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Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms

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Abstract

Mandatory minimum sentences are the product of good intentions, but good intentions do not always make good policy; good results are also necessary. Recognizing this fact, there are public officials on both sides of the aisle who support amending some components of federal mandatory minimum sentencing laws. But before such reform can proceed, Congress must ask itself: With respect to each crime, is justice best served by having legislatures assign fixed penalties to that crime? Or should legislatures leave judges more or less free to tailor sentences to the aggravating and mitigating facts of each criminal case within a defined range?

Key Points

- The U.S. Senate is considering two bills that would revise the federal sentencing laws in the case of mandatory minimum sentences.
- The Justice Safety Valve Act of 2013 expands the existing sentencing "safety valve" by allowing a judge to depart downward from any mandatory minimum "if the court finds that it is necessary to do so in order to avoid imposing" an unjust sentence.
- The Smarter Sentencing Act of 2013 applies only to nonviolent drug crimes and would permit a district judge to issue sentences without regard to any mandatory minimum if the court finds that the defendant meets certain criminal history requirements and did not commit a disqualifying offense.
- Although the Smarter Sentencing Act takes a smaller step than the Safety Valve Act toward the revision of the federal mandatory minimum sentencing laws, such a measured approach could enhance federal sentencing policy while avoiding a number of potential pitfalls.

Is justice best served by having legislatures assign fixed penalties to each crime? Or should legislatures leave judges more or less free to tailor sentences to the aggravating and mitigating facts of each criminal case within a defined range?

The proliferation in recent decades of mandatory minimum penalties for federal crimes, along with the tremendous increase in the prison population, has forced those concerned with criminal justice in America to reconsider this age-old question. The Supreme Court of the United States has upheld lengthy mandatory terms of imprisonment over the challenge that they violate the Eighth Amendment's prohibition against cruel and unusual punishments.[1] The question remains, however, whether mandatory minimums are sound criminal justice policy.

Today, public officials on both sides of the aisle support amending the federal mandatory minimum sentencing laws. Two bills with

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bipartisan support are currently under consideration. Senators Patrick Leahy (D–VT) and Rand Paul (R–KY) have introduced the Justice Safety Valve Act of 2013,[2] which would apply to all federal mandatory minimums. Senators Dick Durbin (D–IL) and Mike Lee (R–UT) have introduced the Smarter Sentencing Act, which would apply to federal mandatory minimums for only drug offenses.[3]

In what follows, this paper will explain how mandatory minimums emerged in the modern era, summarize the policy arguments for and against mandatory minimums, and evaluate both the Justice Safety Valve Act and the Smarter Sentencing Act. The bottom line is this: Each proposal might be a valuable step forward in criminal justice policy, but it is difficult to predict the precise impact that each one would have. This much, however, appears likely: The Smarter Sentencing Act is narrowly tailored to address one of the most pressing problems with mandatory minimums: severe sentences for relatively minor drug possession crimes.[4]

The Modern History of Mandatory Minimum Sentences

For most of the 19th and 20th centuries, federal trial judges had virtually unlimited sentencing discretion.[5] In the 1960s and 1970s, influential members of the legal establishment criticized that practice,[6] concluding that that unrestrained discretion gave rise to well-documented sentencing disparities in factually similar cases.[7] Over time, that scholarship paved the way for Congress to modify the federal sentencing process through the Sentencing Reform Act of 1984.[8] That law did not withdraw all sentencing discretion from district courts; it did, however, establish the United States Sentencing Commission and directed it to promulgate Sentencing Guidelines that would regulate and channel the discretion that remained.[9]

Congress also decided to eliminate the courts' discretion to exercise leniency in some instances by requiring courts to impose a mandatory minimum sentence for certain types of crimes. For example, Congress enacted the Armed Career Criminal Act[10] in 1984 as part of the same law that included the Sentencing Reform Act of 1984.[11] The Armed Career Criminal Act demands that a district court sentence to a minimum 15-year term of imprisonment anyone who is convicted of being a felon in possession of a firearm if he has three prior convictions for "a violent felony or a serious drug offense."[12] Two years later, concerned by the emergence of a new form of cocaine colloquially known as "crack," Congress passed the Anti-Drug Abuse Act of 1986, [13] which imposes mandatory minimum terms of imprisonment for violations of the federal controlled substances laws.[14]

Congress could have allowed the U.S. Sentencing Commission to devise appropriate punishment for those offenses, at least as an initial matter. Instead, Congress forged ahead and preempted the commission by decreeing that offenders should serve defined mandatory minimum terms of imprisonment when convicted of those crimes.[15]

District courts may depart downward from those mandatory minimum sentences only in limited circumstances. For example, the Anti-Drug Abuse Act of 1986 has two exceptions to the mandatory minimum sentencing requirement. The first occurs if a defendant cooperates with the government *and* the government files a motion for a downward departure from the statutory minimum.[16] Absent such a motion, the district court cannot reduce a defendant's sentence based on that exception.[17] The second exception involves the so-called safety valve that allows judges to avoid applying mandatory minimums, even absent substantial assistance.[18] The safety valve, however, has a limited scope: It applies only to sentences imposed for nonviolent drug offenses[19] where the offender meets specific criteria relating to criminal history, violence, lack of injury to others, and leadership.[20] Otherwise, a district court must impose the sentence fixed by the Anti-Drug Abuse Act of 1986. With regard to the Armed Career Criminal Act, no federal law authorizes a district court to impose a term of imprisonment less than the one required by that statute.

