

An hourglass-shaped graphic with a globe in the top bulb and a globe in the bottom bulb. The top bulb is dark blue, and the bottom bulb is light blue. The hourglass is light gray. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*Federal Mandatory Minimum Sentencing Statutes: An
Abbreviated Overview*

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Abstract. Mandatory minimums come in several varieties: the not-less-than, the flat sentence, the piggy-back, and the sentencing guideline versions. In any form, they are not per se unconstitutional, although in rare instances they might be so grossly disproportionate as to offend the Eighth Amendment's cruel and unusual punishments clause.

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CRS Report for Congress

Federal Mandatory Minimum Sentencing Statutes: An Abbreviated Overview

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Summary

Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction. Among other things, they cover drug dealing, murdering federal officials, and using a gun to commit a federal crime. They have been a feature of federal sentencing since the dawn of the Republic. 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 sentence and a certain means of incapacitating the criminally dangerous. The Sentencing Commission and others argue that mandatory minimums undermine the Sentencing Guidelines and introduce disparity into the federal sentencing scheme. Still others respond that no introduction is necessary; the guideline system already creates and tolerates considerable disparity.

Mandatory minimums come in several varieties: the "not-less-than," the flat sentence, and piggy-back versions. In any form, they are not per se unconstitutional, although in rare instances they might be so grossly disproportionate as to offend the Eighth Amendment's cruel and unusual punishments clause.

This is an abbreviated version of CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*, stripped of its citations, footnotes and appendices.

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. A few members of this "not less than" category are less "mandatory" than others. For example, several of the drug-related mandatory minimums are subject to a "safety valve" for small time, first time offenders that may render their minimum penalties less than mandatory, or at least less severe. Some 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. Moreover, prosecutors may negate the not-less-than statutory minimums for a defendant they feel has provided “substantial assistance.”

A second generally recognized category of mandatory minimums consists of the flat or single sentence statutes, the vast majority of which call for life imprisonment. Closely related are the capital punishment statutes that require imposition of either the death penalty or imprisonment either for some term of years or 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 statutes including those that impose mandatory minimums.

Until the Supreme Court intervened in *Booker v. United States* to eliminate the binding effect of the Sentencing Guidelines,¹ the final and least obvious group was comprised of statutes whose violation resulted 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. After *Booker* and the line of cases that followed, the Guidelines cannot fairly be characterized as a source of mandatory minimum sentences, although they continue to tilt heavily towards incarceration.

Mandatory Minimums and the Sentencing Guidelines. Even though the guidelines work to reduce judicial sentencing discretion and might once have been characterized as creating a host of new members of the species of mandatory minimums, the not-less-than mandatory minimums have been criticized as incompatible with the federal Sentencing Guidelines. Perhaps most prominent among its critics has been the Sentencing Commission itself. Its report, sketched the arguments traditionally offered in support of mandatory minimums:

Retribution or “Just Deserts.” Perhaps the most commonly-voiced goal of mandatory minimum penalties is the “justness” of long prison terms for particular serious offenses. . . . Deterrence. By requiring the imposition of substantial penalties for targeted offenses, mandatory minimums are intended both to discourage the individual sentenced . . . from further involvement in crime . . . and, by example discourage other potential lawbreakers Incapacitation, Especially of the Serious Offender. Mandating increased sentence severity aims to protect the public by incapacitating offenders Disparity. Indeterminate sentencing systems permit substantial latitude in setting the sentence, which in turn can mean that defendants convicted of the same offense are sentenced to widely disparate sentences. Inducement of Cooperation. Because they provide specific lengthy sentences, mandatory minimums encourage offenders to assist in the investigation of criminal

¹ 543 U.S. 220 (2005). *Booker* left the Guidelines in place and essentially intact, but they continue to have a large, rather than a commanding, presence within the federal sentencing scheme, see e.g., *Rita v. United States*, 127 S.Ct. 2456 (2007)(appellate courts may consider a sentence within the accurately identified Guideline range reasonable); *Gall v. United States*, 128 U.S. 586 (2007)(sentencing courts must begin by determining the appropriate Guideline range for the case at hand and then consider the other sentencing factors identified in 18 U.S.C. 3553(a); they may not consider a sentence within the Guideline range per se reasonable nor one outside that range per se unreasonable; appellate courts are to review trial court sentences under a deferential abuse of discretion standard).

conduct by others [in order to take advantage of the escape hatch 18 U.S.C. 3553(e) supplies to those who cooperate with authorities]. . . . Inducement of Pleas . . . [P]rosecutors express the view that mandatory minimum sentences can be valuable tools in obtaining guilty pleas.

