

OVERVIEW

A. INTRODUCTION

The United States Sentencing Commission [hereinafter the Commission] submits to Congress this report on mandatory minimum sentencing provisions in federal law pursuant to the statutory directive contained in section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009¹ [hereinafter the statutory directive].

The statutory directive requires that this report include:

- (1) a compilation of all mandatory minimum sentencing provisions under Federal law;
- (2) an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing;
- (3) an assessment of the impact of mandatory minimum sentencing provisions on the Federal prison population;
- (4) an assessment of the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Public Law 98–473; 98 Stat. 1987) and the sentencing guidelines system in place after *Booker v. United States*, 543 U.S. 220 (2005);
- (5) a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements;
- (6) a detailed empirical research study of the effect of mandatory minimum penalties under Federal law;
- (7) a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy; and

¹ Division E of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2843 (enacted October 28, 2009). The Commission also submits this report pursuant to its general authority under 28 U.S.C. §§ 994–995, and its specific authority under 28 U.S.C. § 995(a)(20) which provides that the Commission shall have authority to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”

- (8) any other information the Commission determines would contribute to a thorough assessment of mandatory minimum sentencing provisions under Federal law.

As discussed in Chapter 2, federal statutory mandatory minimum penalties have existed since the early days of the nation. Examination of their use has been ongoing since then as well, including by Congress² and many others, as discussed in Chapter 5. In 1991, the Commission submitted a report to Congress about mandatory minimum penalties, concluding that “the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of the sentencing guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums.”³ This report is intended to contribute to the more recent efforts to examine federal statutory mandatory minimum penalties, particularly in light of the Supreme Court’s decision in *Booker v. United States*,⁴ which rendered the federal sentencing guidelines advisory.

² See 156 CONG. REC. S1680–1683 (daily ed. Mar. 17, 2010) and 156 CONG. REC. H6196–6204 (daily ed. July 28, 2010) (for debate associated with passage of Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372). See also 150 CONG. REC. H4808–4811 (daily ed. June 23, 2004) and 150 CONG. REC. S7527 (daily ed. June 25, 2004) (for debate associated with passage of Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, 118 Stat. 831). See also 149 CONG. REC. S2573–2590 (daily ed. Feb. 24, 2003), 149 CONG. REC. H2440–2443 (daily ed. Mar. 27, 2003), 149 CONG. REC. H3059, 3066–3076 (daily ed. Apr. 10, 2003), 149 CONG. REC. H2950–2968 (daily ed. Apr. 9, 2003), 149 CONG. REC. S5113–5135, S5137–5157 (daily ed. Apr. 10, 2003) (for debate associated with passage of Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650). See also general debate on mandatory minimums and limitation on applicability of statutory minimums in certain cases (associated with passage of Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796).

³ See U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (AS DIRECTED BY SECTION 1703 OF PUBLIC LAW 101–647) (Aug. 1991) [hereinafter 1991 COMMISSION REPORT] at iv. At the time, the sentencing guidelines were binding on the courts. See also *Hearing on Federal Mandatory Minimum Sentencing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. (July 28, 1993) (statement of Hon. William W. Wilkins, Jr., Chairman, United States Sentencing Commission), reprinted in 6 Fed. Sent’g Rep. 67 (1993); *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of Hon. Ricardo H. Hinojosa, Chairman, United States Sentencing Commission); U.S. SENT’G COMM’N, REPORT TO CONGRESS REGARDING FED. MANDATORY MINIMUM SENT’G PENALTIES (on record in *Mandatory Minimums and Unintended Consequences, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 124 (July 14, 2009)); *Mandatory Minimum Penalties Hearing Before the U.S. Sentencing Commission* (May 27, 2010).

⁴ 543 U.S. 220 (2005).

B. OVERVIEW OF REPORT

1. Methodology

In preparing this report, the Commission reviewed legislation, analyzed sentencing data,⁵ and studied scholarly literature.⁶ The Commission sought the views of stakeholders in the criminal justice system in a variety of ways, including conducting seven regional public hearings on sentencing generally,⁷ one public hearing devoted solely to the role of statutory mandatory minimum penalties in federal sentencing,⁸ a survey of federal judges,⁹ and interviews with practitioners in selected districts.¹⁰ The Commission consulted with its advisory groups¹¹ and

⁵ The Commission maintains a comprehensive, computerized data collection system and acts as the clearinghouse of federal sentencing information pursuant to 28 U.S.C. §§ 995(a)(14), (15). The Commission relies on this database for its ongoing monitoring and evaluation of the guidelines, many of its reports and research projects, and for responding to hundreds of data requests received from Congress and other criminal justice entities each year. Pursuant to 28 U.S.C. § 994(w), within 30 days of entry of judgment in every felony and class A misdemeanor case, the Commission receives: (1) the judgment and commitment order; (2) the statement of reasons imposed; (3) the plea agreement, if any; (4) the indictment or other charging information; and (5) the presentence report (unless waived by the court). For each such case, the Commission routinely collects hundreds of pieces of information, including defendant demographics, statute(s) of conviction, application of any statutory mandatory minimum penalty, application of any relief from an applicable statutory mandatory minimum penalty, sentencing guideline applications, and sentences imposed.

