

HISTORY OF MANDATORY MINIMUM PENALTIES AND STATUTORY RELIEF MECHANISMS

A. INTRODUCTION

This chapter provides a detailed historical account of the development and evolution of federal mandatory minimum penalties. It then describes the development of the two statutory mechanisms for obtaining relief from mandatory minimum penalties.

B. MANDATORY MINIMUM PENALTIES IN THE EARLY REPUBLIC

Congress has used mandatory minimum penalties since it enacted the first federal penal laws in the late 18th century. Mandatory minimum penalties have always been prescribed for a core set of serious offenses, such as murder and treason, and also have been enacted to address immediate problems and exigencies.

The Constitution authorizes Congress to establish criminal offenses and to set the punishments for those offenses,¹⁷ but there were no federal crimes when the First Congress convened in New York in March 1789.¹⁸

Congress created the first comprehensive series of federal offenses with the passage of the 1790 Crimes Act, which specified 23 federal crimes.¹⁹ Seven of the offenses in the 1790 Crimes Act carried a mandatory death penalty: treason, murder, three offenses relating to piracy, forgery of a public security of the United States, and the rescue of a person convicted of a capital crime.²⁰ One of the piracy offenses specified four different forms of criminal conduct, arguably increasing to 10 the number of offenses carrying a mandatory minimum penalty.²¹ Treason,

¹⁷ See U.S. Const. art. I, §8 (enumerating powers to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States” and to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); U.S. Const. art. III, § 3 (providing that “Congress shall have Power to declare the Punishment of Treason”). In addition to powers specifically relating to criminal offenses, Congress “routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.” *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010).

¹⁸ See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).

¹⁹ Act of Apr. 30, 1790, Chap. IX (the “1790 Crimes Act”), 1 Stat. 112.

²⁰ See 1790 Crimes Act, §§ 1 (Treason), 3 (Murder), 8 (Piracy), 9 (Citizens as pirates), 10 (Accessory to piracy before the fact), 14 (Forging public security of the United States), and 23 (Rescue of a person convicted of a capital crime), 1 Stat. 112-115, 117.

²¹ See 1790 Crimes Act, § 8, 1 Stat. 112, 113-114. The conduct at section 8 was later separated into individual statutes with each carrying a mandatory penalty, as discussed later. Several of those individual statutes still exist in title 18, United States Code, and carry mandatory penalties. Compare § 8 with 18 U.S.C. §§ 1651 (Piracy under the law of nations) and 1655 (Assault on commander as piracy), which carry mandatory life imprisonment. One of the

murder, and piracy remain punishable by a mandatory penalty today.²² Thirteen of the crimes in the 1790 Crimes Act were punishable by a term of imprisonment with a statutory maximum of up to one year (three offenses²³), three years (seven offenses²⁴), or seven years (three offenses²⁵). The remaining three crimes were punishable by fines and corporal punishment²⁶ or left to the court's discretion.²⁷

The 1790 Crimes Act was consistent with a late 18th century movement among the states to reduce the types of crimes punishable by death. The colonies, reflecting a more pronounced trend in England, had increased the number of capital crimes throughout the 17th and 18th centuries, making death the “standard penalty for all serious crimes.”²⁸ However, spurred by Enlightenment ideals of utilitarianism and proportionality in punishment, the states reduced the number of capital crimes in the decades following the American Revolution.²⁹ The 1790 Crimes Act reflected this trend, imposing death for only seven of the enumerated offenses, and establishing only maximum terms of imprisonment for others. Some of these other offenses, such as manslaughter and larceny, were crimes commonly punished by death in the colonial period.³⁰ Indeed, the debates over the 1790 Crimes Act in the House of Representatives show

statutes no longer carries a mandatory minimum penalty. *Compare* § 8 with 18 U.S.C. § 1656 (Conversion or surrender of vessel) (10-year statutory maximum term of imprisonment).

²² *See* 18 U.S.C. §§ 2381 (Treason) (punishable by death or by imprisonment of not less than five years), 1111 (Murder) (first degree murder punishable by death or by imprisonment for life), 1651 (Piracy under the law of nations) (requiring life imprisonment), and 1652 (Citizens as pirates) (requiring life imprisonment). Treason carried the mandatory death penalty until 1862, when Congress amended the penalty to require death or, in the court's discretion, at least five years of imprisonment. *See infra* note 76 and accompanying text.

²³ *See* 1790 Crimes Act, §§ 5 (Rescuing the body of an executed individual ordered for medical dissection by the court), 22 (Obstruction of process), and 23 (Rescuing a person before conviction of a capital crime), 1 Stat. 112, 113, 117.

²⁴ *See* 1790 Crimes Act, §§ 6 (Misprision of a felony), 7 (Manslaughter), 11 (Concealing a pirate or property taken by a pirate), 12 (Manslaughter and confederacy to become pirates), 18 (Perjury), 26 (Instituting legal action against a foreign ambassador), 28 (Violating safe conduct or assaulting a foreign ambassador), 1 Stat. 112, 113-16, 118. The punishment for perjury also included one hour standing in a pillory.

²⁵ *See* 1790 Crimes Act, §§ 2 (Misprision of treason), 13 (Maiming), 15 (Falsifying court records), 1 Stat. 112, 115-16.

²⁶ *See* 1790 Crimes Act, §§ 16 (Larceny), 17 (Receiving stolen goods), 1 Stat. 112, 116. Both larceny and receiving stolen goods were punishable by a fine of four times the value of the goods taken and not more than 39 stripes.

²⁷ *See* 1790 Crimes Act, § 21 (Bribery), 1 Stat. 112, 117.

²⁸ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 6-9, 23 (2002); *see also* Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (explaining the history of capital punishment in the colonial and post-Revolutionary period). Although many crimes carried the death penalty in the colonial period, “the colonies used the death penalty rather sparingly.” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 42 (1993). Pardons, lack of enforcement, the fiction of “benefit of clergy,” and jury nullification contributed to the lack of executions in the colonies. *See id.* at 41-43.

²⁹ BANNER, *supra* note 28, at 88-100.

³⁰ *Id.* at 5.

the House's concern with utility and proportionality in assigning punishments. The House debated at length whether certain crimes should mandate medical dissection in addition to death, and whether merely passing (as opposed to producing) counterfeit public securities should mandate death.³¹ In both instances, opponents argued that the more severe punishments were disproportional to the offense and thus unnecessary; supporters countered that the punishments served needful purposes and fit the severity of the crime.³² Although Congress ultimately elected to impose the more severe penalties,³³ the debates and Congress's decision to impose death for seven offenses and discretionary terms of imprisonment for the others was a departure from the prevalent use of mandatory death penalties during the colonial period.