The Armed Career Criminal Act and the Anti-Drug Abuse Act of 1986 are the two principal modern federal statutes requiring mandatory minimum terms of imprisonment—but they are by no means the only ones. Mandatory minimums have proliferated and have increased in severity. Since 1991, the number of mandatory minimums has more than doubled.[21] Entirely new types of offenses have become subject to mandatory minimums, from child pornography to identity theft.[22] During that period, the percentage of offenders convicted of violating a statute carrying a mandatory minimum of 10 years increased from 34.4 percent to 40.7 percent.[23]

The Arguments For and Against Mandatory Minimum Sentences

There are powerful arguments on each side of this debate. The next two sections summarize the arguments pro and con on mandatory minimum sentences as each side of that debate would make its case.[24]

The Assault on Mandatory Minimum Sentences. Mandatory minimum sentences have not eliminated sentencing disparities because they have not eliminated sentencing discretion; they have merely shifted that discretion from judges to prosecutors.[25] Judges may have to impose whatever punishment the law requires, but prosecutors are under no comparable obligation to charge a defendant with violating a law carrying a mandatory minimum penalty.[26] As a practical matter, prosecutors have unreviewable discretion over what charges to bring, including whether to charge a violation of a law with a mandatory minimum sentence, and over whether to engage in plea bargaining, including whether to trade away a count that includes such a law. Moreover, even if a prosecutor brings such charges against a defendant, the prosecutor has unreviewable discretion whether to ask the district court to reduce a defendant's sentence due to his "substantial assistance" to the government.[27]

What is more, critics say, unbridled prosecutorial discretion is a greater evil than unlimited judicial discretion. Prosecutors are not trained at sentencing and do not exercise discretion in a transparent way.[28] Critics also claim that prosecutors, who stand to gain professionally from successful convictions under mandatory minimums, do not have sufficient incentive to exercise their discretion responsibly.[29]

Indeed, nowhere else in the criminal justice system does the law vest authority in one party to a dispute to decide what should be the appropriate remedy. That decision always rests in the hands of a jury, which must make whatever findings are necessary for a punishment to be imposed, or the judge, who must enter the judgment of conviction that authorizes the correctional system to punish the now-convicted defendant.[30]

Furthermore, they contend, mandatory minimum sentences do not reduce crime. As University of Minnesota Law Professor Michael Tonry has concluded, "the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away."[31] Nor is it clear that mandatory minimum sentences reduce crime through incapacitation. In many drug operations, if a low-level offender is incapacitated, another may quickly take his place through what is known as the "replacement effect."[32] In drug cases, mandatory minimum sentences are also often insensitive to factors that could make incapacitation more effective, such as prior criminal history.[33]

In theory, mandatory minimum sentences enable the government to "move up the chain" of large drug operations by using the assistance of convicted lower-level offenders against senior offenders. The government can reward an offender's cooperation by moving in district court for a reduction of the offender's term of imprisonment below whatever term is required by law.[34] In reality, however, critics argue that the value of that leverage is overstated. The rate of cooperation in cases involving mandatory minimums is comparable to the average rate in all federal cases.[35]

Further, only certain defendants in cases involving organized crime—those who are closest to the top of the pyramid—will be able to render substantial assistance.[36] The result is that sentencing reductions go to serious offenders rather than to small-scale underlings. The practice of affording sentence concessions to defendants who assist the government is entrenched in American law, but the quantity-driven drug mandatory minimums are uniquely problematic because they can render each low-level co-conspirator responsible for the same quantity of drugs as the kingpin.[37]

Statutes imposing mandatory minimum sentences result in arbitrary and severe punishments that undermine the public's faith in America's criminal justice system. Consider the effect of those provisions in the Anti-Drug Abuse Act of 1986. Drug offenses, which make up a significant proportion of mandatory minimums, can give rise to arbitrary, severe punishments.[38] The difference between a drug quantity that triggers a mandatory minimum and one that does not will often produce a "cliff effect."[39] While someone with 0.9 gram of LSD might not spend much time incarcerated, another fraction of a gram will result in five years behind bars.

In fact, it is easy to find examples of unduly harsh mandatory minimums for drug offenses. A financially desperate single mother of four with no criminal history was paid $100 by a complete stranger to mail a package that, unbeknownst to her, contained

232 grams of crack cocaine. For that act alone, she received a sentence of 10 years in prison even though the sentencing judge felt that this punishment was completely unjust and irrational.[40]

In some cases, mandatory minimums have been perceived as being so disproportionate to a person's culpability that the offender has altogether escaped punishment. Florida Judge Richard Tombrink "nullified" the 25-year mandatory sentence of a man who possessed (without an intent to distribute) hydrocodone pills.[41] Juries also have the power to nullify by acquitting someone they would otherwise have convicted if not for the disproportionately harsh sentence. Although defendants cannot demand that the trial judge explicitly instruct the jury that it has the power to nullify, in mandatory contexts, a judge troubled by the length of the sentence a defendant must receive for a conviction can allow the jury to learn what those penalties are in the hope that the jury exercises this power *sua sponte*.[42]

Finally, critics maintain that mandatory minimum sentences are not cost-effective. The certainty of arrest, prosecution, conviction, and punishment has a greater deterrent effect than the severity of punishment. If a one-year sentence for a crime has the same deterrent effect as a five-year sentence, the additional four years of imprisonment inflict unnecessary pain on the offender being incarcerated and, to borrow from economics, impose a "dead weight" loss on society. Mandatory minimum sentences, therefore, waste scarce criminal justice resources.

The Defense of Mandatory Minimums. On the other hand, a number of parties defend the use of mandatory minimum terms of imprisonment. They argue that mandatory minimum sentences reflect a societal judgment that certain offenses demand a specified minimum sanction and thereby ensure that anyone who commits such a crime cannot avoid a just punishment.

