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Federal Mandatory Minimum Sentencing Statutes: Introductory Comments to a List with Captions

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Summary

Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction. They cover drug dealing, murdering federal officials, and using a gun to commit a federal crime. They circumscribe judicial sentencing discretion, although they impose no limitations upon prosecutorial discretion or upon the President's power to pardon. They have been criticized as unthinkingly harsh and incompatible with a rational sentencing guideline system; yet they have also been embraced as hallmarks of truth in sentencing and a certain means of incapacitating the criminally dangerous.

There are several varieties of mandatory minimums: the "not less than" statute, the flat sentence statute, the piggy-back statute, and the guideline constructed mandatory minimum. The Eighth Amendment cruel and unusual punishment clause condemns statutes that impose a mandatory minimum penalty of death or a penalty that is grossly disproportionate to the offense. Few federal mandatory minimums are imperiled under this standard and fewer still are susceptible to constitutional attack on the grounds of separation of power, equal protection, ex post facto, or double jeopardy.

This is an abridged version, without footnotes or citations of the introductory comments in *Federal Mandatory Minimum Sentencing Statutes: A List of Citations with Captions, Introductory Comments, and Bibliography*, CRS Report RL30281 (1999); *Federal Mandatory Minimum Sentencing Statutes: An Overview of Legislation in the 106th Congress*, CRS Report RS20307 (1999) is a sketch of related legislative developments.

Types of Mandatory Minimums

Mandatory minimum statutes come in many stripes, including some whose status might be disputed. The most widely recognized are those that demand that offenders be sentenced to imprisonment for "not less than" a designated term of imprisonment. Some

are triggered by the nature of the offense, others by the criminal record of the offender. A few members of this category are some less mandatory than others. Several of the drug-related mandatory minimums in this category, for instance, are subject to a "safety valve" that may make their minimum penalties less than mandatory for small time, first time offenders. A handful of the other "not-less-than" statutes permit the court to sentence an offender to a fine rather than to a mandatory term of imprisonment.

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

The final and least obvious group is comprised of statutes whose violation results in the imposition of a mandatory minimum term of imprisonment by operation of law, or more precisely by operation of the Sentencing Reform Act and the sentencing guidelines issued in its name. Most federal criminal laws do not mention a mandatory minimum sentence, they simply establish a maximum fine and a maximum term of imprisonment and indicate that subject to those maximum levels the court may sentence an offender to either a fine or a term of imprisonment or both. The sentencing guidelines convert many of these simple-maximum-fine\maximum-term-of-imprisonment\or-both statutes into what might reasonably be considered mandatory minimum sentencing statutes.

The federal sentencing guidelines are designed to eliminate unwarranted sentencing disparity. They establish a scorecard system that presents sentencing courts with a narrow range within which the sentence to be imposed must fall. The bottom of the applicable range for most crimes calls for imprisonment. Constraints on the option of probation make a sentence other than incarceration even more rare. A court may depart from the sentence the guidelines dictate if the case before it involves mitigating or aggravating factors overlooked in the guidelines. Such departures are expected to occur only highly infrequently.

Under the current guidelines and absent grounds for departure, federal courts must impose a sentence of imprisonment following conviction for any crime carrying a maximum of fifteen years or higher. They will enjoy no greater discretion in most ten year felony cases or in many five year felony cases.

Mandatory Minimums and the Sentencing Guidelines

Even though the guidelines work to reduce judicial sentencing discretion and in fact might be characterized as creating a host of new members of the species, mandatory minimums have been criticized as incompatible with the federal sentencing guidelines. Perhaps most prominent among its critics was the Sentencing Commission itself which found that mandatory minimums contributed to unwarranted sentencing disparity and lacked the precision that would have otherwise been possible under the guidelines.

Congress responded with the safety valve provisions of 18 U.S.C. 3553(f) under which the court may disregard various drug mandatory minimums and sentence an offender within the applicable sentencing guideline range as long as the offender was a low

level, nonviolent participant with no prior criminal record who had cooperated fully with the government.

Constitutional Boundaries

Defendants sentenced to mandatory minimum terms of imprisonment have challenged them on a number of constitutional grounds ranging from cruel and unusual punishment through ex post facto and double jeopardy to equal protection and due process. Each constitutional provision defines outer boundaries that a mandatory minimum must be crafted to honor; none confine legislative prerogatives in any substantial way.

Cruel and Unusual Punishment. Mandatory minimums implicate considerations under the Eighth Amendment's cruel and unusual punishments clause. The clause bars mandatory capital punishment statutes, *Woodson v. North Carolina*, 428 U.S. 280 (1976). And although the case law is somewhat uncertain, it seems to condemn punishment that is "grossly disproportionate" to the misconduct for which it is imposed, *Harmelin v. Michigan*, 501 U.S. 957 (1992).

In *Solem v. Helm*, 463 U.S. 277 (1983), the Court declared that imposition of a mandatory term of life imprisonment under a state recidivist statute constituted cruel and unusual punishment. The "objective criteria" which guided a proportionality analysis included, "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on the other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions," 463 U.S. at 292.

Furman found that the Eighth Amendment's cruel and unusual punishment clause, made binding upon the states by the due process clause of the Fourteenth Amendment, precluded imposition of the death penalty at the unguided discretion of the judge or jury. The states initially travelled one of two paths to avoid the problems of unguided discretion identified in *Furman.* Some eliminated discretion; others provided guidance. The second approach passed constitutional muster, *Gregg v. Georgia*, 428 U.S. 153 (1976); the first did not, *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Mandatory capital punishment offended the Eighth Amendment on three grounds, *Woodson* declared. It was contrary to the evolving standards of decency which mark the threshold of the Amendment's protection, 428 U.S. at 288-301. It failed to address the objections of *Furman* to imposition of the death penalty at the *unguided* discretion of the judge or jury, 428 U.S. at 302. And it failed to permit consideration of individual characteristics of the crime and offender.