Congress enacted the first mandatory minimum terms of imprisonment at the close of the 18th century as part of its response to strained relations between the United States and France. Following the XYZ Affair³⁴ and in preparation for a possible war with France, Congress passed the Sedition Act of 1798, which among other provisions created a new offense of opposing or impeding a federal officer by means of insurrection, riot, or unlawful assembly.³⁵ The offense carried a mandatory minimum penalty of at least six months of imprisonment.³⁶ Congress again used a mandatory minimum penalty in 1799 with its passage of the Logan Act.³⁷ The Logan Act provided that any citizen who, without the consent of the United States, corresponded with a foreign power about "disputes or controversies with the United States" with the intent to influence the foreign government or "to defeat the measures of the United States" was to be imprisoned for at least six months.³⁸ The Sedition Act contained a sunset provision and automatically expired on March 3, 1801, on the last day of President John Adams' term in

³¹ 13 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, DEBATES IN THE HOUSE OF REPRESENTATIVES 968-74 (Helen E. Veit et al. eds, 1994); *see also* Banner, *supra* note 28, at 76-77 (describing dissection as a method of "intensifying" a death sentence, and noting that "[b]y adding dissection to a death sentence the state could simultaneously furnish bodies to physicians and deter crime").

³² *Id.*

³³ *See* 1790 Crimes Act §§ 3 & 14, 1 Stat. 112, 113, 115.

³⁴ The XYZ Affair refers to an incident occurring in 1798 during which three French agents (identified as X, Y, and Z) demanded that American diplomatic emissaries pay a bribe and other concessions in return for the continuance of peace talks between the two nations. *See* U.S. Department of State, Office of the Historian, *The XYZ Affair and the Quasi-War with France, 1798-1800*, available at <http://history.state.gov/milestones/1784-1800/XYZ>.

³⁵ Act of July 14, 1798, ch. LXXIV, § 1, 1 Stat. 596; *see* Dwight F. Henderson, *Treason, Sedition and Fries' Rebellion*, 14 AM. J. LEGAL HIST. 308, 308-09 (1970); David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 155-56 (2001).

³⁶ Act of July 14, 1798, ch. LXXIV, § 1, 1 Stat. 596.

³⁷ *See* Act of Jan. 30, 1799, ch. I, 1 Stat. 613.

³⁸ *Id.* Congress passed the Logan Act following an unauthorized attempt by Dr. George Logan, a private citizen, to conduct diplomacy with French authorities. *See* Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 292-94 (1987).

office.³⁹ The offense created in the Logan Act remains in force, but no longer carries a mandatory minimum penalty.⁴⁰

Congress also used mandatory minimum penalties in its efforts to end the importation of slaves. The Constitution prohibited Congress from curtailing or abolishing the importation of slaves before 1808.⁴¹ In advance of the 1808 date, and with President Thomas Jefferson's urging, Congress passed an Act prohibiting the importation of slaves in February 1807.⁴² Among other provisions, the 1807 Act prohibited citizens from bringing slaves into the United States or serving on a vessel that transported slaves.⁴³ These offenses carried mandatory minimum penalties of at least five years and two years of imprisonment, respectively.⁴⁴ However, the mandatory minimum penalties were much less severe than the mandatory death penalty many in the House of Representatives wanted to attach to these offenses, on grounds that importing human beings was a crime of morality and akin to murder.⁴⁵ Other offenses created by the 1807 Act, such as outfitting slave vessels and purchasing or selling illegally imported slaves, carried only fines.⁴⁶

In 1818, Congress enacted additional mandatory minimum penalties for slave-related offenses in response to a number of problems caused by illegal slave trafficking. First, illegal slave smuggling and piracy in territories near New Orleans necessitated the use of military force against the smugglers.⁴⁷ Second, slave trafficking interfered with the United States' policy of neutrality in the ongoing wars between Spain and its colonies in the Americas, as these smugglers operated under revolutionary flags but used primarily crews of United States citizens and vessels outfitted in United States ports.⁴⁸ In response to these problems, Congress enacted a law that proscribed outfitting vessels for use in the slave trade, citizens from transporting slaves, and importing slaves to the United States – all subject to mandatory minimum terms of

³⁹ Act of July 14, 1798, ch. LXXIV, § 4, 1 Stat. 596, 597.

⁴⁰ See 18 U.S.C. § 953.

⁴¹ U.S. Const. art. I, §9.

⁴² DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, at 166-67 (1985).

⁴³ See Act of Mar. 2, 1807, ch. XXII, §§ 5 (Citizens bringing slaves to the United States) and 7 (Individuals serving on vessels holding slaves), 2 Stat. 426, 427-428.

⁴⁴ *Id.*

⁴⁵ HENDERSON, *supra* note 42, at 168-69.

⁴⁶ See Act of Mar. 2, 1807, ch. XXII, §§ 2 (Outfitting vessels for the slave trade) and 6 (Purchasing or selling illegally imported slaves), 2 Stat. 426, 426-28.

⁴⁷ HENDERSON, *supra* note 42, at 175-80.

⁴⁸ *Id.* at 126-43.

imprisonment of three years.⁴⁹ These penalties did not stop the trade in slaves, however,⁵⁰ leading Congress in 1820 to declare that persons who served on the crew of a vessel used for trading slaves or who forcibly confined individuals for the slave trade were pirates and subject to mandatory death.⁵¹

In 1825, Congress passed another crimes act⁵² that created new offenses and amended some of the offenses and penalties established 35 years earlier in the 1790 Crimes Act. The 1825 Crimes Act is notable for its lack of mandatory minimum penalties. Then-Representative Daniel Webster, Chairman of the House Judiciary Committee responsible for drafting the bill, explained that “the present bill would be found, upon the whole, to be a mitigation of the laws as they previously stood.”⁵³ United States Attorney General Benjamin Franklin Butler argued before the Supreme Court that Congress passed the 1825 Crimes Act, in part, because “[t]he penalties imposed by the [1790 Crimes Act] were found to be too heavy.”⁵⁴ Of the 21 crimes enumerated in the 1825 Crimes Act, only the debasement of United States gold and silver coins by a United States treasury employee carried a mandatory minimum penalty, requiring a term of imprisonment of at least one year.⁵⁵ Although the 1825 Crimes Act punished three offenses with mandatory death (burning a dwelling house on a military post, committing certain felonies on the high seas, and setting fire to a vessel of the United States),⁵⁶ it also repealed the 1790 Crime Act’s mandatory death penalty for counterfeiting certificates and public securities of the United States, which the 1825 Crimes Act replaced with a sentence of up to 10 years of imprisonment.⁵⁷

⁴⁹ See Act of Apr. 20, 1818, ch. XCI, §§ 3 (Outfitting vessels for the slave trade), 4 (Citizens transporting slaves), and 6 (Importing slaves to the United States), 3 Stat. 450, 451-52.

⁵⁰ Justice Joseph Story, charging a federal jury in Maryland in his role as a Circuit Justice, explained in 1819 that one would expect the severe penalties Congress imposed for engaging in slave smuggling would “extinguish[]” the slave trade because “virtuous men would, by their abhorrence, stay its polluted march, and wicked men would be overawed by its potent punishment.” He lamented, though, that “unfortunately the case is far otherwise. We have but too many melancholy proofs from unquestionable sources, that it is still carried on with all the implacable ferocity and insatiable rapacity of former times.” 1 LIFE AND LETTERS OF JOSEPH STORY 339-40 (William W. Story ed., 1851).

⁵¹ See Act of May 15, 1820, ch. CXIII, §§ 4 (Crew of foreign vessel seizing persons for the slave trade) and 5 (Persons forcibly confining individuals destined for slave trade), 3 Stat. 600, 600-01.

⁵² See Act of Mar. 3, 1825, ch. LXV (the “1825 Crimes Act”), 4 Stat. 115.