A nation of more than 300 million people will necessarily have a tremendous diversity of views as to the heinousness of the conduct proscribed by today's penal codes, and a bench with hundreds of federal district court judges will reflect that diversity. The decision as to what penalty should be imposed on a category of offenders requires consideration of the range of penological justifications for punishment, such as retribution, deterrence, incapacitation, education, and rehabilitation. Legislatures are better positioned than judges to make those types of judgments,[43] and Americans trust legislatures with the authority to make the moral and empirical decisions about how severely forbidden conduct should be sanctioned. Accordingly, having Congress specify the minimum penalty for a specific crime or category of offenses is entirely consistent with the proper functioning of the legislature in the criminal justice processes.

Mandatory minimum sentences eliminate the dishonesty that characterized sentencing for the majority of the 20th century. For most of that period, Congress vested district courts with complete discretion to select the appropriate period of confinement for an offender while also granting parole officials the authority to decide precisely whether and when to release an inmate before the completion of his sentence.

That division of authority created the inaccurate impression that the public action of the judge at sentencing fixed the offender's punishment while actually leaving that decision to the judgment of parole officials who act outside of the view of the public. At the same time, Congress could escape responsibility for making the moral judgments necessary to decide exactly how much punishment should be inflicted upon an individual by passing that responsibility off to parties who are not politically accountable for their actions. The entire process reflected dishonesty and generated cynicism, which corrodes the professional and public respect necessary for the criminal justice system to be deemed a morally defensible exercise of governmental power.

Mandatory minimum sentences also address two widely acknowledged problems with the criminal justice system: sentencing disparity and unduly lenient sentences. Mandatory minimums guarantee that sentences are uniform throughout the federal system and ensure that individuals are punished commensurate with their moral culpability by hitching the sentence to the crime, not the person.[44]

In fact, the need to use mandatory minimums as a means of addressing sentencing variances has become more pressing in the wake of the Supreme Court's 2005 decision in *United States v. Booker*.[45] *Booker* excised provisions of the Sentencing Reform Act of 1984 that had made the Sentencing Guidelines binding upon federal judges.[46] The result, unfortunately, has been a return to the type of inconsistency that existed before that statute became law. According to the Department of Justice, *Booker* has precipitated a return to unbridled judicial discretion: "[For]

offenses for which there are no mandatory minimums, sentencing decisions have become largely unconstrained."[47] *Booker* therefore threatens to resurrect the sentencing disparities that, 30 years ago, prompted Congress to enact the Sentencing Reform Act. Mandatory minimum sentences may be the only way to eliminate that disparity today.

Mandatory minimum sentences also prevent crime because certain and severe punishment inevitably will have a deterrent effect.[48] Locking up offenders also incapacitates them for the term of their imprisonment and thereby protects the public.[49] In fact, where the chance of detection is low, as it is in the case of most drug offenses, reliance on fixed, lengthy prison sentences is preferable to a discretionary sentencing structure because mandatory sentences enable communities to conserve scarce enforcement resources without losing any deterrent benefit.[50]

Finally, the available evidence supports those conclusions. The 1990s witnessed a significant drop in crime across all categories of offenses,[51] and the mandatory minimum sentences adopted in the 1980s contributed to that decline.[52]

Moreover, mandatory minimums are an important law enforcement tool. They supply the police and prosecutors with the leverage necessary to secure the cooperation and testimony of low-level offenders against their more senior confederates.[53] The evidence shows that mandatory minimums, together with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission, have produced more cooperation and accomplice testimony in organized crime cases.[54]

It is a mistake to condemn mandatory minimum sentences because of the cost of imprisoning offenders. Opponents of mandatory minimums decry the high cost of housing a large number of inmates for a lengthy period of time and point to other criminal justice programs—e.g., the FBI, Federal Public Defenders, and victim advocates—that can better use those funds. That argument, however, does not consider both sides of the ledger. Imprisonment reduces the number of future victims of crime and thereby reduces the costs that they and the rest of society would otherwise suffer. Society is entitled to decide how to spend its funds, and underwriting the cost of incapacitating proven criminals is certainly a legitimate use of resources. Moreover, this efficiency-based criticism mistakenly assumes that Congress will not increase the budget for the Justice Department to use a valuable criminal justice tool: imprisonment.

In any event, there is no guarantee that any funds saved by reducing the length of offenders' sentences will go to other components of the criminal justice system. Indeed, there is no criminal justice "lockbox" into which all saved or unspent funds are dumped, and it is dishonest to pretend that funds not given to the Federal Bureau of Prisons will necessarily be used elsewhere in the criminal justice system rather than for non–criminal justice government programs.

Finally, the arguments against mandatory minimum sentences are, at their core, just a sleight of hand. The principal objection to mandatory minimum sentences is not that they are mandatory, but that they are severe or that they are required for drug offenses. No one would object to a mandatory 30-day sentence for possession of heroin or a mandatory one-year sentence for rape (in fact, the objection likely would be that those mandatory sentences are too short). Critics are concerned less about the mandatory nature of federal sentences than they are about their length and their use in drug cases.

Potential Reforms: The Justice Safety Valve Act and the Smarter Sentencing Act

The U.S. Senate is considering two bills that would revise the federal sentencing laws in the case of mandatory minimum sentences. These bills differ significantly in their details, but they have the common goal of ameliorating some of the harsh results that those laws can produce.