⁶ See Appendix I for a bibliography of relevant literature compiled for this report.

⁷ The Commission held seven regional public hearings to coincide with the 25th anniversary of the enactment of the Sentencing Reform Act of 1984 to solicit the views of judges, prosecutors, defense attorneys, probation officers, academics, and others on a variety of federal sentencing and criminal justice topics, including mandatory minimum penalties. These hearings were held in Atlanta, GA (Feb. 10–11, 2009), Palo Alto, CA (May 27–28, 2009), New York, NY (July 9–10, 2009), Chicago, IL (Sept. 9–10, 2009), Denver, CO (Oct. 20–21, 2009), Austin, TX (Nov. 19–20, 2009), and Phoenix, AZ (Jan. 20–21, 2010). Witness statements and transcripts for the public hearings are available on the Commission’s webpage at www.usc.gov. Summaries of the testimony relating to mandatory minimum penalties can be found in Appendix J of this Report.

⁸ On May 27, 2010, in Washington, DC, the Commission held a public hearing on the topic of mandatory minimum sentencing provisions in federal law in response to Congress’s directive to report on the topic. Witness statements and transcripts for the public hearing are available on the Commission’s webpage at www.usc.gov. Summaries of the testimony can be found in Appendix G of this Report.

⁹ In early 2010, the Commission conducted a survey of federal district judges to solicit their views on a variety of sentencing topics, including mandatory minimum penalties. See U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010) [hereinafter 2010 JUDGES’ SURVEY], which is available on the Commission’s webpage at www.usc.gov.

¹⁰ The Commission interviewed one or more representatives of the United States Attorney and the Federal Public Defender, and a Criminal Justice Act panel attorney in 13 districts across the nation as part of this study of mandatory minimum penalties and federal sentencing. The Commission conducted similar interviews in 1991 when preparing the 1991 COMMISSION REPORT. As was the case in 1991, this report will not identify the districts visited, nor will individual respondents be identified or identifiable in the Commission’s public documents. The interview topics inquired about the use of mandatory minimum penalties in each district and included questions about charging decisions, plea practices, and the use of two mechanisms discussed in Chapter 2 (*i.e.*, substantial assistance and the safety valve) that provide relief from application of mandatory minimum penalties. The input received from these interviews is discussed in Chapter 6, and a copy of the interview questions is provided in Appendix F of this Report.

representatives from all three branches of the federal government, and heard from judges, prosecutors, defense attorneys, probation officers, social scientists, scholars, and others who apply or study mandatory minimum sentencing provisions.

2. *Definitions of Key Terms*

For purposes of this report, “mandatory minimum penalty,” “mandatory minimum sentencing provision,” “statute carrying a mandatory minimum penalty,” “convicted of an offense carrying a mandatory minimum penalty,” and related terms refer to a federal criminal statute requiring, upon conviction of a federal criminal offense and the satisfaction of criteria set forth in that statute, the imposition of a specified minimum term of imprisonment. A provision that requires a mandatory minimum fine, mandatory minimum term of probation, mandatory minimum term of supervised release, or any other mandatory component of a sentence other than imprisonment is not considered a mandatory minimum penalty for purposes of this report.

The statutory criteria that trigger mandatory minimum penalties typically are one of three types. First, many mandatory minimum penalties are triggered by offense characteristics or elements of the offense of conviction. For example, some of the most commonly applied federal mandatory minimum penalties are for drug trafficking offenses. Under the relevant statutes, the mandatory minimum penalty applies if the offense involved a quantity of a particular type of drug above a specified threshold amount, a sale to a person under 21 years of age, a sale occurring within 1,000 feet of a school, or the employment of a person under 18 years of age.¹²

Second, some mandatory minimum penalties specified in one statute are triggered by reference to another underlying offense. Typically in these cases, a mandatory minimum penalty does not apply to the underlying offense, but an additional, consecutive, mandatory minimum penalty applies if criteria specified in a separate statute are met. The most commonly applied mandatory minimum penalty of this type is 18 U.S.C. § 924(c), which requires a mandatory consecutive term of imprisonment for the possession or use of a firearm in connection with certain underlying offenses. Another example is 18 U.S.C. § 1028A, which requires a mandatory consecutive term of imprisonment for identity theft committed in connection with certain underlying offenses.