⁵³ 1 REG. DEB. 156 (1825).

⁵⁴ *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 73 (1838).

⁵⁵ See 1825 Crimes Act, § 24 (Debasement of U.S. gold or silver coins), 4 Stat. 115, 122.

⁵⁶ See 1825 Crimes Act, §§ 1 (Burning of a dwelling house), 4 (Murder and rape committed on the high seas), and 11 (Setting fire to a vessel of the United States), 4 Stat. 115-18.

⁵⁷ Compare 1825 Crimes Act, §§ 17, 4 Stat. 115, 119-20 with 1790 Crimes Act, § 14, 1 Stat. 115. The 1825 Crimes Act also amended the punishment for receiving stolen goods from a fine of four times the value of the goods involved and 39 stripes to a term of imprisonment not exceeding three years. Compare 1825 Crimes Act, § 8, 4 Stat. 115, 116 with 1790 Crimes Act, § 17, 1 Stat. 112, 116.

The remaining 17 crimes were punishable by terms of imprisonment of up to six months,⁵⁸ one year,⁵⁹ three years,⁶⁰ five years,⁶¹ and 10 years.⁶²

Congress relied heavily on mandatory minimum penalties when establishing crimes for the District of Columbia. The 1831 District of Columbia Crimes Act included 18 offenses with punishments for conduct occurring in the District of Columbia, fifteen of which carried mandatory minimum penalties.⁶³ For example, receiving stolen goods carried a mandatory minimum penalty of at least one year of imprisonment.⁶⁴ Fifteen of the offenses also specified mandatory minimum penalties for a second or subsequent offense.⁶⁵ A second conviction for receiving stolen goods carried a mandatory minimum penalty of at least two years of imprisonment.⁶⁶ In some instances, Congress prescribed mandatory minimum penalties for offenses committed in the District of Columbia even where analogous federal offenses of general application did not carry such penalties. The first offense for receiving stolen goods in the District of Columbia carried a mandatory minimum penalty of one year of imprisonment and a maximum term of five years of imprisonment, but under other federal law the offense of receiving stolen goods carried no mandatory minimum penalty and a statutory maximum term of imprisonment of three years.⁶⁷

⁵⁸ See 1825 Crimes Act, § 10 (Abandoning a mariner), 4 Stat. 115, 117.

⁵⁹ See 1825 Crimes Act, § 12 (Extortion by officer of the United States), 4 Stat. 115, 118.

⁶⁰ See 1825 Crimes Act, §§ 8 (Receiving stolen goods), 19 (Forging ship's certificates), 21 (Forging copper United States coins), and 22 (Assault at sea), 4 Stat. 115, 116, 120-22.

⁶¹ See 1825 Crimes Act, § 7 (Breaking and entering a vessel) and the two offenses at § 13, (Perjury) and (Procuring perjury), 4 Stat. 115, 116, 118.

⁶² See 1825 Crimes Act, §§ 2 (Burning of a non-dwelling house), 6 (Attacking a vessel of the United States), 9 (Plundering a vessel in distress), 16 (Embezzlement of Bank of the United States funds), 17 (Forging a public security issued by the United States), 18 (Forging a financial instrument), 20 (Forging gold or silver United States coins), and 23 (Conspiracy to destroy a vessel), 4 Stat. 115, 115-16, 118-22.

⁶³ See 1831 DC Crimes Act, §§ 2 (Manslaughter, Assault with intent to kill), 3 (Arson), 4 (Rape), 5 (Assault and battery with intent to rape), 6 (Burglary, Robbery), 7 (Horse stealing, Mayhem, Bigamy), 8 (Perjury), 9 (Larceny), 11 (Forgery), 12 (Obtaining goods by false pretenses, Keeping a gaming table), 4 Stat. 448, 448-50.

⁶⁴ See 1831 DC Crimes Act, § 10, 4 Stat. 448, 449.

⁶⁵ See 1831 DC Crimes Act, §§ 2 (Manslaughter, Assault with intent to kill), 3 (Arson), 4 (Rape), 5 (Assault and battery with intent to rape), 6 (Burglary, Robbery), 7 (Horse stealing, Mayhem, Bigamy), 8 (Perjury), 9 (Larceny), 11 (Forgery), 13 (Petty larceny), 4 Stat. 448, 448-50.

⁶⁶ See 1831 DC Crimes Act, § 10, 4 Stat. 449.

⁶⁷ Compare 1831 DC Crimes Act, § 10, 4 Stat. 448, 449 with Crimes Act of 1825, § 8, 4 Stat. 115, 116. Also compare 1831 DC Crimes Act §§ 8 (Perjury) (punishable by a term of imprisonment of not less than two nor more than 10 years) and 11 (Forgery) (punishable by a term of imprisonment of not less than one nor more than seven years), 4 Stat. 448, 449 with 1825 Crimes Act § 13 (Perjury) (punishable by a term of imprisonment of a term not exceeding five years) and either § 20 (forgery of U.S. gold or silver coins) or § 21 (U.S. copper coins) (punishable by a term of imprisonment not to exceed 10 or three years, respectively), 4 Stat. 115, 118, 121.

In subsequent years, Congress continued to enact criminal laws that addressed specific needs, and these new laws sometimes imposed mandatory minimum penalties. In 1835, Congress enacted statutes concerning mutiny, encouragement of mutiny, and mistreatment of a ship's crew by the ship's master or officers, which carried terms of imprisonment not to exceed ten, five, and five years, respectively.⁶⁸ In doing so, however, Congress also repealed the 1790 Crimes Act's mandatory death penalty for mutiny.⁶⁹ In 1840, Congress enacted legislation to provide for the collection and safeguarding of public revenue, which included a mandatory minimum penalty of at least six months of imprisonment for embezzlement of funds by an officer charged with custody of public funds.⁷⁰ In the late 1850s, Congress enacted a mandatory minimum penalty of at least three years of imprisonment for offenses related to the forgery of land titles in California and forging military land-warrants.⁷¹

C. MANDATORY MINIMUM PENALTIES IN THE CIVIL WAR ERA

In the 1860s, as the federal government responded to the Civil War and its aftermath, Congress enacted mandatory minimum penalties targeting individuals allied with the Confederacy. In 1861, Congress created an offense intended to punish individuals who conspired to overthrow the Government of the United States with a mandatory minimum penalty of at least six months of imprisonment.⁷² A second offense punished individuals recruiting personnel for military service against the United States with a mandatory minimum penalty of at least one year of imprisonment, and also punished the recruit by the same mandatory minimum penalty.⁷³

In 1862, Congress enacted a law mandating death for certain Confederate spies.⁷⁴ A second offense created by the 1862 Act provided a mandatory minimum penalty of five years of imprisonment for kidnapping a freed person with intent to sell the person into slavery.⁷⁵ The 1862 Act also amended the penalty for treason created in the 1790 Crimes Act, reducing it from mandatory death to "death; or, at the discretion of the court, . . . imprison[ment] at hard labor for

⁶⁸ See Act of Mar. 3, 1835, ch. XL, §§ 1 (Mutiny), 2 (Endeavoring to mutiny), and 3 (Mistreatment of ship's crew), 4 Stat. 775, 775-77.

