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Federal Mandatory Minimum Sentencing Statutes: An Overview of Legislation in the 107th Congress

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Summary

Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction. They cover drug dealing and using a gun to commit a federal crime, among other crimes. They circumscribe judicial sentencing discretion. They have been criticized as unthinkingly harsh and incompatible with a rational sentencing guideline system; yet they have also been embraced as hallmarks of truth in sentencing and a certain means of incapacitating the criminally dangerous. Among the bills introduced in the 107th Congress, some would have created new mandatory minimums, several would have enlarged existing mandatory minimums, others would have eliminated existing mandatory minimums, and some would have adjusted existing mandatory minimums in other ways. The only proposed mandatory minimum enacted came in the form of a piggyback statute which extends the pre-existing mandatory minimums applicable in the special maritime and territorial jurisdiction of the United States to misconduct committed in U.S. overseas facilities when an American is either the offender or the victim, 18 U.S.C. 7(9). Revisions will occur as legislative activities during the remainder of the 107th Congress warrant.

Related CRS Reports include CRS Report RS21346, *Mandatory Minimum Sentences: Three Strikes in the Supreme Court – Ewing v. California and Lockyer v. Andrade*; and CRS Report RL30281, *Federal Mandatory Minimum Sentencing Statutes: A List of Citations with Captions, Introductory Comments and Bibliography.*

Types of Mandatory Minimums

Mandatory minimum statutes come in many stripes, including some whose status might be disputed. The most widely recognized are those that demand that offenders be sentenced to imprisonment for "not less than" a designated term of imprisonment. Some, like the drug trafficking mandatory minimums, are triggered by the nature of the offense; others, like the three strikes provisions, by the criminal record of the offender. A few are

somewhat less mandatory than others. Several of the drug-related mandatory minimums, for instance, are subject to a "safety valve" that may make their minimum penalties less than mandatory for small time, nonviolent, first time offenders.

A second generally recognized category of mandatory minimums consists of the flat or single sentence statutes.[1] Closely related are the capital punishment statutes that require imposition of either the death penalty or imprisonment for life.[2] The "piggyback" statutes make up a third class. The piggyback statutes are not themselves mandatory minimums but sentence offenders by reference to an underlying statute with mandatory minimums or otherwise.[3]

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. This category includes many felonies punishable by "imprisonment for not more than 5 years"; and most felonies with maximum penalties in excess of 5 years. We have omitted discussion of the proposals in this category in the interest of brevity.

Constitutional Boundaries

The Constitution precludes mandatory capital punishment statutes, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and sentences that are grossly disproportionate to the crimes for which they are imposed, *Harmelin v. Michigan*, 501 U.S. 957 (1992); *United States v. Bajakajian*, 524 U.S. 321 (1998). It may also limit the imposition of long prison terms for relatively minor crimes under state habitual offender statutes, *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom., Lockyer v. Andrade*, 122 S.Ct. 1434 (2002).[4] Otherwise, the enactment of mandatory minimums is a matter of policy rather than constitutional prerogative.

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[1] *E.g.,* 18 U.S.C. 1651 ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States *shall be imprisoned for life*")(emphasis added).

[2] *E.g.*, 18 U.S.C. 1201(a)("Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . if death of any person results, shall be punished by death or life imprisonment").

Most observers would include within this category capital crimes made punishable by death, life imprisonment, *or imprisonment for any term of years*, the suggestion that a sentence of imprisonment for zero years is a sentence "any term of years" being inconsistent with the intent of Congress given the seriousness of the offense to which the sentence attaches. On the other hand, most would probably not characterize as a mandatory minimum any capital or flat sentence statute that permitted imposition of a fine as an alternative sentence, *see e.g.*, 18 U.S.C. 1589 (emphasis added) (". . . If death results from a violation of this section . . . the defendant shall be fined under this title *or* imprisoned for any term of years or life. . . .").

[3] *E.g.*, 18 U.S.C. 2 ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal").

[4] See CRS Report RS21346, *Mandatory Minimum Sentences: Three Strikes in the Supreme Court – Ewing v. California and Lockyer v. Andrade*.

Proposals in the 107th Congress

Section 804 of the USA PATRIOT Act, P.L. 107-56 (18 U.S.C. 7(9)), appears to be the only mandatory minimum sentencing proposal enacted in the 107th Congress. It extends the proscriptions covering murder, kidnaping, assault and other common law crimes committed within the special maritime and territorial jurisdiction of the United States (including the mandatory minimums) to comparable misconduct committed overseas by or against Americans (U.S. nationals) in U.S. facilities or the residences of federal officers or employees.[5]

Two other proposals have passed one House but not the other. The Senate approved the "Enhanced Penalties for Enabling Terrorists Act of 2002" (S. 1981) on April 18, 2002, 148 *Cong.Rec.* S2989. It establishes a mandatory minimum term of imprisonment of undesignated duration for fraudulently producing identification documents in connection with an act of international or domestic terrorism, 18 U.S.C. 1028(b)(4)("a fine under this title *and* imprisonment for not more than 25 years, if the offense is committed to facilitate an act of international terrorism. . . or domestic terrorism . . .").

The House passed the "Two Strikes and You're Out Child Protection Act" (H.R. 2146) on March 14, 2002, 148 *Cong.Rec.* H925. It establishes a mandatory term of imprisonment for an individual with a prior conviction for a sex offense against a minor who is subsequently convicted of a federal sex offense against a minor (*i.e.*, a violation of 18 U.S.C. 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243(a)(sexual abuse of minor), 2244(a)(1), (2)(abusive sexual contact), 2245 (sexual abuse resulting in death), 2251A (selling or buying children), 2423(a)(interstate transportation for sexual purposes)), 18 U.S.C. 3559.