The Justice Safety Valve Act of 2013. As noted above, Section 3553(f) of Title 18 contains a "safety valve" that allows judges to exempt certain drug and other offenders from mandatory minimum sentences. The Justice Safety Valve Act would add a new subsection (g) to Section 3553.[55] That provision would expand the existing safety valve by allowing a judge to depart downward from any mandatory minimum "if the court finds that it is necessary to do so in order to avoid imposing" an unjust sentence.[56] Judges would need to state on the record their reason(s) for not imposing a mandatory minimum sentence, but they could reduce every sentence required by law to the punishment that the court deemed appropriate in each case.[57]

The Smarter Sentencing Act of 2013. The other law, called the Smarter Sentencing Act, operates in a different and far more limited manner.[58]

To start with, it would not apply to every mandatory minimum sentence. Instead, it would amend Section 3553(f), which applies only to nonviolent drug crimes. The Smarter Sentencing Act would permit a district judge to impose sentences without regard to any mandatory minimum if the court finds that the defendant has no more than two criminal history points, as defined by the U.S. Sentencing Guidelines, and the defendant was not convicted of a disqualifying offense, such as a violent crime.[59]

Finally, the act would make retroactive the Fairness in Sentencing Act of 2010,[60] which reduced the disparity between the amount of crack cocaine and powder cocaine needed to trigger mandatories and eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine.[61] It is sensible as a matter of policy to apply that statute retroactively. The Fairness in Sentencing Act of 2010 reduces the crack-to-powder ratio used in calculating a mandatory minimum sentence from 100:1 to 18:1. If the higher ratio is unnecessary to serve the legitimate purposes of punishment, there is no obvious reason why it should not be applied retroactively. After all, if Congress decides that a particular method of calculating a sentence of imprisonment is unduly severe on a going-forward basis, it makes little sense to continue to apply that penalty to offenders already suffering under it.

Comparing the Two Proposals

Each bill would grant district courts greater discretion to depart downward from a mandatory minimum sentence than current law allows. The Safety Valve Act would allow such departures in every case in which there is a mandatory minimum sentence, while the Smarter Sentencing Act permits that result only in connection with violations of the controlled substances laws and only if the defendant satisfies certain requirements.

Neither the Justice Department nor the Government Accountability Office has analyzed the potential effect of either proposal, so Americans are left with uncertainty about those proposals' likely effects. In theory, the Safety Valve Act could result in a greater number of downward departures than the Smarter Sentencing Act because the former would apply to *every* mandatory minimum statute. It is uncertain, however, just how often district courts would depart downwards in non-drug cases and how many years of imprisonment courts would shave off the amount now required by law for those offenses.

Moreover, the Safety Valve Act could pose a risk of *overcorrection*. That bill, for example, would authorize a district court to disregard a mandatory minimum sentence "if the court finds that it is necessary to do so in order to avoid" imposing a sentence that would "violat[e]" the purposes of federal criminal punishment, which are to impose a sentence that is "sufficient, but not greater than necessary" to, among other "things, reflect the seriousness of the offense," "provide just punishment," "afford adequate deterrence," and "protect the public from further crimes of the defendant."[62] Even though the act would require district courts to provide a written statement of the reasons for any downward departure,[63] that provision would, on its face, appear to grant district courts virtually unfettered discretion to issue a sentence below the statutory minimum. Furthermore, the Safety Valve Act supplies district courts with no objective standards, thereby denying an appellate court the criteria needed to determine whether the district court had abused its discretion.

Given that the Sentencing Guidelines are no longer mandatory, the Safety Valve Act might effectively return to district courts the broad discretion that they enjoyed before the Sentencing Reform Act of 1984. The result would be to make every current mandatory minimum sentence into a mere recommendation, thereby accelerating the transformation of federal sentencing law back to the "bad old days" of unjustified sentencing disparities—a risk that must be considered.

The Smarter Sentencing Act is a far narrower remedy than the Safety Valve Act because it addresses perhaps the most troubling aspect of mandatory minimums: their capacity to impose arbitrary and unduly severe sentences on relatively low-level offenders in controlled substances cases. That problem is particularly acute in drug cases, because an additional gram of a controlled substance quantity can have an enormous impact on sentencing even though that additional gram has little marginal bearing on the offender's moral culpability.[64] By removing the mandate in cases where offenders, despite having a slightly more substantial criminal history, otherwise qualify for the safety valve and by substantially decreasing mandatory sentences for

nonviolent drug offenses, the Sentencing Act would mitigate the evils of the "cliff effect" that some critics have identified.

Perhaps, in the long term, the Safety Valve Act might be preferable policy. For now, however, such sweeping reform might be a bridge too far. The immediate and most urgent problem facing America's criminal justice system is that district courts must impose unduly severe mandatory minimum sentences on certain small-scale drug offenders. The Smarter Sentencing Act focuses on remedying that problem while leaving for another day the issue of whether there should be mandatory minimum sentences imposed on, for example, violent criminals. The Smarter Sentencing Act takes a smaller step than the Safety Valve Act toward the revision of the federal mandatory minimum sentencing laws, but a smaller step might enhance federal sentencing policy while avoiding the risks noted above.

Conclusion

Mandatory minimum sentences are the product of good intentions, but good intentions alone do not make good policy; good results are also necessary. Congress was right to be concerned about reducing sentencing disparity and ensuring that sentences are neither unduly lenient nor unduly harsh.

Nonetheless, just as law should be tempered with equity, so should rigid sentencing rules leave room for adjustment in certain cases where a legislatively fixed sentence would be manifestly unjust. No statute can account for every variable in every case, and the attempt to do so with mandatory minimums has given rise to punishments in some small-scale drug possession cases that are completely out of whack with the purpose of the federal sentencing laws.

The problem, however, is remediable. Granting district courts some additional limited sentencing discretion would improve the status quo by eliminating some unjust sentences without obviously undercutting the incapacitative, deterrent, and educative benefits of the criminal law. The Smarter Sentencing Act seeks to mitigate the "cliff effect" in the context of nonviolent drug offenses. Doing so could ameliorate some of the extremely harsh sentences that district courts have imposed without taking a bite out of the efforts that the government has made over the past four decades to improve public safety.