⁶⁹ See Act of Mar. 3, 1835, ch. XL, § 1 (Mutiny), 4 Stat. 775, 776.

⁷⁰ See Act of July 4, 1840, ch. XLI, § 17 (Embezzlement), 5 Stat. 385, 389. Congress repealed this Act the following year but re-enacted a similar embezzlement offense with the same mandatory minimum. See Act of Aug. 13, 1841, ch. VII, §§ 1 (repealing Act of July 4, 1840), 2 (Embezzlement), 5 Stat. 439, 439-40.

⁷¹ See Act of May 18, 1858, ch. XL, 11 Stat. 290, 290-91; Act of Feb. 5, 1859, ch. XXIII, 11 Stat. 381, 381.

⁷² See Act of July 31, 1861, ch. XXXIII, 12 Stat. 284, 284.

⁷³ See Act of Aug. 6, 1861, ch. LVI, 12 Stat. 317, 317.

⁷⁴ See Act of Feb. 13, 1862, ch. XXV, § 4, 12 Stat. 339, 340.

⁷⁵ See Act of Apr. 16, 1862, ch. LIV, § 8, 12 Stat. 376, 378. The maximum penalty was 20 years of imprisonment.

not less than five years.”⁷⁶

In 1863, Congress prohibited communications with the “present pretended rebel Government” intended to affect the operations of the federal government without its permission and punished such communications with a mandatory minimum penalty of not less than six months of imprisonment.⁷⁷ This offense was similar to the Logan Act of 1799, discussed *supra*, which imposed a mandatory minimum penalty for like conduct with a foreign government. The same year, Congress passed legislation regulating the drafting of men into military service that included a mandatory minimum penalty of at least six months of imprisonment for anyone encouraging desertion or sheltering a deserter.⁷⁸ Fraud against the government carried a mandatory minimum penalty of at least one year of imprisonment.⁷⁹

In 1864, Congress created an offense targeting individuals who entice or aid seamen to desert from the United States Navy and provided a mandatory minimum penalty of at least six months of imprisonment.⁸⁰ Other offenses enacted during the war carrying mandatory minimum penalties included embezzlement by an officer or agent of a national bank, which carried a mandatory minimum penalty of at least five years of imprisonment;⁸¹ creating or circulating forged notes or possessing counterfeit engraving plates, which carried a mandatory minimum penalty of at least five years of imprisonment;⁸² and damaging post office boxes, which carried a mandatory minimum penalty of one year of imprisonment.⁸³ For some other offenses, Congress set mandatory minimum penalties of imprisonment for two years,⁸⁴ six months,⁸⁵ or three months.⁸⁶ In the period immediately following the war, Congress established several more

⁷⁶ See Act of July 17, 1862, ch. CXCIV, § 1, 12 Stat. 589, 589-90. Regardless of whether the offender was punished with death or imprisonment, the Act required that “all his slaves, if any, shall be declared and made free.” *Id.*

⁷⁷ See Act of Feb. 25, 1863, ch. LX, 12 Stat. 696, 696.

⁷⁸ See Act of Mar. 3, 1863, ch. LXXV, § 24, 12 Stat. 731, 735.

⁷⁹ See Act of Mar. 2, 1863, ch. LXVII, § 3, 12 Stat. 696, 698.

⁸⁰ See Act of July 1, 1864, ch. CCIV, 13 Stat. 343, 343.

⁸¹ See Act of Feb. 25, 1863, ch. LVIII, § 52 (Embezzlement), 12 Stat. 665, 680; see also Act of June 3, 1864, ch. CVI, § 55 (Embezzlement), 13 Stat. 99, 116; Act of Mar. 3, 1869, ch. CXLV, 15 Stat. 339, 339 (extending penalties to those who aid or abet such embezzlement). The maximum penalty was 10 years of imprisonment.

⁸² See Act of Feb. 25, 1863, ch. LVIII, §§ 57-58, 12 Stat. 665, 680-81. The maximum term of imprisonment was 15 years. See also Act of June 3, 1864, ch. CVI, §§ 59-60, 13 Stat. 99, 117.

⁸³ See Act of Mar. 3, 1865, ch. LXXXIX, § 13, 13 Stat. 504, 506-07. The maximum term of imprisonment was three years.

⁸⁴ See Act of July 3, 1866, ch. CLXII, § 2, 14 Stat. 81, 81-82 (death caused by transporting nitroglycerine in a passenger conveyance; no maximum).

⁸⁵ See Act of Mar. 3, 1863, ch. LXXXI, § 2, 12 Stat. 755, 755 (federal officer’s disobeying a judicial order to discharge a prisoner; no maximum).

⁸⁶ See, e.g., Act of Mar. 3, 1865, ch. LXXIX, § 17, 13 Stat. 487, 489-90 (enlisting a person not eligible to serve, or depriving a soldier of a bounty earned for service; maximum two years).

mandatory minimum penalties, most commonly with a minimum term of one year of imprisonment.⁸⁷

D. THE REVISED STATUTES: MANDATORY MINIMUM PENALTIES AFTER THE CIVIL WAR

In the 1870s, Congress codified federal law, resulting in the Revised Statutes, a predecessor of the current United States Code.⁸⁸ The absence of a prior codification makes it difficult to state with precision how many mandatory minimum penalties were in effect at any particular time because Congress tended to overwrite old laws with new ones and repealed an uncertain number of provisions by implication. The Revised Statutes thus provide a snapshot of all federal crimes and penalties in force in 1878.⁸⁹

At least 108 offenses codified in the Revised Statutes carried a mandatory penalty. Of these 108 offenses, 16 mandated death. Those capital offenses included murder, piracy, various maritime crimes, and arson.⁹⁰ Murder, piracy, and slave trafficking had carried the death penalty

⁸⁷ For statutes carrying a mandatory minimum penalty of one year of imprisonment, *see, e.g.*, Act of July 13, 1866, ch. CLXXXIV, § 45, 14 Stat. 98, 163 (for trafficking in distilled spirits, either imprisonment for not less than three months or a fine); Act of Mar. 2, 1867, ch. CXCIII, 14 Stat. 557, 557 (for robbery or larceny of property of the United States, either imprisonment at hard labor from one year to 10 years, or a fine, or both); Act of Mar. 2, 1867, ch. CLXIX, § 26, 14 Stat. 471, 483-84 (for unlawful claims settlement by a revenue officer, maximum 10 years of imprisonment); Act of July 14, 1870, ch. CCLIV, § 1, 16 Stat. 254, 254 (for perjury in connection with immigration, maximum five years of imprisonment).