Most of the other proposals in the 107th Congress involve firearms or drugs. A number address the crack-powder cocaine sentencing ratio (100 to 1). Trafficking in either *5000* grams or more of powder cocaine or *50* grams of crack cocaine is punishable by imprisonment for not less than 10 years (not less than 20 years if serious injury or death results or for subsequent convictions). This 100 to 1 ratio also applies to trafficking in *500* grams or more of powder or *5* grams or more of crack, either of which are punishable by imprisonment for not less than 5 years (not less 10 years for a second conviction and not less than 20 years if death or serious injuries result), 21 U.S.C.

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[5] 18 U.S.C. 7(9)("The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes . . . (9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act– (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities. Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title [relating to crimes committed overseas by members of the U.S. armed forces, their dependents, and those who accompany the U.S. armed forces overseas]").

841(b)(1)(B), 960(b)(1)(B). Simple possession of 3 grams or more of crack is punishable by imprisonment for not less than 5 years if the offender has a prior conviction (1 gram or more if the offender has 2 or more prior convictions); there is no mandatory minimum for simple possession of powder cocaine, 21 U.S.C. 844.

S. 1874 (Sessions/Hatch) alters the crack-powder sentencing ratio from 100 to 1 to a ratio of 20 to 1; reduces the amount of powder cocaine required to trigger the mandatory minimum penalties for drug trafficking (from 5000 grams to 4000 grams for large scale trafficking and from 500 grams to 400 grams for trafficking on a smaller scale), and increases the amount of crack cocaine required to trigger the two from 50 grams to 200 grams for large scale trafficking and from 5 grams to 20 grams for smaller scale trafficking; and reduces the mandatory minimum for simple possession of crack from 5 years down to 1 year, 21 U.S.C. 841, 844, 960.

H.R. 4026 (Bartlett) eliminates the sentencing distinction by striking the mandatory minimum for simple possession of crack and by lowering the threshold amount for powder to that of the threshold amount for crack – the mandatory minimum term of imprisonment for not less than 10 years (not less than 20 years if serious injury or death results or for subsequent convictions) applies to trafficking in 50 grams or more of cocaine in any form (as opposed to trafficking in 50 grams of crack or 5000 grams of powder as is now the case), and the mandatory minimum term of not less than 5 years (not less 10 years for a second conviction and not less than 20 years if death or serious injuries result) applies to trafficking in 5 grams or more of cocaine in any form (as opposed to the present 5 grams of crack or 500 grams of powder), 21 U.S.C. 841(b)(1), 844, 960(b)(1).

H.R. 697 (Rangel) eliminates the sentencing distinction by striking the mandatory minimum for simple possession of crack and repealing the crack-specific trafficking provisions – the mandatory minimum term of imprisonment for not less than 10 years (not less than 20 years if serious injury or death results or for subsequent convictions) applies to trafficking in 5000 grams or more of cocaine in any form (as opposed to trafficking in 50 grams of crack or 5000 grams of powder as is now the case), and the mandatory minimum term of not less than 5 years (not less 10 years for a second conviction and not less than 20 years if death or serious injuries result) applies to trafficking in 500 grams or more of cocaine in any form (as opposed to the present 5 grams of crack or 500 grams of powder), 21 U.S.C. 841(b)(1), 844, 960(b)(1).

H.R. 1978 (Waters et al.) eliminates the distinction by abolishing the mandatory minimum penalties now applicable to trafficking in, or simple possession of, controlled substances, 21 U.S.C. 841, 844, 960.

Other drug-related mandatory minimum bills include:

H.R. 417 (Andrews) that creates an additional 5 year mandatory penalty for drug trafficking in an open air drug market, 21 U.S.C. 865.

H.R. 213 (Sweeney) that subjects major drug smugglers to a mandatory term of life imprisonment, 21 U.S.C. 960.

H.R.765 (Wynn et al.)/ S.3017 (Levin) that makes the "safety valve" available retroactively to cases arising prior to its enactment. The "safety valve" of 18 U.S.C. 3553(f) allows a court to sentence a low level, nonviolent, first time offender under the sentencing guidelines notwithstanding otherwise applicable drug-related mandatory minimums. Under existing law, the safety valve is only available to offenders convicted of offenses occurring prior to enactment.

The remaining mandatory minimum proposals deal with gun control, child abuse, and terrorism:

H.R. 114 (Holt): authorizes the Attorney General to establish a federal handgun licensing and registration system with respect to handgun possession in any state that does not already have such a system, and sets a mandatory minimum of 15 years for possession of any unregistered handgun, 18 U.S.C. 931, 924(a)(7).

S. 2091 (Torricelli): establishes mandatory minimums for multiple interstate sales of firearms where neither the seller nor purchaser are licensed dealers (in cases involving 5 to 50 firearms — imprisonment for not less than 3 years (not less than 5 years for a second offense and not less than 10 years if a victim is subsequently injured or killed by someone using one of the firearms); in cases involving more than 50 firearms — imprisonment for not less than 15 years (not less than 25 years if a victim is subsequently injured or killed by someone using one of the firearms), 18 U.S.C. 922(z), 924(p).

H.R. 2817 (Simmons et al.)/S. 1232 (McConnell): sets a 5 year mandatory minimum for interstate travel for purposes of engaging in criminal sexual activity with a juvenile, 18 U.S.C. 2423.

H.R. 3123 (Pascrell et al.): sets a 1 year mandatory minimum for using the mails, telephone, or other means of interstate commerce to communicate a threat to kill, injure, or intimidate another or to burn or bomb a building, vehicle or other property, 18 U.S.C. 844(e).

Author Information

Charles Doyle
Senior Specialist in American Public Law

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