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Endnotes:

1. *See* Ewing v. California, 538 U.S. 11 (2003) (upholding application of the California "three strikes" law); Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding mandatory sentence of life imprisonment for a drug offense).
2. The Justice Safety Valve Act of 2013, S. 619, 113th Congress (2013). *See infra* Appendix A.
3. The Smarter Sentencing Act of 2013, S. 1410, 113th Congress (2013). *See infra* Appendix B.
4. Both the Justice Safety Valve Act and the Smarter Sentencing Act would revise *the front end* of the correctional process by amending federal mandatory minimum sentencing laws in order to permit district court judges to depart downwards in a larger number of cases than the law currently allows. An alternative would be to revise *the back end* of the correctional process by amending the federal good-time (or earned-time) laws in order to allow the Federal Bureau of Prisons to grant prisoners additional credit toward an early release, perhaps even in cases in which the prisoner was sentenced under a mandatory minimum sentencing law. For a discussion of potential reform of the federal good-time laws, *see, e.g.,* Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 Geo. J.L. & Pub. Pol'y 1 (2013). Of course, it also is possible to reform both ends of the process. For a list and discussion of the various possible front and back-end reforms, *see, e.g.,* Urban Institute, Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System (Nov. 2013), *available at* http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf.
5. *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 363 (1989); Larkin, *supra* note 4, at 7–8.
6. Judge Marvin E. Frankel criticized the sentencing disparities resulting from leaving district courts complete freedom to impose a sentence within the range authorized by Congress. *See* Marvin E. Frankel, Criminal Sentences: Law Without Order (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1 (1972). His work was particularly important in drawing attention to the "lawlessness" of the status quo. *See* Kevin R. Reitz, *Sentencing Reform in the States*, 64 U. Colo. L. Rev. 645, 650 n.21 (1993) (finding that Frankel's work "charted the general outline of sentencing reform through the 1980s and into the 1990s").
7. *See*, *e.g.*, S. Rep. No. 97–307, at 956 (1981) ("glaring disparities…can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence."); Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 895–97 (1990) (detailing studies demonstrating widespread sentencing disparities in the pre–Sentencing Guidelines era); William Austin & Thomas A. Williams III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. Crim. L. & Criminology 306 (1977) (finding that judges sentencing in the pre–Sentencing Guidelines era imposed different sentences despite having the identical case information); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223 (1993) (recounting the legislative history of the Sentencing Reform Act of 1984 and describing how Frankel's work inspired the legislators instrumental in pushing sentencing reform).
8. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 (2006)).
9. *See* 28 U.S.C. § 991 (2006) (establishing the Commission and describing its duties); *Mistretta*, 488 U.S. at 363–70.
10. 18 U.S.C. § 924 (2006).
11. Both the Sentencing Reform Act of 1984 and the Armed Career Criminal Act were enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).
12. 18 U.S.C. § 924(e).
13. Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986).
14. *See*, *e.g.*, Chapman v. United States, 500 U.S. 453 (1991); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J.L. & Pub. Pol'y 241, 241–42 (2013). While drug quantities are for the most part pegged to five- and 10-year sentences, some drug offenses can result in life imprisonment. *See* 21 U.S.C. § 841(b)(1)(B), 960(b)(2)(A)–(C), (G) & (H).
15. *See* Stith & Koh, *supra* note 7, at 259 (describing a "growing public concern about crime and a new President, Ronald Reagan, keenly interested in toughening and expanding federal anticrime measures"); U.S. Sentencing Comm'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 23 (2011) (describing the new drug mandatory minimums as a "response to a number of circumstances, including the increased incidence of drug use and trafficking and well-publicized tragic incidents such as the June 1986 death of Boston Celtics' first-round draft pick, Len Bias.")
16. Section 3553(e) of Title 18 provides that, "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."
17. *See*, *e.g.*, Melendez v. United States, 518 U.S. 120 (1996); Wade v. United States, 504 U.S. 181 (1992).
18. *See*, *e.g.*, 139 Cong. Rec. 27, 842 (daily ed. Nov. 8, 1993) (statement of Sen. Hatch urging that a safety valve could restore "a small degree of discretion to the courts for a small percentage of nonviolent drug cases.").
19. *See* 18 U.S.C. § 3553(f) (applies only to offenders convicted under "401, 404, or 406 of the Controlled Substances Act…or section 1010 or 1013 of the Controlled Substances Import and Export Act.").