For statutes carrying mandatory minimum penalties of other lengths, *see, e.g.*, Act of July 13, 1866, § 38, 14 Stat. 98, 159 (for fraudulent packaging of distilled spirits, imprisonment for a minimum of two years and a maximum of five years); Act of Mar. 2, 1867, ch. CLXIX, §§ 9, 28, 29, 14 Stat. 471, 473, 484 (for evading liquor or tobacco taxes, imprisonment for a minimum of 60 days and a maximum of two years; for impersonating a revenue officer, imprisonment for a minimum of six months and a maximum of two years; for unlawfully mixing or selling illuminating oils, imprisonment for a minimum of six months and a maximum of three years); Act of July 20, 1868, ch. CLXXVI, §§ 44, 45, 48, 57, 71-72, 15 Stat. 125, 142-44, 149-50, 156-57 (for various offenses involving liquor and tobacco taxes, imprisonment for minimum terms ranging from 10 days to two years); Act of Dec. 22, 1869, ch. III, § 5, 16 Stat. 59, 60 (for hindering a member of the reconstructed legislature of Georgia from attending or participating at session, imprisonment at hard labor for a minimum of two years and a maximum of 10 years); Act of July 14, 1870, ch. CCLIV, § 2, 16 Stat. 254, 254-55 (for immigration fraud, either imprisonment at hard labor from one year to five years, or a fine, or both); and Act of Mar. 3, 1871, ch. CXX, § 3, 16 Stat. 544, 570 (for making an unlawful contract with Indians, imprisonment for a minimum of six months (with no maximum)).

⁸⁸ *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012-16 (1938). Congress enacted the first Revised Statutes of the United States in June 22, 1874, thereby consolidating all of the general and permanent laws into a single act. *See* Act of June 22, 1874, §§ 5595-96, 18 Stat. 1, 1091. However, because of errors in that version, Congress authorized the publication of a second edition of the Revised Statutes, which became law in 1878. *See* Act of Mar. 2, 1877, 19 Stat. 268, 268-69; Dwan & Feidler, *supra*, at 1014-16.

⁸⁹ *See* Revised Statutes (1878) [hereinafter the Revised Statutes or Rev. Stat.].

⁹⁰ Rev. Stat. §§ 5323 (accessory before the fact to piracy), 5339 (murder), 5345 (rape in maritime jurisdiction), 5365 (owner destroying his vessel at sea), 5366 (person other than owner destroying a vessel at sea), 5368 (piracy under the laws of nations), 5369 (seaman laying violent hands upon his commander), 5370 (robbery upon the high seas), 5371 (robbery on shore by crew of piratical vessel), 5372 (murder upon the high seas), 5373 (piracy under color of a foreign commission), 5374 (piracy by subjects or citizens of a foreign state), 5375 (piracy in confining,

since the 1790 Crimes Act or, in the case of slave trafficking, since the 1820s. The Revised Statutes repealed the mandatory death penalty for counterfeiting, one of the original capital crimes established in the 1790 Crimes Act.⁹¹ The Revised Statutes also reflected Congress's 1863 amendment to the treason offense, which was punishable by death or, in the court's discretion, by a term of at least five years of imprisonment.⁹²

Of the 108 offenses codified in the Revised Statutes that carried a mandatory penalty, at least 92 of those offenses carried a mandatory minimum term of imprisonment.⁹³ Only one offense — robbery of United States mail — required life imprisonment, but even then only upon a second conviction; otherwise, the offense carried a mandatory minimum penalty of five years of imprisonment.⁹⁴ The remaining offenses required mandatory minimum penalties ranging from 10 days (for offenses relating to the destruction of tobacco package tax stamps) to five years of imprisonment (for counterfeiting national bank notes).

Over half (50) of the offenses in the Revised Statutes that carried a mandatory minimum penalty involved internal revenue taxation, primarily aimed at preventing fraud in the collection and payment of excise taxes on tobacco and alcohol. Shortly after the Civil War began, the federal government levied excise taxes — for the first time since the late 18th century — on alcohol, tobacco, and other goods in order to raise funds for the costly war effort.⁹⁵ Excise taxes constituted a large percentage of the federal government's overall revenue, and therefore thorough collection was a crucial goal, but it proved difficult.⁹⁶ As one of many efforts aimed at increasing compliance with the alcohol and tobacco duties, Congress enacted a variety of mandatory minimum penalties.⁹⁷ Of these mandatory minimum penalties, only one required more than one year of imprisonment (a two-year mandatory minimum penalty for affixing false

detaining, or transferring Negroes on vessels for the purpose of slavery), 5385 (arson of a dwelling house within a United States fort), 5387 (arson of a United States vessel of war), 5400 (rescue of an individual sentenced to death).

⁹¹ See Rev. Stat. § 5415.

⁹² See Rev. Stat. § 5332.

⁹³ See Table C-1 (mandatory minimums penalties in the 1878 revised statutes) in Appendix C of this Report.

⁹⁴ Rev. Stat. § 5472.

⁹⁵ See Report of the Commissioner of Internal Revenue, at iv–vii (1875).

⁹⁶ See ALBERT SIDNEY BOLLES, A FINANCIAL HISTORY OF THE UNITED STATES, FROM 1861 TO 1885, at 421 (1886) (“The frauds began soon after enacting the law, and quickly reached gigantic proportions. A congressional investigating committee, in 1868, declared that if the tax were honestly paid, \$200,000,000 would be collected annually, when, in truth, not much more than one-eighth of that sum had been received.”). See Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1875, at xiv–xx (1875) (detailing the nature of the distilled spirits fraud and the government's collection efforts).

⁹⁷ These mandatory minimums were largely enacted in 1868. See Act of July 20, 1868, 15 Stat. 125. The Secretary of the Treasury viewed the new legislation as an improvement over former law, in part because it was “more rigorous in its punishment of offenders,” but cautioned that “its successful operation must depend upon the vigilance and fidelity of the local officers. The corruption of storekeepers, gaugers, and assistant assessors . . . will always open sources of ruin to honest tax-payers and loss to the treasury, which neither the wisest legislation nor the most stringent regulations of the department can close.” Annual Report of the Secretary of the Treasury 480 (1868).

tobacco stamps); eight required one year of imprisonment; 26 required at least six months of imprisonment; eight required at least three months of imprisonment; and the remaining seven required from 10 days to one month of imprisonment.⁹⁸ However, evidence suggests that while criminal prosecutions were a key feature of combating tax evasion,⁹⁹ these mandatory minimum penalties resulted in relatively few offenders being imprisoned¹⁰⁰ and did not effectively increase compliance with the revenue laws.¹⁰¹ Moreover, widespread evasion of the excise taxes ended by the mid-1880s, apparently due not to the mandatory minimum penalties, but to advances in the government's ability to monitor alcohol output and reforms in the hiring and supervision of revenue officers.¹⁰²

Beyond revenue offenses, the Revised Statutes primarily employed mandatory minimum penalties for offenses involving counterfeiting and forgery, piracy, and slave trafficking, in addition to misconduct by government agents and interference with governmental functions. The use of mandatory minimum penalties for offenses relating to counterfeiting, piracy, and slave trafficking is unsurprising because they all were historically punishable by death. Moreover, the mandatory minimum penalties in effect in 1878 were relatively short compared to

⁹⁸ See Table C-1 of this Report.

⁹⁹ Annual Report of the Secretary of the Treasury on the State of the Finances, at xxxv-xxxvii (1875) (“The Secretary considers it important to the future collection of the revenue, that all parties engaged in persistent and systemic frauds shall be visited with the severest penalties of the law. To this end, instructions have been repeatedly given . . . to render all proper assistance to the officers of the Department of Justice in the prosecution of the cases now pending, and in the detection and punishment of such guilty parties as have not yet been indicted.”).