Third, some mandatory minimum penalties are triggered by the offender’s criminal history. The most frequently applied mandatory minimum penalty of this type is 18 U.S.C. § 924(e), commonly known as the Armed Career Criminal Act. Section 924(e) provides a mandatory minimum of 15 years of imprisonment if a person commits a firearms offense and has previously been convicted of three or more violent felonies or serious drug offenses.

¹¹ The Commission has three standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, and the Victims Advisory Group. Information on each of these advisory groups can be found on the Commission’s webpage at www.ussc.gov.

¹² *See, e.g.*, 21 U.S.C. §§ 841, 859, 860, and 861.

For purposes of this report, the Commission considered an offender to have been “convicted of” an offense carrying a mandatory minimum penalty if the court so indicated on a statement of reasons form or other sentencing documentation received by the Commission and conclusively established that one or more of the statutes of conviction carried such a penalty.¹³

Not all offenders convicted of an offense carrying a mandatory minimum penalty are sentenced to at least the mandatory minimum term of imprisonment specified in the statute of conviction. As will be discussed throughout the report, many offenders convicted of an offense carrying a mandatory minimum penalty receive a lower sentence due to operation of one of two relief mechanisms commonly known as “substantial assistance” and the “safety valve.” First, as discussed in Chapter 2, the court “has authority to impose a sentence below a level established by statute as a minimum sentence” if the government files a motion to reflect a defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense.”¹⁴ Second, in the case of an offense under 21 U.S.C. §§ 841, 844, 846, 960, or 963, if the defendant meets five “safety valve” criteria specified in 18 U.S.C. § 3553(f), the court “shall impose a sentence . . . without regard to any statutory minimum sentence.”¹⁵ If either of these two mechanisms apply to an offender convicted of an offense carrying a mandatory minimum penalty, this report refers to that offender as having been “relieved from application of” a mandatory minimum penalty. If neither of these two mechanisms apply to an offender convicted of an offense carrying a mandatory minimum penalty, this report refers to that offender as having been “subject to” a mandatory minimum penalty at the time of sentencing.

3. *Organization*

To meet the objectives of the statutory directive, this report is organized in the following manner:

Chapter 2 explores the historical development of mandatory minimum penalties. It also describes the development of the safety valve and substantial assistance provisions.

Chapter 3 discusses the requirements in the Sentencing Reform Act of 1984¹⁶ that govern promulgation of the federal sentencing guidelines, the operation of the guidelines, and the process by which the Commission amends the guidelines. It also discusses the manner in which the Commission has responded to and incorporated mandatory minimum penalties into the guidelines. Finally, it examines means by which the guidelines account for conduct that is similar to conduct subject to mandatory minimum penalties.

¹³ Sentencing courts are required to send the Commission five sentencing documents, *see supra* note 5. The statement of reasons form sets forth the sentencing court’s reasons for the sentence imposed in a particular case. *See* 28 U.S.C. § 994(w); 18 U.S.C. § 3553(c).

¹⁴ 18 U.S.C. § 3553(e); USSG §5K1.1 (Substantial Assistance to Authorities).

¹⁵ 18 U.S.C. § 3553(f); USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); subsection (b)(11) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

¹⁶ Pub. L. No. 98–473, 98 Stat. 1837 (1984) [hereinafter the Sentencing Reform Act].

Chapter 4 focuses on recent changes that affect the examination of mandatory minimum penalties and the impact of the use of mandatory minimum penalties on the federal prison population. It also discusses the impact on the federal prison population resulting from other factors, such as new federal crimes, changes in the size and composition of the federal criminal docket, federal incarceration rates, and average sentence length.

Chapter 5 discusses the policy implications of mandatory minimum penalties. In particular, it describes the reasons often cited in support of and in opposition to such penalty provisions.

Chapter 6 discusses the results of interviews with prosecutors and defense attorneys in thirteen selected districts about how mandatory minimum penalties are used in the selected districts and the impact of mandatory minimum penalties on charging, guilty pleas, and sentencing practices in the districts.

Chapter 7 reviews both current and cumulative sentencing data on mandatory minimum penalties. In particular, it provides general comparisons between offenders convicted of offenses carrying mandatory minimum penalties and offenders in the overall federal population.

Chapter 8 reviews current sentencing data about offenders convicted of drug offenses carrying mandatory minimum penalties.

Chapter 9 reviews current sentencing data about offenders convicted of firearms offenses carrying mandatory minimum penalties.

Chapter 10 reviews current sentencing data about offenders convicted of sex offenses carrying mandatory minimum penalties.

Chapter 11 reviews current sentencing data about offenders convicted of an aggravated identity theft offense that carries a mandatory minimum penalty.

Chapter 12 sets forth the Commission's conclusions and policy recommendations in light of the data and information contained in the preceding chapters.