

## SENTENCING GUIDELINES

## Expert Analysis

# Mandatory Minimums: Time for a Change?

**M**andatory minimum sentences have, for years, been the subject of complaints from the bench, the defense bar and academics. But this year, these criticisms are taking hold—and all three branches of the federal government are getting into the fray.

Some district court judges are in open rebellion against mandatory minimums and the Sentencing Guidelines that are tied to them. For example, in sentencing a defendant earlier this year for a drug trafficking crime, Judge John Gleeson of the Eastern District of New York rejected the guidelines-recommended range because the guidelines are tied to the quantity-driven mandatory minimums.<sup>1</sup> Judge Jack Weinstein of the same district issued a 400-page sentencing memorandum, finding that the five-year statutory minimum for distributing child pornography constituted cruel and unusual punishment under the Eighth Amendment. Remarkably, only a few hours after the Second Circuit reversed Weinstein's sentence and required him to impose at least the five-year mandatory minimum, Weinstein issued a nine-page memorandum forcefully reiterating his view that the mandatory minimum sentence was unjust.<sup>2</sup>

To be sure, some judges have been railing against mandatory minimums for years. Judge Paul Cassell of the District of Utah lamented that the 55-year mandatory minimum sentence



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he was forced to impose on a 24-year-old first-time offender convicted of marijuana distribution and gun possession was “unjust, cruel, and irrational.”<sup>3</sup> Similarly, in sentencing a former FBI informant with a substance abuse problem to a mandatory life sentence for selling crack cocaine, Judge James Spencer of the Eastern District of Virginia said the sentence was “ridiculous” and “a travesty.”<sup>4</sup>

The Supreme Court also recently chimed in, correcting its inconsistent treatment of statutory maximums and minimums by holding that any fact that increases a mandatory minimum sentence is an element of the crime that must be submitted to the jury and proven beyond a reasonable doubt.<sup>5</sup>

The Executive Branch has been equally bold. In August, Attorney General Eric H. Holder Jr. pronounced that the Justice Department would be “fundamentally rethinking the notion of mandatory minimum sentences for drug-related crimes.”<sup>6</sup> On the same day as his speech, Holder published a memorandum to all federal prosecutors mandating that, for drug-related crimes, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum if (a) the defendant's conduct did not involve violence, minors, death or serious injury; (b) the defendant is not a drug

kingpin and does not have ties to a large-scale criminal organization; and (c) the defendant does not have a significant criminal history.

Finally, several bills have been introduced this year in Congress to address sentencing and correctional reform. Two of them would, to varying degrees, curtail mandatory minimums.

It is remarkable where we are now, compared to the 1980s and 1990s, when sentencing reform effectively meant more time for the same crime. The question now is: How far should Congress go to reform the mandatory minimum sentencing regime?

### Overview

Some context about mandatory minimums is in order. Mandatory minimum penalties have been around since the founding of the Republic. From the late 18th century through the first half of the 20th century, Congress enacted mandatory minimum penalties to target the most serious crimes—for example, rape, murder, piracy and treason—and to address particular concerns, such as tax fraud during Reconstruction and the sale of alcohol during Prohibition. But they were a seldom-used weapon in Congress' fight against crime.

Beginning in the 1950s, however, Congress changed course, and mandatory minimums have increasingly been a penalty of choice. In 1951, in an effort to combat organized drug trafficking, Congress enacted the first mandatory minimums for drug offenses. Although Congress eliminated these mandatory minimums in 1970 in order to establish “a more realistic, more flexible, and thus more effective system of punishment and deterrence” of drug

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laws,<sup>7</sup> it enacted new mandatory minimums for drug offenses in 1986 in response to the growing crack cocaine epidemic. Congress intended for these new mandatory minimums to target kingpins and major traffickers, but the mandatory minimums applied to drug traffickers generally based solely on the type and quantity of drug. Since then, other federal mandatory minimums have followed and currently there are nearly 200 on the books.

### Unintended Consequences

The federal penal system now faces many problems, and the mandatory minimums of the 1980s are a contributing cause. The federal prison system has swelled from 24,000 (in 1980) to 219,000, an 800 percent increase, and is currently operating at 36 percent over-capacity. Half of today's prison population were convicted of drug offenses.<sup>8</sup> The number of persons convicted of drug offenses carrying mandatory minimum penalties is notable—of the 20,037 persons convicted in 2012 of a federal offense carrying a mandatory minimum penalty, 15,577, or 78 percent, were convicted of drug offenses.<sup>9</sup>

As a result of this prison population explosion, the cost of federal prisons has ballooned. The Bureau of Prisons' budget request for fiscal year 2014 is \$6.9 billion, accounting for more than 25 percent of the Justice Department's budget.<sup>10</sup>

Mandatory minimums also have heavily affected minorities. In 2010, for example, 69.8 percent of all offenders convicted of a federal offense carrying a mandatory minimum were either black or Hispanic.<sup>11</sup>