¹⁰⁰ In 1889, the Attorney General reported to Congress that there were 14,588 federal criminal prosecutions, of which 5,648 were brought under the internal revenue laws. Although the 14,588 prosecutions yielded 3,158 convictions, the federal government received only 29 prisoners that year who “were committed for violation of the revenue laws.” Annual Report of the Attorney General of the United States, at vii to viii, xii (1889). Data for earlier years is apparently unavailable for, as the Attorney General reported in 1873, it was difficult and costly to collect imprisonment data from the wardens of the many state penitentiaries that held federal prisoners. See Annual Report of the Attorney General of the United States for the Fiscal Year Ending June 30, 1873, at 5 (1873). However, based on the data the Attorney General was able to collect in 1873, of the 16,201 persons in federal custody, 1,117 were convicted of miscellaneous offenses (a category that apparently included those imprisoned for internal revenue crimes in addition to many other types of offenses). See *id.* at 36-39.

¹⁰¹ See BOLLES, *supra* note 96, at 424-25 (“To destroy these frauds, which had grown to enormous dimensions, and stretched their strong roots in so many directions, was not easy. The harder Congress tried to combat them, the more they grew. Every remedy proved unavailing.”); *United States v. Ulrici*, 28 F. Cas. 328, 331 (C.C. Mo. 1875) (“Notwithstanding the heavy penalties denounced against crimes which go to defraud the government of its revenue from internal taxes, and notwithstanding the minuteness and particularity in the description of these crimes, and notwithstanding all of the aids which Congress has given by legislation to the enforcement of the revenue laws, they have been very imperfectly executed, and that the government is cheated out of perhaps one-half of its revenue, especially that from the tax on whisky and tobacco.”).

¹⁰² See Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1882, at xv (1882). (declaring a “successful close of the struggle to establish and maintain the internal-revenue laws of the United States” and that “[f]rauds in the manufacture and sale of whisky and tobacco in the districts where they have hitherto most prevailed have become the exception rather than the rule”); BOLLES, *supra* note 96, at 437 (attributing the “marked improvement” in the collection of alcohol excise taxes to “[t]he method adopted in 1868 of measuring the product at the still, and of requiring the payment of a tax on that quantity, together with the selection of better officers for administering the law”).

those Congress enacted in the 20th century, discussed *infra*. Only 19 of the 42 statutes carrying a mandatory minimum penalty for offenses unrelated to revenue required a term of imprisonment of more than one year, and most of those 19 offenses were lesser versions of capital slave trafficking and maritime offenses.¹⁰³ Only nine offenses carried a mandatory minimum penalty of three years of imprisonment, and only two offenses carried a mandatory minimum penalty of five years of imprisonment. Thus, many of the mandatory minimum penalties in the Revised Statutes applied to offenses that historically had carried severe penalties, and the mandatory minimum penalties in the Revised Statutes were generally shorter than the mandatory minimum penalties that are most commonly applied today.

E. THE 1909 CRIMINAL CODE AND SUBSEQUENT CODIFICATIONS IN THE FIRST HALF OF THE 20TH CENTURY

In the late 1800s, Congress initiated a chain of events that led to the repeal of some of the mandatory minimum penalties codified in the Revised Statutes. In 1897, Congress created the Commission to Revise and Codify the Criminal and Penal Laws of the United States.¹⁰⁴ Congress initially charged the Revision Commission with revising and codifying the federal criminal and penal codes,¹⁰⁵ but before the Revision Commission submitted its report, Congress expanded its duties to include a complete revision and codification of all federal laws.¹⁰⁶

In its reports to Congress, the Revision Commission recommended the abolition of mandatory minimum penalties for many crimes not punishable by death.¹⁰⁷ The Revision Commission explained in a 1901 interim report that prescribing only statutory maximum sentences instead of mandatory minimum penalties embraced “the more enlightened practice [of] fit[ting] the punishment to the criminal” rather than assigning penalties based solely on the offense committed.¹⁰⁸ The Revision Commission further explained in its final report in 1906 that it had changed criminal penalties “in some instances to mitigate the severity that characterized former times, and in others to respect the principle of proportioning the punishment to the relative gravity of the offenses.”¹⁰⁹

¹⁰³ See Table C-1 of this Report.

¹⁰⁴ See Act of June 4, 1897, 30 Stat. 11, 58 [hereinafter the Revision Commission].

¹⁰⁵ *Id.* at 58.

¹⁰⁶ See S. REP. NO. 60–10, pt. 1, at 1-2 (1908).

¹⁰⁷ See Revision Commission to Revise and Codify the Laws of the United States, *Final Report of the Commission to Codify and Revise the Laws of the United States* (1906). The Revision Commission’s revisions and codifications of the criminal code did not include the mandatory minimum penalties relating to internal revenue enforcement. See *id.* Thus, the Revision Commission’s final report left those penalties in place. See *id.*

¹⁰⁸ See Revision Commission to Revise and Codify the Criminal and Penal Laws of the United States, *Report on the Penal Code of the United States*, at xxii (1901). The Revision Commission also favored a parole system but recognized that such a system was impractical because most federal prisoners were then housed in state rather than federal institutions. See *id.* at xxxii–xxxiii.

¹⁰⁹ See Revision Commission to Revise and Codify, *supra* note 107, at 100.

In 1907, Congress established a Special Joint Committee on the Revision of the Laws, which it directed “to examine, consider, and submit to Congress recommendations upon the revision and codification of the laws reported by the statutory [R]evision [C]ommission.”¹¹⁰ The Committee first took up the portion of the Revision Commission’s work dealing with criminal offenses, resulting in the enactment in 1909 of a new criminal code [hereinafter the 1909 Criminal Code].¹¹¹ The Special Joint Committee largely agreed with the Revision Commission’s opposition to mandatory minimum penalties.¹¹²

In its report, the Special Joint Committee on the Revision of the Laws gave the following reasons for repealing mandatory minimum penalties:

The committee has also adopted a uniform method of fixing in all offenses not punishable by death the maximum punishment only, leaving the minimum to the discretion of the trial judge.

The criminal law necessarily subjects to its corrective discipline all who violate its provisions. The weak and the vicious, the first offender and the atrocious criminal, the mere technical transgressor and the expert in crime are alike guilty of the same offense. In the one case the utmost severity of punishment can scarcely provide the protection to which society is entitled; in the other anything except a nominal punishment may effectually prevent the reclamation of the offender.

The argument most frequently urged against leaving the minimum punishments to the discretion of the trial judge is that it affords parties convicted of a crime of a heinous character an opportunity to obtain immunity because of the weakness or dishonesty of judges. It has been well said by a distinguished authority upon this subject that—

Instances of the former are rare, and of the latter none is believed by us ever to have existed. The purity of our judiciary is one of the things which calumny has yet left untouched.

This recommendation will be found in accordance with the humane spirit of advanced criminal jurisprudence. The early English statutes were proverbially cruel; the gravest crimes and the most trivial offenses alike invoked the penalty of death. Our own crimes act of 1790 reflected this barbarous spirit and denounced the death penalty for thirteen distinct offenses, but this spirit of vindictive retribution has entirely disappeared. We have abolished the punishment of death in all but three cases—treason, murder, and rape—and have provided that even in these cases it may be modified to imprisonment for life; and as humane judges in England availed themselves of the most technical irregularities in pleadings and proceedings as an excuse for discharging prisoners from the cruel rigors of the

¹¹⁰ See S. REP. NO. 60–10, pt. 1, at 1 (1908); H.R.J. Res. 19, 59th Cong., 34 Stat. 1423, 1423 (1907).

