind of loophole here. Prosecutors can avoid sec. 841 altogether by charging under a different drug statute. This is one of the results that the U.S. Sentencing Commission details in its Report.

The alternative for prosecutors was to charge under the conspiracy statute 21 U.S.C. sec. 846. This loophole was plugged in 1988. This, however, did not stop prosecutors from using sec. 841 as a bargaining chip. Because judges are constrained by the maximum penalties authorized for the offense of conviction prosecutors can avoid the fact-based mandatories by limiting the charge to an offense with a low statutory cap. Since 1988 the more popular options for prosecutors have been the phone count--use of a communications facility to further a drug offense and simple possession of a controlled substance. The statistics, according to Schulhofer, show that mandatories for drug distribution and conspiracy have produced an "epidemic of telephone use and simple possession".

Discretionary Mandatories:

- Help avoid the high process costs of additional trials that "real" mandatories can generate.
- May reduce costs because severe penalties can induce pleas that would not otherwise be forthcoming.
- Tend to increase the severity of sentences that guilty plea defendants will accept.
- Increase, rather than reduce, disparity because their application depends on low-visibility prosecutorial choices.
- Affect first offenders in borderline situations, who may have plausible defenses and are more likely to insist upon trial, more severely than guilty repeat offenders who avoid the mandatory by guilty pleas.

Justice Department Materials

The Justice Department policy and its implementation are very important in analyzing this issue. Justice has sought consistency in the application of mandatories through a series of directives that began with the "Redbook", a prosecutor's handbook issued in November 1987. The Redbook obligated prosecutors to bring all readily provable serious charges. The Redbook, however, undercut the force of its mandate because it did not require supervisory review of charging and bargaining decisions. First it admonished against bargaining away provable charges but then it pointed out the prosecutors broad discretion to make judgments about whether charges were provable.

A year and a half later, Attorney General Dick Thornburgh issued a memorandum that purported to reaffirm the Redbook but modified it in significant respects. While the memo re-stated the rule against bargaining, it said that readily provable charges can be dropped with supervisory approval, left local offices free to determine the grounds upon which that may be done. The result is that theoretically mandatory prosecution became theoretically discretionary prosecution.

Who Has Said What on Mandatory Minimums?

President Clinton - The President expressed his support for mandatory minimums during the campaign. "Clinton-Gore's Suburban Ticket", Chicago Tribune, July 12, 1992 sec. 4 at 3. (We don't have the article)

Attorney General Janet Reno - Attorney General Reno has made several comments to the press about mandatory minimums. The statements to date have been fairly general and they echo many of the same dissatisfactions that were mentioned above. The AG has said that,

- Federal sentencing "reform" has produced unrealistically long mandatory prison sentences, doubling the prison population in a decade.

- Criminal cases are driving out civil cases, by filling court dockets with demands for speedy trials to the exclusion of other crimes the Feds should be fighting.

- Mandatory sentences in drug cases do not correct the problem because they do not provide detoxification or job opportunities. She favors alternative sanctions, like job training and placement, that work like a carrot and stick.

- She favors eliminating mandatory minimum sentences for non-violent drug offenders, who make up nearly 50 percent of the inmates in federal prisons, according to drug policy experts, to make room for dangerous career criminals.

- Offenders need to be reintegrated into the community and that delineations between federal and state prosecutorial responsibilities need to be made.

U.S. Representative Don Edwards (D-Calif.) - Introduced a bill, H.R. 957, to abolish all mandatory minimums and federal sentencing guidelines. Although the bill was co-sponsored by 25 members, there is not much general support for H.R. 957 because it goes too far by abolishing all mandatory minimums and the guidelines as well.

U.S. Senator Orrin Hatch - In a Wake Forest Law Review article published this summer, the Republican Senator from Utah was critical of mandatory minimums. The tone of the article, however, was not confrontational. Hatch never openly advocated for abolishing mandatory minimums. His approach is very similar to that used by the U.S.Sentencing Commission in its 1991 report.
Some of his critiques are that sentencing disparity has not been completely eradicated by the guidelines, that the guidelines are excessively time consuming, rigid and technical in application and overly harsh in effect.

Hatch also noted how the guidelines' compulsory nature gives prosecutors too much leverage over defendants, "thereby elbowing out judges out of the sentencing process". He offered alternatives that were not really alternatives in the true sense of the word. Hatch, in essence, endorsed the recommendations that were made by the U.S. Sentencing Commission in its report. Those were along the lines of changes that can be made such as Congress taking a greater role in the Commission's work by providing specific or general statutory directives and greater oversight of the Commission as well as more effective use of the information/data collected by the Commission. Hatch also said that "Congress may need to examine whether the most effective way of addressing these problems is to return to a greater degree of flexibility to the judiciary.

U.S. Representative Charles Schumer (D-NY) - Supports mandatory minimums, however, is concerned about the effect of mandatory minimum sentences on first-time, non-violent offenders who are minimal participants in the crime. According to Schumer there are not too many people who fall in this category. Research done by Schumer's staff shows that since 1991, when authorities began collecting this type of data, there are around 3,200 people who fall into this small category. The Bureau of Prisons, however, estimates that about 2,300 inmates would fall in this category.