The Court regularly and consistently recognized the individual considerations requirement in subsequent capital punishment cases. Although the logic would seem to apply with similar force in noncapital cases, the Court emphasized that the doctrine was limited to capital cases.

***Harmelin*:** Harmelin, a first time offender, was convicted of possession of 672 grams of cocaine, enough for possibly as many as 65,000 individual doses. Under the laws of the State of Michigan, the conviction carried with it a mandatory sentence of life imprisonment without the possibility of parole.

Harmelin contended that the sentence violated both the individual consideration and proportionality doctrines of the Eighth Amendment. A majority of the Court rejected the individual considerations argument and a plurality refused to accept the proportionality assertion.

The Court noted that in its opinions "[t]he penalty of death differs from all other forms of criminal punishment. . . . in its total irrevocability." In view of the differences, the majority saw no reason "to extend this so-called individualized capital-sentencing doctrine to an individualized mandatory life in prison without parole sentencing doctrine." 501 U.S. at 995 (citations omitted).

The proportionality question proved somewhat more difficult. Justice Scalia and Chief Justice Rehnquist simply refused to recognize an Eighth Amendment proportionality requirement, at least in noncapital cases, 501 U.S. at 994. For three other justices, Kennedy, O'Connor and Souter, a sentence which satisfies the first of the *Solem* tests, seriousness of the offense, need not survive or even face comparisons with sentences for other crimes in the same jurisdiction and for the same crime in other jurisdictions, 501 U.S. at 1004.

More precisely, the plurality emphasized that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime," 501 U.S. at 1001.

After *Harmelin*: Since *Harmelin*, the lower federal courts have regularly and uniformly rejected Eighth Amendment challenges to mandatory minimums in most of their variant forms including: the piggyback mandatory minimums of 18 U.S.C. 924(c); the death-resulting, death penalty or mandatory imprisonment for life, 18 U.S.C. 34; the armed career criminal mandatory minimum, 18 U.S.C. 924(e); the three strikes, recidivist mandatory minimum, 18 U.S.C. 3559(c); the mandatory minimum for drug dealing by repeat offenders, 21 U.S.C. 841(b); and the drug kingpin, one sentence mandatory minimum, 21 U.S.C. 848(b).

Separation of Powers

While "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another," *Loving v. United States*, 517 U.S. 748, 757 (1996), the Supreme Court has observed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion," *United States v. Chapman*, 500 U.S. 453, 467 (1991). Thus, the lower federal courts have regularly upheld mandatory minimum statutes challenged on separation of powers grounds, and the Supreme Court has denied any separation of powers infirmity in the federal sentencing guideline system which produces its own form of mandatory minimums, *Mistretta v. United States*, 488 U.S. 361 (1989).

Crack and Equal Protection

The equal protection objections to the mandatory minimums that attach to the sale and possession of cocaine base (crack), flow from the disparate treatment afforded the two forms of cocaine. The penalties for possession with intent to distribute 50 grams of crack

are the same as those for possession with intent to distribute 5000 grams of cocaine powder. The 100:1 ratio between the two continues through the federal sentencing structure with one exception. There is no mandatory minimum for simple possession of powder cocaine, but simple possession of 5 grams or more of crack is punishable by imprisonment for not less than 5 years. The sentencing difference has a racially disparate impact that invites equal protection analysis.

Statutes are subject to strict scrutiny under the equal protection clause when they contain express racial classifications as well as when, though race neutral on their face, they are motivated by a racial purpose or object. Although insufficient on its own, a racially adverse impact is one factor to be considered in the determination of whether a facially neutral statute is racially motivated. A statute will survive strict scrutiny only if narrowly tailored to serve a compelling governmental interest. A statutory classification that is not racially motivated or similarly suspect and thus not subject to strict scrutiny will pass constitutional muster if it is based on some rational justification, *Heller v. Doe*, 509 U.S. 312, 320 (1993).

Only one lower federal court has concluded that the disparate penalties had a disparate racial impact, was subject to, and could not withstand equal protection strict scrutiny. The decision was overturned on appeal under an analysis that rejected, as have other courts, strict scrutiny in favor a rational basis standard.

Recidivism, Ex Post Facto and Double Jeopardy

Double jeopardy bans trying a defendant twice for the same offense and ex post facto bars retroactive criminal statutes. More precisely, the double jeopardy clause protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. The ex post facto clauses, on the other hand, preclude laws that retroactively alter the definition of crimes or [retroactively] increase the punishment for criminal acts.

Some argue that recidivist mandatory minimums offend both the double jeopardy and ex post facto clauses. They are contrary to double jeopardy, it is said, because by using a first conviction to justify an increased penalty for a second conviction they are in effect punishing the first offense twice. They contravene ex post facto when they are used to sentence a defendant whose first conviction predates the recidivist statute, or so it is contended. The courts have rejected both arguments.

As the Supreme Court explained when it rejected the double jeopardy challenge to the California "three strikes" statute, "we have found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an 'offense'." Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime which is considered to be an aggravated offense because a repetitive one." *Monge v. California*, 118 S.Ct. at 2250-251 (some citations omitted).

> Courts confronted with ex post facto challenges to recidivist statutes have similarly focused upon the "latest crime" and not upon the first.

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