Because of these and other factors, there is an emerging view that existing federal sentencing policies are inefficient and ineffective, and that money can be better spent on alternatives to mass incarceration. As Holder stated in his recent speech, "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason."<sup>12</sup>

### Times They Are a-Changin'

The convergence of these economic, practical and penological concerns has created a

perfect storm for legislative sentencing reform. Two bipartisan bills aimed at reforming mandatory minimums are currently pending in Congress. Earlier this year, the Justice Safety Valve Act of 2013 was introduced in the Senate by Senators Rand Paul (R-Ky.) and Patrick Leahy (D-Vt.) and in the House by Representatives Robert "Bobby" Scott (D-Va.) and Thomas Massie (R-Ky.).<sup>13</sup> The act would create a new "safety valve" for all federal mandatory minimums. Under the act, a court could impose a sentence below the mandatory minimum if it found that the mandatory minimum sentence would violate §3553(a). Section 3553(a), in turn, requires a sentencing court to consider many factors and affords a judge broad discretion to vary from the otherwise-prescribed sentence. The proposed statute says nothing about the standard of appellate review for sentences below the mandatory minimum.

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The second bill is the Smarter Sentencing Act of 2013, introduced earlier this year in the Senate by Senators Dick Durbin (D-Ill.), Mike Lee (R-Utah) and Leahy and in the House by Representatives Raúl Labrador (R-Idaho) and Scott.<sup>14</sup> This law would bring about several sentencing reforms. First, it would make the Fair Sentencing Act of 2010, which reduced the sentencing disparity between crack and powder cocaine offenses, retroactive. Second, it would significantly lower mandatory minimum sentences for the principal drug trafficking violations—reducing the 20-year mandatory minimum to 10 years (except when the violation results in death or serious injury), the 10-year mandatory minimum to five years and the five-year minimum to two. Third, it would expand the drug "safety valve" so that it would apply to offenders with slightly greater criminal histories than allowed under the current iteration of the "safety valve" (Category II vs. I). The statute

also would direct the Sentencing Commission to make appropriate matching reductions in the guidelines.

### Too Far, Too Fast?

There is widespread, bipartisan support for mandatory minimum reform legislation. More than 50 former prosecutors and judges,<sup>15</sup> the Judicial Conference, the Sentencing Commission, and people all over the political spectrum—from Grover Norquist and George Will to the NAACP and the ACLU—agree that we need to do something about mandatory minimums. To date, there does not appear to be extensive opposition to either bill.

Support for these bills stems primarily from the harsh and sometimes irrational consequences of mandatory minimums for drug-related crimes. But unlike the Smarter Sentencing Act, which focuses only on drug offenses, the Justice Safety Valve Act would affect all mandatory minimums, effectively rendering them advisory. In contrast to the "safety valve" for drug crimes, which provides for specific elements that a defendant must prove by a preponderance of the evidence (e.g., no violence, limited criminal history, lower-level role, truthful proffer about the crime), the Justice Safety Valve Act would allow a district court to consider the inherently broad §3553(a) factors in determining whether the mandatory minimum should apply. If the court decided not to impose the mandatory minimum, it would then fall back, as an initial starting point, to the Sentencing Guidelines. But the guidelines are not binding generally and, in cases involving a statutory mandatory minimum, can be disregarded almost at will. This is because the Sentencing Commission formulated these guidelines to be proportionate to mandatory minimums<sup>16</sup> rather than basing them on "empirical data and national experience."<sup>17</sup>

Such a significant change warrants a healthy debate about why mandatory minimums exist at all. Mandatory minimum sentences reflect Congress' view that some conduct is more heinous and dangerous and thus warrants a minimum term of imprisonment. Many offens-

es carrying mandatory minimum penalties reflect these considerations, including bombing federal property, sex trafficking involving children or using force, espionage, and murder of a federal official. These are crimes that are indisputably very serious and should require serious punishment. In this way, mandatory minimums help keep our communities safer by incapacitating those most dangerous to society and further the retributive goal of criminal punishment.

Mandatory minimums also were intended in part to provide greater certainty and uniformity in federal sentencing. To the extent this is so, eliminating mandatory minimums may increase sentencing disparity. And although the government has the ability to appeal district court sentences, it does so only in egregious cases and, even then, the deferential appellate standard of review would limit circuit courts' ability to rein in divergent sentences.

Some argue that mandatory minimums also provide leverage to prosecutors seeking a plea agreement or cooperation.<sup>18</sup> But the validity of this objective as a policy matter is debatable,<sup>19</sup> and many drug offenders (in 2012, 29 percent of those facing a mandatory minimum) already get relief from mandatory minimums through the "safety valve" without having to cooperate.<sup>20</sup> In any event, Mr. Holder's recent speech would seem to reject this justification for mandatory minimums—at least for low-level drug offenders.