20. *See* 18 U.S.C. § 3553(f): "(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement."
21. *See* U.S. Sentencing Comm'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 71 (2011) (hereafter Mandatory Minimum Penalties).
22. *See*, *e.g.*, Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105–314, 112 Stat. 2974 (codified at 18 U.S.C. § 2241 (2006)); Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105–318, 112 Stat. 3007 (codified at 18 U.S.C. § 1028 (2006)).
23. *See* U.S. Sentencing Comm'n, *supra* note 21, at 75. Ironically, in 1990, slightly more than half of offenders convicted of a mandatory minimum sentence offense violated a statute mandating five years of imprisonment, whereas in 2010, that number declined to 39.9 percent. *Id*.
24. For an excellent discussion of the arguments pro and con, see Eric Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1 (2010).
25. *See*, *e.g.*, Jeffrey T. Ulmer, Megan C. Kurlychek, & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. Res. Crim. & Delinq. 427, 451 (2007) ("Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion.")
26. Internal Justice Department policies regulate a federal prosecutor's exercise of charging discretion. Those policies seek to prevent a nationwide occurrence of disparate charging decisions by limiting a prosecutor's decision not to charge the most serious provable offense. *See*, *e.g*., Memorandum from U.S. Attorney General Eric Holder on Department Policy on Charging and Sentencing to All Federal Prosecutors (May 19, 2010), *available at* http://www.talkleft.com/holder-charging-memo.pdf; and Memorandum from U.S. Attorney General Eric Holder on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases to the United States Attorney and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), *available at* http://www.popehat.com/wp-content/uploads/2013/08/holder-mandatory-drug-minimums-memo.pdf. Those policies, however, are not judicially enforceable. *See* United States v. Caceres, 440 U.S. 741 (1979) (ruling that federal courts may not exercise their supervisory power to exclude evidence obtained in violation of an agency's internal rules).
27. *See*, *e.g.*, David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. Law & Econ. 591, 622 (2005) ("[P]rosecutors generally have the discretion to prosecute a defendant for a lesser charge than the initial arrest charge, and the use of such discretion can have dramatic effects on sentencing with respect to mandatory sentencing laws."); Michael A. Simons, *Departing Ways: Uniformity, Disparity, and Cooperation in Federal Drug Sentences*, 47 Vill. L. Rev. 921, 934 (2002) ("Whether a defendant is eligible for a substantial assistance departure is almost completely discretionary—and that discretion rests entirely with the prosecution.").
28. *See*, e.g., Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550, 551 (1978) (arguing that prosecutorial discretion is "usually exercised by people of less experience and less objectivity than judges"); Hon. Anthony M. Kennedy, "Speech at the American Bar Association Annual Meeting," Aug. 9, 2003, *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx'Filename=sp_08-09-03.htm ("The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.").
29. *See Reevaluating the Effectiveness of Mandatory Minimum Sentences*: *Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 4 (2013) (statement of Hon. Brett Tolman arguing that "institutional pressures to prosecute with an eye toward identifying and using mandatory minimum statutes to achieve the longest potential sentence in a given case are severe").
30. *See*, *e.g*., United States v. Booker, 543 U.S. 220 (2005) (ruling that the Sixth Amendment Jury Trial Clause limits the sentence that a trial judge may impose to one that rests on the jury's findings or the defendant's admissions).
31. *See* Barbara S. Vincent & Paul J. Hofer, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings, Federal Judicial Center (1994), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf.
32. *See*, *e.g*., Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980—1996*, 26 Crime & Just. 17, 57 (1999) ("Incarceration of even three hundred thousand drug offenders does little to reduce drug sales through deterrence or incapacitation as long as the drug market can simply recruit replacements."); Larkin, *supra* note 14, at 247–48 & n.35.
33. *See* U.S. Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (2004), *available at* http:// www.ussc.gov/publicat/Recidivism_General.pdf ("In general, as the number of criminal history points increases, the risk of recidivating within two years increases"); Jane L. Fryod, *Safety Valve Failure: Low-Level Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1491 (2000) ("[T]he [Sentencing] Guidelines provide graduated, proportional increases in sentence severity for additional misconduct or prior convictions, whereas mandatory minimums sentences do not.").
34. *See* 18 U.S.C. § 3553(3) (2006).
35. *See* Luna & Cassell, *supra* note 24, at 19.

36. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199, 212 (1993) ("Defendants who are most in the know, and thus have the most 'substantial assistance' to offer, are often those who are most centrally involved in conspiratorial crimes.").
37. *Id.* at 213.
38. In fiscal year 2010, 77.2 percent of defendants convicted of violating a statute carrying a mandatory minimum were convicted of a drug trafficking offense. U.S. Sentencing Comm'n 2011, *supra* note 21, at 72.
39. Schulhofer, *supra* note 36, at 209.
40. *See* Steven Nauman, *Brown v. Plata; Renewing the Call to End Mandatory Sentencing*, 65 Fla. L. Rev. 855, 866–67 (2013). In another case, a man who attempted suicide by overdosing on Vicodin received 15 years in prison because he possessed 31 pills. His sentencing judge lamented, "I do believe this is an inappropriate sentence for you … but there are restraints placed on my ability to stray from the statutory framework that would result in [your] early release." *See* Erin Fuchs, *10 People Who Received Outrageous Sentences for Drug Convictions*, Business Insider, Apr. 23, 2013, *available at* http://www.businessinsider.com/10-most-outrageous-mandatory-minimum-2013-4?op=1.
41. *See id.* Upon failing to find an alternative to the sentence, Judge Tombrink declared the statute unconstitutional because his conscience would not permit him to execute the sentence, and he did not want to waste the taxpayers' money. *See id.*
42. *See* Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 96 Colum. L. Rev. 1232, 1232 (1995).
43. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 186 (1976) (lead opinion) ("The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.").
44. *See, e.g.*, Mandatory Minimum Penalties, *supra* note 21 (describing how critics of indeterminate sentencing during the pre-Guidelines era urged that a system of determinate sentencing would increase sentencing effectiveness by requiring sentences that are "more certain, less disparate, and more appropriately punitive"); Prepared Statement of David B. Muhlhausen, Senior Policy Analyst, Heritage Foundation, to the U.S. Sentencing Comm'n 9 (May 27, 2010) ("[M]andatory minimum sentences that establish long incarceration or death sentences for very serious and violent crimes can be justified based solely on the doctrine of just deserts.").
45. 543 U.S. 220 (2005).
46. *See, e.g.*, Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 Am. Crim. L. Rev. 303, 321–26 (2013).
47. Prepared Statement of Sally Quillian Yates, U.S. Attorney, Northern District of Georgia, to the U.S. Sentencing Comm'n 7 (May 27, 2010).
48. *See*, e.g., Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 Criminology & Pub. Pol'y 13, 37–38 (2011) (finding that certainty of punishment may have a large deterrent effect); Charles R. Tittle & Alan R. Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 Soc. Forces 455 (June 1974) (finding that certainty of imprisonment deters the commission of offenses).
49. *See, e.g.*, Shlomo Shinnar & Reuel Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 Law & Soc'y Rev. 581 (1975) (suggesting violent crime can be significantly reduced by mandatory incarceration due to the incapacitation of offenders); Robert S. Mueller III, *Mandatory Minimum Sentencing,* 4 Fed. Sent'g Rep. 230 (1992) ("[T]he imposition of prescribed minimum prison terms enhances public safety by incapacitating dangerous offenders for substantial periods, thus preventing numerous instances of death, injury, and loss of property.").
50. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 178–85 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1212–13 (1985).
51. *See* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s*, 18 J. of Econ. Persp. 163, 163 (2004) (describing the phenomenon).
52. *See* Stanley Sporkin & Asa Hutchinson, Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?,* 36 Am. Crim. L. Rev. 1279, 1283 (1999) (statement of Rep. Hutchinson) ("[M]andatory minimum penalties appear to be effective. Violent crime has declined seven years in a row.").
53. *See Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 3 (2013) (statement of Scott Burns, Executive Director, National District Att'ys' Ass'n) ("Mandatory sentences have been extremely helpful to state and local prosecutors as leverage to secure cooperation from defendants and witnesses and solve other crimes or, in a drug distribution case, 'move up the chain' and prosecute those at higher levels of sophisticated trafficking organizations."); Prepared Statement of Raymond W. Kelly, Commissioner, New York Police Department, to the U.S. Sentencing Comm'n 4 (July 10, 2009) (testifying that the potential application of more severe penalties in federal court "has convinced a number of suspects to give up information.").
54. *See, e.g.*, John C. Jeffries, Jr., & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1119–21 (1995) (finding that mandatory minimums have "produced far more cooperation and accomplice testimony in organized crime cases than occurred in the pre-Guidelines era.").
55. The Justice Safety Valve Act is reprinted in Appendix A.
56. Subsection 3553(a) of Title 18 sets forth various factors that federal judges may consider in imposing sentence, which include, among other things, criminal history, offense gravity, deterrence, and the need to protect the public.
57. *See* Justice Safety Valve Act, § 2.