Schumer proposes a "safety-valve" that could be invoked to prevent any injustice that may result from the imposition of a mandatory minimum sentence. The specifics of this safety valve have not been determined. A safety valve approach to the mandatory minimum problem has been criticized by Judge William Wilkins, Chairman of the Sentencing Commission. According to Wilkins safety valves would add more complexity to an already complex sentencing system. He says that safety valves would add a third layer to the mandatory minimum sentencing and guideline sentencing systems. Wilkins also says that safety valves do not address the problem of cliffs and the other problems with mandatory minimum sentences.

U.S. Senator Edward M. Kennedy (D-MA) - Senator Kennedy opposes mandatory minimums but supports the guidelines. In a brief article in the Federal Sentencing Reporter (March-April 1991), Kennedy discusses the differences between the guidelines and mandatory minimum sentences. He said that mandatories do not produce uniformity. Like others, he criticizes the fact that the guidelines have been skewed by the incorporation of mandatory minimums.

Senators Kennedy and Simon are drafting a bill that calls for a return to the guidelines and which amends the guidelines. (Attached)

U.S. Representative Coble ( ) - Supports alternative programs along the lines of boot camp and those proposed by the ABA.

U.S. Representative Moorhead ( ) - Supports rehabilitation

U.S. Representative McCollum ( ) - Supports the reform of mandatory minimums but not abandoning them. Does not favor giving discretion back to judges.

U.S. Representative Bill Hughes ( ) - Emphasis was on the increased numbers of people being sent to jail. He does not support mandatory minimums for drug sentencing.

U.S. Representative F. James Sensenbrenner (R-Wis) - At the Oversight Hearing on Mandatory Minimum Sentencing on July 28th, Sensenbrenner said that "mandatories address the crimes that pull at the fabric of society".

U.S. Representative Romano Mazzoli (D-KY) - Supports mandatory minimums. Mazzoli favors discrete changes but would not entirely abandon mandatories. He argues that the fact that so many people are complaining shows that the mandatories are working. Mazzoli objects to the use of terms such as "minor participant" or "peripheral participant" and he does not believe in the description of "non-violent drug offender".

U.S. Representative Jim Ramstad (R-MN) - Supports properly targeted mandatory minimums. Ramstad also supports a broader approach to addressing the crime problem and prison overcrowding through alternative sentencing such as boot camps.

U.S. Representative George Sangmeister (D-IL) - Sangmeister supports mandatory minimums and sees no way to change them because "the people favor them".

U.S. Representative Steven Schiff (R-NM) - Supports mandatory minimums but notes the objections that there are disparities in their application. He does not favor re-introducing parole.

U.S. Representative George Gekas (R-PA) - Gekas supports mandatory minimums.

U.S. Representative John Conyers (D-MI) - Conyers opposes mandatory minimums because they conflict with guidelines. At a recent hearing Conyers said that "we are not following our own laws".

U.S. Senator Phil Gramm (R-TX) - Gramm is a strong supporter of mandatory minimums. His favorable opinions of mandatory minimums, however, represent an extreme. In his article, "Don't Let Judges Set Crooks Free", Gramm, with the help of some interesting and shocking statistics argues that mandatory minimums directly deal with the problem of crime. He uses the correct buzz words ie., "treating criminals as victims of dysfunctional families", "soft sentencing", "on average, a person committing murder in the U.S. today can expect to spend only 1.8 years in prison" to bolster his argument.

Comment: Gramm gives his unequivocal support to mandatory minimums without discussing some of the problems that mandatory minimum critics have been pointing out ie.,disparity in sentencing, first-time non-violent offenders, conflicts with the guidelines. He specifically denies that cost "is not the fundamental issue", an argument that dismisses the very large costs of maintaining prisons and other parts of the justice system.

Chief Justice Rehnquist - At the National Symposium on Drugs and Violence, Rehnquist spoke against mandatory minimums. According to Rehnquist, "mandatory minimum sentences are good examples of the law of unintended consequences". Rehnquist referred to the unduly harsh punishments given to "mules" who play only minor roles in drug distribution schemes, the shift to prosecutors of discretion in charging offenders. Rehnquist criticized the process through mandatories are created. For example, he mentioned floor amendments by legislators who want to give the appearance of being "tough on crime". Finally, Rehnquist said that mandatory minimums frustrate the "careful calibration of sentences" that the guidelines were intended to accomplish.

The American Bar Association - The ABA is firmly committed to the repeal of mandatory minimum sentences. Their reasons are that 1. mandatory minimums are inflexible and rigid and that they do not provide for those who do not fit the general rules and thus, lead to unjust sentences; 2. mandatory minimums do not guarantee that a particular penalty will be imposed for a particular crime. Relying on the U.S. Sentencing Commission Report, the ABA states that over one third of those defendants who were supposed to trigger the application of mandatory minimums did not do so; 3. The ABA opposes the racial disparity that mandatory minimums have allegedly caused; 4. The ABA is concerned about the financial and "human" costs of the "unnecessary incarceration of many nonviolent offenders".