¹¹¹ See Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088.

¹¹² See S. REP. NO. 60–10, pt. 1, at 14 (1908).

common law, so jurors here often refuse to convict for offenses attended with extenuating circumstances rather than submit the offender to what in their judgment is the cruel requirement of a law demanding a minimum punishment.¹¹³

The 1909 Criminal Code repealed at least 31 of the mandatory minimum terms of imprisonment codified in the Revised Statutes, representing mandatory minimum penalties for offenses including misconduct by government employees, counterfeiting and forgery, and slave trafficking.¹¹⁴ Although the Revision Commission had recommended the repeal of additional mandatory minimum penalties as part of its codification of all federal law, Congress enacted only the Revision Commission's work on the Criminal Code and the Judicial Code.¹¹⁵ Thus, mandatory minimum penalties with respect to offenses that were not included in the Criminal Code remained in force after 1909. The substantial majority of the remaining mandatory minimum penalties related to internal revenue collection, discussed *supra*.¹¹⁶

In addition to eliminating some mandatory minimum penalties, Congress in enacting the 1909 Criminal Code reduced the penalties for various offenses from mandatory death to mandatory life imprisonment. Those offenses were detaining or transferring slaves aboard a vessel, seizing slaves on foreign shores, piracy, a seaman laying violent hands upon his commander, robbery on shore by a piratical crew, piracy under color of foreign commission, and piracy by aliens—all of which had been punishable by death since the early republic.¹¹⁷ The 1909 Criminal Code replaced the mandatory death penalty for rescuing a condemned person and arson with statutory maximum terms of up to 25 and 20 years of imprisonment, respectively.¹¹⁸

¹¹³ See S. REP. NO. 60–10, pt. 1, at 14 (1908).

¹¹⁴ Compare 1909 Criminal Code § 341 (enumerating repealed sections of the Revised Statutes), with Table C-1 (Mandatory Minimum Penalties in the 1878 Revised Statutes) in Appendix C of this Report.

¹¹⁵ See Dwan & Feider, *supra* note 88, at 1018.

¹¹⁶ The evidence indicates that the mandatory minimum penalties relating to internal revenue collection were rarely used in the late-19th century. Revenue officials observed as early as 1882 that the government had successfully ended widespread fraud in collection of excise taxes, and incarceration statistics from the post-Reconstruction era show that not many defendants were imprisoned for committing internal revenue offenses. See *supra* notes 96 to 104 and accompanying text. This trend continued into the 20th century. For example, in 1910, the Attorney General reported that there were 15,371 completed criminal prosecutions nationwide. While 4,355 of those prosecutions involved internal revenue offenses, only 161 of newly-incarcerated federal prisoners were held on account of violating the internal revenue laws. See Annual Report of the Attorney General of the United States for the Year Ended June 30, 1910, at 36, 67 (1910). The same year, fines totaling \$278,746.58 were assessed in internal revenue criminal cases. See *id.* at 67.

¹¹⁷ See 1909 Criminal Code §§ 246 (confining, detaining or transferring slaves aboard a vessel, punished by life imprisonment), 247 (seizing slaves on foreign shores, punished by life imprisonment), 290 (piracy under the law of nations, punished by life imprisonment), 294 (seaman laying violent hands upon his commander, punished by life imprisonment), 302 (robbery on shore by a piratical crew, punished by life imprisonment), 304 (piracy under color of foreign commission, punished by life imprisonment), 305 (piracy by aliens, punished by life imprisonment); see also *supra* note 90 (mandatory capital crimes in the Revised Statutes).

¹¹⁸ See 1909 Criminal Code §§ 142 (rescue of a condemned person going to or at an execution), 285 (arson of a dwelling house in the maritime or territorial jurisdiction), 286 (arson of another building or a vessel in the maritime or territorial jurisdiction).

First degree murder and rape remained mandatory capital crimes in the 1909 Criminal Code;¹¹⁹ second degree murder, obstructing the escape of a shipwrecked person, and holding out a false light to a vessel in distress carried mandatory minimum penalties of 10 years of imprisonment;¹²⁰ destruction of a vessel required imprisonment for life or a “term of years”;¹²¹ and treason continued to carry an alternative penalty structure requiring either death or a mandatory minimum of five years of imprisonment.¹²²

Congress subsequently enacted offenses carrying mandatory minimum penalties in the Prohibition Era. Congress passed the Volstead Act in October 1919, in anticipation of the ratification of the Eighteenth Amendment.¹²³ The Act placed significant restrictions on the unlawful manufacture or sale of alcohol and punished some violations with mandatory minimum penalties. A first offense for unlawful manufacture or sale received a maximum penalty of six months of imprisonment; a second or subsequent offense received a mandatory minimum penalty of at least one month but not more than five years of imprisonment.¹²⁴ Additional mandatory minimum penalties were prescribed for maintaining a premise where alcohol was unlawfully sold¹²⁵ (at least 30 days of imprisonment) and contempt for violating an injunction concerning any provision of the Volstead Act¹²⁶ (at least 30 days of imprisonment). These mandatory minimum penalties were as short-lived as Prohibition itself; Congress repealed the Volstead Act and its penalty provisions upon ratification of the Twenty-First Amendment.¹²⁷

In 1948, with the enactment of Title 18 of the United States Code, Congress changed the punishment for rape from mandatory death to “death, or imprisonment for any term of years or for life,”¹²⁸ but added a mandatory minimum penalty of 10 years of imprisonment for homicide or kidnapping during a bank robbery or larceny.¹²⁹ Congress also reduced the applicable penalty

¹¹⁹ See 1909 Criminal Code §§ 275 (first degree murder), 278 (rape).

¹²⁰ See 1909 Criminal Code §§ 275 (second degree murder), 297 (obstructing escape of a shipwrecked person), 297 (holding out false light to a vessel in distress).

¹²¹ See 1909 Criminal Code §§ 300 (owner destroying vessel at sea), 301 (other person destroying, or attempting to destroy, a vessel at sea).

¹²² See 1909 Criminal Code § 2 (treason).

¹²³ See National Prohibition (Volstead) Act, Pub. L. No. 66–66, 41 Stat. 305 (1919); Amendment to the Constitution, 40 Stat. 1941, 1941–42 (1919) (certifying the ratification of the Eighteenth Amendment).

¹²⁴ See Pub. L. No. 66–66, § 29, 41 Stat. 305, 316 (1919).

¹²⁵ See Pub. L. No. 66–66, § 3, 41 Stat. 305, 306 (1919).

¹²⁶ See Pub. L. No. 66–66, § 24, 41 Stat. 305, 315 (1919).

¹²⁷ See U.S. Const. amend. XXI; see also Liquor Law Repeal and Enforcement Act, Pub. L. No. 74–347, 49 Stat. 872 (1935) (repealing titles I and II, and amending title III, of the Volstead Act).

¹²⁸ See 18 U.S.C. § 2031 (1948), 62 Stat. 683, 795.