58. On January 30, 2014, the Senate Judiciary Committee voted to send to the floor a revised version of the original bill. Appendix B contains the version approved by the committee. An additional salutary feature of the bill reported out of the Senate Judiciary Committee can be seen in Section 7. Section 7 would impose four new requirements on the federal government: (1) It directs the Attorney General, within one year, to prepare a report that lists all federal criminal offenses, the punishment authorized for a violation of each offense, the mens rea elements required by each offense, and the number of federal prosecutions brought within the last 15 years; (2) Section 7 directs each specified federal regulatory agency within one year to prepare a similar report listing all federal criminal offenses enforced by the agency, the punishment authorized for a violation of each offense, the mens rea elements required by each offense, and the number of cases that the agency referred to the Justice Department for prosecution within the past 15 years; (3) Section 7 directs the Attorney General, within two years, to have publicly available without cost an index of each criminal offense listed in the report that is accessible without cost on the website of the Department of Justice; and (4) within two years, each federal agency must have a similar list of regulatory offenses that is publicly accessible without charge on its agency website. The Heritage Foundation has previously supported the concept of having federal authorities "count the crimes" and has highlighted the problems posed by enacting criminal laws and regulations that lack adequate mens rea requirements. *See*, *e.g.*, Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, The Heritage Foundation Backgrounder No. 2812 (June 17, 2013), http://www.heritage.org/research/reports/2013/06/ignorance-of-the-law-is-no-excuse-but-it-is-reality; Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Crimina*l, The Heritage Foundation Legal Memorandum No. 98 (July 18, 2013), http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal; *Defining the Problem and Scope of Over-criminalization and Over-federalization*: *Hearing Before the H. Comm. on the Judiciary*, 112th Congress (2013) (testimony of John G. Malcolm, Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, The Heritage Foundation).
59. *See* Appendix B, § 2.
60. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 3, 124 Stat. 2372 (codified at 21 U.S.C. §§ 841, 960 (2012)).
61. *See* Appendix B, §§ 3–4.
62. *See* Justice Safety Valve Act, § 2, and 18 U.S.C. § 3553(a).
63. *See* Justice Safety Valve Act, § 3.
64. The same cannot be said for, say, the use of a firearm to commit a crime.

Appendix A

The Justice Safety Valve Act of 2013, S. 619, 113th Congress (2013), provides as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Justice Safety Valve Act of 2013."

SEC. 2. AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.

Section 3553 of title 18, United States Code, is amended by adding at the end the following:

"(g) Authority To Impose a Sentence Below a Statutory Minimum To Prevent an Unjust Sentence.—

"(1) General rule.—Notwithstanding any provision of law other than this subsection, the court may impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements of subsection (a).

"(2) Court to give parties notice.—Before imposing a sentence under paragraph (1), the court shall give the parties reasonable notice of the court's intent to do so and an opportunity to respond.

"(3) Statement in writing of factors.—The court shall state, in the written statement of reasons, the factors under subsection (a) that require imposition of a sentence below the statutory minimum.

"(4) Appeal rights not limited.—This subsection does not limit any right to appeal that would otherwise exist in its absence."

Appendix B

As voted out of the Senate Judiciary Committee on January 30, 2014, The Smarter Sentencing Act of 2013, S. 1410, 113th Congress (2013), provides as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Smarter Sentencing Act of 2014."

SEC. 2. APPLICABILITY OF STATUTORY MINIMUMS.

Section 3553(f)(1) of title 18, United States Code, is amended to read as follows:

"(1) the defendant—

"(A) does not have more than 1 criminal history point, as determined under the sentencing guidelines; or

"(B)(i) does not have more than 2 criminal history points, as determined under the sentencing guidelines;

"(ii) has no prior convictions for any offense that has as an element the use, attempted use, or threatened use of physical force against the person of another; and

"(iii) has not been convicted of—

"(I) a firearm offense under section 922 or 924;

"(II) a sex offense (as defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16911));

"(III) a Federal crime of terrorism (as defined in section 2332b(g)(5));

"(IV) a racketeering offense under section 1962; or

"(V) conspiring to use and invest illicit drug profits under section 414 of the Controlled Substances Act (21 U.S.C. 854);".

SEC. 3. CLARIFICATION OF APPLICABILITY OF THE FAIR SENTENCING ACT.