Finally, one cannot ignore the reality that crime has dropped significantly over the last two decades—the violent crime rate has dropped over 48 percent and the rate of property crimes has dropped about 40 percent.<sup>21</sup> Of course, there are many reasons for the drop in crime which are wholly unrelated to federal sentencing practices generally or mandatory minimums in particular. But some studies have shown that up to 25 percent of the drop in crime can be attributed to increased incarceration.<sup>22</sup>

Given all this, enacting the Smarter Sentencing Act would be a more appropriate step for Congress to take because it focuses on drug-related crimes, which are the primary cause

of the problems arising out of the mandatory minimum sentencing regime. Although narrower than the Justice Safety Valve Act, the Smarter Sentencing Act, if passed, would have a significant (and much-needed) impact. It's estimated that reducing mandatory minimum terms for drug offenders would result in approximately \$2.5 billion in savings over 10 years.<sup>23</sup> Making the Fair Sentencing Act retroactive would make nearly 9,000 defendants convicted of crack cocaine offenses eligible for sentence reductions averaging 53 months.<sup>24</sup> And expanding "safety valve" eligibility would make its benefits available to over 1,000 more defendants a year.<sup>25</sup>

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All three branches of government seem to agree that these are worthy goals. And since the Senate is scheduled to begin marking up both bills this week, we may soon know whether those goals will become a reality.

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1. *United States v. Diaz*, 2013 WL 322243, at \*5-6 (E.D.N.Y. Jan. 28, 2013).

2. *United States v. C.R.*, 792 F.Supp.2d 343, 347 (E.D.N.Y. May 16, 2011); *United States v. Reingold*, 731 F.3d 204, 222 (2d Cir. Sept. 26, 2013); *United States v. C.R.*, 2013 WL 5366961 (E.D.N.Y. Sept. 26, 2013).

3. *United States v. Angelos*, 345 F.Supp.2d 1227, 1263 (D. Utah Nov. 16, 2004).

4. Transcript of Sentencing Proceeding at 7, *United States v. Gregg*, No. 3:09-cr-180 (E.D. Va. Jan. 27, 2010).

5. *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013).

6. Eric H. Holder, Jr., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [hereinafter "Holder Speech"].

7. H.R. Rep. No. 91-1444, at 71 (1970), reprinted in 1970 U.S.C.A.N. 4566, 4638.

8. BUREAU OF PRISONS, QUICK FACTS, <http://www.bop.gov/about/facts.jsp> (last updated Oct. 26, 2013).

9. Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences, Hearing Before the S. Comm. on the Judiciary, at 11 (Sept. 13, 2013) (statement of Patti B. Saris,

Chair, U.S. Sentencing Commission) [hereinafter "Saris Statement"].

10. U.S. DEPARTMENT OF JUSTICE FY 2014 BUDGET REQUEST, <http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs> (last visited Dec. 8, 2013).

11. U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 123 (Oct. 2011) [hereinafter "MM REPORT"].

12. Holder Speech.

13. S. 619, 113th Cong. (March 20, 2013); H.R. 1695, 113th Cong. (April 24, 2013).

14. S. 1410, 113th Cong. (July 31, 2013); H.R. 3382, 113th Cong. (Oct. 30, 2013).

15. Letter from former Federal Prosecutors and Judges to Senators Patrick Leahy and Rand Paul (July 17, 2013), available at <http://famm.org/Repository/Files/JSVA%20Letter%20from%20Former%20Prosecutors%20and%20Judges%207-17-2013.pdf> (last visited Dec. 8, 2013).

16. MM REPORT at 53-54.

17. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); see also *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010); *United States v. Grant*, 2008 WL 2485610, at \*4 (D. Neb. June 16, 2008).

18. See, e.g., Lanny A. Breuer, The Attorney General's Sentencing and Corrections Working Group: A Progress Report, FED. SENT'G REP., Dec. 2010, at 110, 112; Frank O. Bowman, "Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform," 58 STAN. L. REV. 235, 252 (2005) (describing Department of Justice's position).

19. *United States v. Kupa*, 2013 WL 5550419, at \*19-20 (E.D.N.Y. Oct. 9, 2013) (Gleeson, J.) (describing use of enhanced mandatory minimums pursuant to prior felony information statute in order to induce pleas or cooperation); see also An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants To Plead Guilty (Human Rights Watch) December 2013, at 81, available at <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse> (plea bargaining results in distorted sentences and "undermine[s] the accuracy and integrity of the criminal justice process").

20. An Offer You Can't Refuse at 67 (analyzing Sentencing Commission's data).

21. FEDERAL BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES 2012, at tbl. 1, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime> (last visited Dec. 8, 2013) (comparing 1993 and 2012 crime rates).

22. Marc Mauer, et al., Incarceration and Crime: A Complex Relationship (The Sentencing Project) 2005, at 4, available at [http://www.sentencingproject.org/doc/publications/inc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf) (citing studies).

23. Julie Samuels, et al., Stemming the Tide: Strategies To Reduce the Growth and Cut the Cost of the Federal Prison System (Urban Institute) Nov. 2013, at 24, available at <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>.

24. Saris Statement at 10.

25. MM REPORT at app. D, tbl. D-20.