The ABA approved a Model Adult Community Corrections Act which spells out a number of community-based sanctions, including means based fines, home confinement, electronic surveillance, day reporting centers and intensive supervision probation, which would relieve jail and prison overcrowding.

Other Proposals

In addition to Edward's bill there is the Kennedy/Simon bill which is in the drafting stages and the U.S. Sentencing Commission has a bill as well. The Reconciliation Act proposed by the Sentencing Commission would allow mandatory minimum penalties to remain in place but would provide for the application of the sentencing guidelines by the Sentencing Reform Act. (Described in Wilkins' statement in folder).

STATISTICS FROM MAY 12, 1993 PRISON POPULATION HEARING
TESTIMONY AND RESPONSES TO QUESTIONS
WITNESS: KATHLEEN HAWK, DIRECTOR, BUREAU OF PRISONS

Federal Prison Population Facts and Figures

1980 -- 25% of prison population consisted of drug offenders
1993 -- 60% of prison population consists of drug offenders
1997 -- 72% of prison population expected to be drug offenders

Total number of drug offenders in prison population is 39,508

50% of drug offenders entering the federal prison system are first time offenders

10% of all inmates **now entering** the federal prison system are drug offenders who could be considered low level and potentially could be diverted to alternative sanctions

3% of the current population of approximately 76,000 inmates are immediately identifiable from Bureau of Prison records as being as being first time low level offenders with no history of violence. This is about 2,300 inmates.

The Bureau of Prisons suspects that the number of persons who could be determined to be basically "carriers" or "mules" -- those with minimal participation but charged with high amounts of drugs because of amount in total conspiracy or e.g. a handler off-loading charged with entire boat cargo amount is a "very large percentage" of the first time drug offenders.

In 1991, 91% of all defendants sentenced under statutes that carried mandatory minimums were sentenced for drug offenses.

For first time drug offenders there is an 81% success rate in terms of return to the community.

ADDITIONAL FACTS AND FIGURES FROM BUREAU OF PRISONS

Of the 36,491 defendants who received guideline sentences in FY 1992, approximately one-third received mandatory minimum sentences. 15, 289 received drug trafficking sentences of which approximately two-thirds were mandatory minimums.

Drug Mandatory Minimums	All Mandatory Minimums	Sentence
201	221	1 year
4,262	4,989	5 years
4,139	4,194	10 years
273	633	15 years
306	331	20 years
17	22	30 years
57	78	Life

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

PLEASE DELIVER THE FOLLOWING TRANSMITTAL:

TO: Jose Cerda

TELECOPY NUMBER: 202/456-7739
VERIFICATION NUMBER: 202/456-2564

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

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WASHINGTON, DC 20515-6216

MAJORITY—225-3951
MINORITY—225-6906

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]<u>See</u> 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. <u>Commission Report</u>, <u>supra</u> 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.

- <u>The Cliff Effect</u>. 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.

- <u>Unwarranted Uniformity</u>. 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.

- <u>The Cooperation Paradox</u>. 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.

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

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[21] <u>Id</u>.

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.

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.

Table 7

AVERAGE SENTENCE LENGTH FOR LESS SERIOUS* DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM
(October 1, 1991 through September 30, 1992)

Drug Type	N	%	Mean	Median
TOTAL	3,037	100.0	88.2	63
Cocaine	1,678	55.3	94.2	72
Crack	367	12.1	103.1	87
Heroin	359	11.8	77.8	63
Marihuana	463	15.3	64.2	60
Meth.	114	3.8	89.7	75
LSD	45	1.5	69.2	60
Other	11	0.4	76.4	48

*"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 8

AVERAGE SENTENCE LENGTH FOR DRUG OFFENDERS SENTENCED TO A MANDATORY MINIMUM BY DEPARTURE STATUS
(October 1, 1991 through September 30, 1992)

Drug Type	Non-Departure				Substantial Assistance Departure*				Estimated Sentence Absent 5K1.1 Departure	
	#	%	Mean	Median	N	%	Mean	Median	Mean	Median
TOTAL	5,630	100.0	146.7	120	2,585	100.0	65.6	55	115.6	97
Cocaine	2,814	50.0	149.5	121	1,333	51.6	66.5	60	125.6	97
Crack	1,199	21.3	165.2	135	386	14.9	72.4	70	147.9	121
Heroin	462	8.2	131.5	97	208	8.1	54.1	46	116.2	97
Marihuana	807	14.3	108.6	78	424	16.4	52.2	42	104.4	63
Meth.	261	4.6	176.2	138	156	6.0	71.3	60	146.1	121
LSD	51	0.9	134.4	121	55	2.1	52.7	48	108.2	97
Other	36	0.6	164.8	150	23	0.9	73.8	84	130.2	110

*Of the 2,585 mandatory minimum drug offenders who received substantial assistance departures, 1,678 (64.9%) had at least one of the three factors defining a more serious offender/offense. ("More" Serious is used as a label for a particular set of offense/offender circumstances and is defined as the presence of at least one of the three conditions: weapon use, prior offender, or aggravating role in the offense).

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