(a) Definition of Covered Offense.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) Defendants Previously Sentenced.—A court that imposed a sentence for a covered offense, may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) Limitations.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a motion made under this section to reduce the sentence was previously denied. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

SEC. 4. SENTENCING MODIFICATIONS FOR CERTAIN DRUG OFFENSES.

(a) Controlled Substances Act.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A), in the flush text following clause (viii)—

(A) by striking "10 years or more" and inserting "5 years or more"; and

(B) by striking "such person shall be sentenced to a term of imprisonment which may not be less than 20 years and" and inserting "such person shall be sentenced to a term of imprisonment which may not be less than 10 years and"; and

(2) in subparagraph (B), in the flush text following clause (viii)—

(A) by striking "5 years" and inserting "2 years"; and

(B) by striking "not be less than 10 years" and inserting "not be less than 5 years".

(b) Controlled Substances Import and Export Act.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), in the flush text following subparagraph (H)—

(A) by striking "not less than 10 years" and inserting "not less than 5 years"; and
(B) by striking "such person shall be sentenced to a term of imprisonment of not less than 20 years" and inserting "such person shall be sentenced to a term of imprisonment of not less than 10 years"; and
(2) in paragraph (2), in the flush text following subparagraph (H)—
(A) by striking "5 years" and inserting "2 years"; and
(B) by striking "10 years" and inserting "5 years".

SEC. 5. DIRECTIVE TO THE SENTENCING COMMISSION.

(a) Directive to Sentencing Commission.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend, if appropriate, its guidelines and its policy statements applicable to persons convicted of an offense under section 401 of the Controlled Substances Act (21 U.S.C. 841) or section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. 960) to ensure that the guidelines and policy statements are consistent with the amendments made by sections 2 and 4 of this Act and reflect the intent of Congress that such penalties be decreased in accordance with the amendments made by section 4 of this Act.
(b) Considerations.—In carrying out this section, the United States Sentencing Commission shall consider—
(1) the mandate of the United States Sentencing Commission, under section 994(g) of title 28, United States Code, to formulate the sentencing guidelines in such a way as to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons";
(2) the findings and conclusions of the United States Sentencing Commission in its October 2011 report to Congress entitled, Mandatory Minimum Penalties in the Federal Criminal Justice System;
(3) the fiscal implications of any amendments or revisions to the sentencing guidelines or policy statements made by the United States Sentencing Commission;
(4) the relevant public safety concerns involved in the considerations before the United States Sentencing Commission;
(5) the intent of Congress that severe sentences for violent, repeat, and serious drug traffickers who present public safety risks remain in place; and
(6) the need to reduce and prevent racial disparities in Federal sentencing.
(c) Emergency Authority.—The United States Sentencing Commission shall—
(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 120 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and
(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 6. REPORT BY ATTORNEY GENERAL.

Not later than 6 months after the date of enactment of this Act, the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report outlining how the reduced expenditures on Federal corrections and the cost savings resulting from this Act will be used to help reduce overcrowding in the Federal Bureau of Prisons, help increase proper investment in law enforcement and crime prevention, and help reduce criminal recidivism, thereby increasing the effectiveness of Federal criminal justice spending.

SEC. 7. REPORT ON FEDERAL CRIMINAL OFFENSES.

(a) Definitions.—In this section—
(1) the term "criminal regulatory offense" means a Federal regulation that is enforceable by a criminal penalty; and

(2) the term "criminal statutory offense" means a criminal offense under a Federal statute.

(b) Report on Criminal Statutory Offenses.—Not later than 1 year after the date of enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report, which shall include—

(1) a list of all criminal statutory offenses, including a list of the elements for each criminal statutory offense; and

(2) for each criminal statutory offense listed under paragraph (1)—

(A) the potential criminal penalty for the criminal statutory offense;

(B) the number of prosecutions for the criminal statutory offense brought by the Department of Justice each year for the 15-year period preceding the date of enactment of this Act; and

(C) the mens rea requirement for the criminal statutory offense.

(c) Report on Criminal Regulatory Offenses.—

(1) Reports.—Not later than 1 year after the date of enactment of this Act, the head of each Federal agency described in paragraph (2) shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report, which shall include—

(A) a list of all criminal regulatory offenses enforceable by the agency; and

(B) for each criminal regulatory offense listed under subparagraph (A)—

(i) the potential criminal penalty for a violation of the criminal regulatory offense;

(ii) the number of violations of the criminal regulatory offense referred to the Department of Justice for prosecution in each of the years during the 15-year period preceding the date of enactment of this Act; and

(iii) the mens rea requirement for the criminal regulatory offense.

(2) Agencies described.—The Federal agencies described in this paragraph are the Department of Agriculture, the Department of Commerce, the Department of Education, the Department of Energy, the Department of Health and Human Services, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, the Department of Transportation, the Department of the Treasury, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, the Export–Import Bank of the United States, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Mine Safety and Health Review Commission, the Federal Trade Commission, the National Labor Relations Board, the National Transportation Safety Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Office of Compliance, the Postal Regulatory Commission, the Securities and Exchange Commission, the Securities Investor Protection Corporation, the Environmental Protection Agency, the Small Business Administration, the Federal Housing Finance Agency, and the Office of Government Ethics.

(d) Index.—Not later than 2 years after the date of enactment of this Act—

(1) the Attorney General shall establish a publically accessible index of each criminal statutory offense listed in the report required under subsection (b) and make the index available and freely accessible on the website of the Department of Justice; and

(2) the head of each agency described in subsection (c)(2) shall establish a publically accessible index of each criminal regulatory offense listed in the report required under subsection (c)(1) and make the index available and freely accessible on the website of the agency.

(e) Rule of Construction.—Nothing in this section shall be construed to require or authorize appropriations.