The report argued, however, that:

- only 4 of the 60 mandatory minimums were regularly prosecuted;
- mandatory minimums induce new sentencing disparities [others contend the extent of earlier disparity was exaggerated and that disparity under the guidelines continues];
- due to plea bargaining, 35% of the defendants who might have been charged and sentenced under mandatory minimums were not;
- disparate application of mandatory minimum sentences . . . appears to be related to race [some critics point to the crack-powdered cocaine sentencing distinction rather than its attendant mandatory minimums as the culprit];
- mandatory minimums lack the capacity to consider the range of aggravating and mitigating circumstances that may attend the same offense and as a consequence produce unwarranted sentencing uniformity [these arguments would seem to be most persuasive in the case of flat sentence mandatory minimums; in other instances the range between the mandatory minimum and the statutory maximum would seem to provide ample room for the type of distinctions just mentioned];
- uneven application deprives mandatory minimums of their potential to deter [proponents might suggest that incapacitation and the prospect of minimal punishment were always the principal objectives. Deterrence is at best challenging to judge; the fact that not all possible cases receive mandatory minimum treatment is no reason to abandon incapacitation for those that are ensnared; and the result is one more properly laid to the door of prosecutorial discretion than to mandatory minimums];
- mandatory minimums breed disparity by transferring judicial discretion to the prosecution [this presumes that unwarranted disparity existed before the guidelines, that the guidelines have reduced or eliminated it, and that mandatory minimums returned it to the system -- three propositions upon which there is no consensus; even if one accepts all three, the question remains whether disparity, produced by plea agreements that make possible the conviction of other wrongdoers, is unwarranted or appropriately laid to the door of mandatory minimums];
- in contrast to the calibrated approach of the guidelines, mandatory minimums create cliffs where minuscule factual differences can have enormous sentencing consequences [critics might suggest that such “cliffs” are natural, necessary, and frequently occurring in the law (e.g., the age of majority, alcohol-blood levels, statutes of limitations) or that few cliffs are as high as the one that stands between a crime committed the day before the effective date of the guidelines and one committed the day after];

- the amendment process of the Sentencing Guidelines makes them perpetually self-correcting, while mandatory minimums are single-shot efforts at crime control; and

- the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of Sentencing Guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums.

The Commission's report was quickly followed by a Department of Justice study that concluded that a substantial number of those sentenced under federal mandatory minimums were nonviolent, first-time, lower level drug offenders.

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 has 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 confines legislative prerogatives in any substantial way.

Mandatory minimums implicate considerations under the Eighth Amendment's cruel and unusual punishments clause. The clause bars mandatory capital punishment statutes. 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, a standard which a sentence imposed under a mandatory minimum statute is likely to breach under extreme circumstances.

The Fifth and Sixth Amendments insist that no person "be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" and that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Moreover, due process requires that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime" with which an accused is charged. Yet the Court has declared that a fact, such as a defendant's criminal record or the brandishing of a firearm during the commission of the offense, upon which imposition of a mandatory minimum rests need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.

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," the Supreme Court has observed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." Thus, the lower federal courts have regularly upheld mandatory minimum statutes when challenged on separation of powers grounds, and the Supreme Court has denied any separation of powers infirmity in the federal Sentencing Guideline system which might be thought to produce its own form of mandatory minimums.

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 5,000 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. One federal court 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 of a rational basis standard.

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 proscription 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:

Historically, 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,” see *e.g.*, *Nichols v. United States*, 511 U.S. 738, 747 (1994)(noting that repeat-offender laws “penaliz[e] only the last offense committed by the defendant”). 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.”

Courts confronted with ex post facto challenges to recidivists statutes have similarly focused upon the “latest crime” and not upon the first.