¹²⁹ See 18 U.S.C. § 2113(e) (1948).

for seizing persons on foreign shores to sell into slavery and holding slaves aboard a vessel from mandatory life imprisonment to indefinite terms of imprisonment of up to seven or four years, respectively.¹³⁰

F. MANDATORY MINIMUM PENALTIES FROM THE MID-TWENTIETH CENTURY

1. Introduction

As detailed herein, beginning in 1951, Congress changed how it used mandatory minimum penalties in three significant ways. First, Congress enacted more mandatory minimum penalties. Second, Congress expanded its use of mandatory minimum penalties to offenses not traditionally covered by such penalties. Before 1951, mandatory minimum penalties typically punished offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting. Today, the majority of convictions under statutes carrying mandatory minimum penalties relate to controlled substances, firearms, identity theft, and child sex offenses. Third, the mandatory minimum penalties most commonly used today are generally lengthier than mandatory minimum penalties in earlier eras.

In the second half of the 20th century, Congress reversed its prior policy of disfavoring mandatory minimum penalties to combat what it perceived as widespread problems resulting from drug trafficking and related crime. In 1951, Congress enacted a mandatory minimum penalty of two years of imprisonment for violating the Narcotic Drugs Import and Export Act, which broadly prohibited the importation, sale, purchase, and receipt of controlled substances.¹³¹ Second and third violations of the Act carried mandatory minimum penalties of five and 10 years of imprisonment, respectively.¹³² And when Congress created additional controlled substances offenses in 1956, it set a mandatory minimum penalty of 10 years of imprisonment for selling heroin to a juvenile and five years of imprisonment for a first offense of possessing narcotics on a vessel.¹³³

By the late 1960s, however, as mandatory minimum penalties for drug offenses became increasingly unpopular, the Nixon administration proposed a sweeping reform of the controlled substance sentencing laws.¹³⁴ As a result, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970,¹³⁵ which repealed nearly all mandatory minimum penalties for drug offenses. Congress believed that changes in the existing penalties, “particularly through elimination of mandatory minimum sentences,” would establish “a more realistic, more flexible,

¹³⁰ See 18 U.S.C. §§ 1585 (Seizure, detention, transportation or sale of slaves), 1587 (Possession of slaves aboard vessel) (1948), 62 Stat. 683, 773.

¹³¹ See Pub. L. No. 82–255, § 1, 65 Stat. 767, 767 (1951).

¹³² See *id.*

¹³³ See Narcotics Control Act of 1956, §§ 103, 105, 107, 108, Pub. L. No. 84–728, 70 Stat. 567, 568, 570-71.

¹³⁴ See, e.g., 116 Cong. Rec. 33,315 (1970) (statement of Rep. MacGregor).

¹³⁵ Pub. L. No. 91–513, 84 Stat. 1236 (1970).

and thus more effective system of punishment and deterrence of violations of the federal narcotics laws.”¹³⁶

Congress’s repeal of mandatory minimum penalties for drug offenses did not necessarily reflect a general policy disfavoring mandatory minimum penalties for all types of offenses. For example, Congress also amended 18 U.S.C. § 924(c) to require a mandatory minimum penalty of at least one year of imprisonment for using or carrying a firearm during the commission of a felony, as well as a mandatory consecutive two-year term of imprisonment for second and subsequent offenses.¹³⁷ In 1970, the same year it repealed mandatory minimum penalties for drug offenses, Congress created a mandatory minimum penalty of at least one year of imprisonment for using or carrying explosives while committing certain other crimes.¹³⁸

Congressional action in the 1980s resulted in the enactment of many additional mandatory minimum penalties and an increase in the length of existing penalties—particularly for drug offenses and violent crimes.¹³⁹ Congress’s use of mandatory minimum penalties in this period followed a shift in sentencing attitudes away from a rehabilitative model toward controlling crime using “more certain, less disparate, and more appropriately punitive” sentences.¹⁴⁰ This shift contributed to the enactment of the mandatory minimums that are most commonly applied today, particularly the penalties for firearm and drug trafficking crimes.

2. *Mandatory Minimum Penalties for Drug Offenses*

The Anti-Drug Abuse Act of 1986¹⁴¹ established the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties, which ranged from five years to life imprisonment, differed for various drugs and, in some cases, including cocaine, for different forms of the same drug. Congress expedited passage of the 1986 Act in 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. Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative

¹³⁶ H. REP. NO. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566.

¹³⁷ *See* Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, tit. II, § 13, 84 Stat. 1880, 1889-90 (1971).

¹³⁸ *See* Pub. L. No. 91-452, tit. XI, § 1102, 84 Stat. 922, 957 (1970) (codified as amended at 18 U.S.C. § 844(h)).

¹³⁹ During this time period Congress also developed and passed the Sentencing Reform Act.

¹⁴⁰ 1991 COMMISSION REPORT at 7.

¹⁴¹ *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986).

process.¹⁴² As a result, Congress held no committee hearings and produced no reports related to the 1986 Act (although there were 17 related reports on various issues).¹⁴³

Floor statements delivered by members in support of the 1986 Act and a committee report on a predecessor bill suggest that Congress intended to create a two-tiered penalty structure for discrete categories of drug traffickers. Specifically, Congress intended to link the five-year mandatory minimum penalties to what some called “serious” traffickers and the ten-year mandatory minimum penalties to “major” traffickers. Drug quantity would serve as a proxy for identifying the type of trafficker.¹⁴⁴

Senator Robert Byrd, then the Senate Minority Leader, summarized the intent behind the legislation:

For the kingpins — the masterminds who are really running these operations — and they can be identified by the amount of drugs with which they are involved — we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail — a minimum of 5 years for the first offense.¹⁴⁵

A report issued by the House Judiciary Subcommittee on Crime following its consideration of a predecessor bill also provides evidence of Congress’s intent to establish two-tiered mandatory minimum penalties for serious and major traffickers. The Subcommittee determined that the five and ten-year mandatory minimum sentencing structure would encourage the Department of Justice to direct its “most intense focus” on “major traffickers” and “serious traffickers.”¹⁴⁶ “One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”¹⁴⁷

The 1986 Act distinguished between powder cocaine and cocaine base (also known as crack cocaine), by treating quantities of cocaine base differently than similar quantities of

¹⁴² See e.g., 132 CONG. REC. 26,436 (Sept. 26, 1986) (statement of Sen. Hawkins) (“Drugs pose a clear and present danger to America’s national security. If for no other reason we should be addressing this on an emergency basis.”).

¹⁴³ See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5-6 (May 2002).

¹⁴⁴ See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6 (May 2002).

¹⁴⁵ 132 CONG. REC. 27,193–94 (Sept. 30, 1986); see also 132 CONG. REC. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

¹⁴⁶ H.R. REP. NO. 99–845, pt. 1, at 11-12 (1986).

¹⁴⁷ *Id.* at 11.

powder cocaine.¹⁴⁸ Under the so-called “100-to-1” ratio, the 1986 Act established a mandatory minimum penalty of five years of imprisonment for trafficking offenses involving at least five grams of crack cocaine, whereas trafficking offenses involving powder cocaine required at least 500 grams of the substance to trigger the same mandatory minimum.¹⁴⁹ The legislative history of the ratio shows that, in addition to viewing the ratio as consistent with the Act’s general serious/major trafficker penalty structure,¹⁵⁰ Congress predicated the ratio upon its conclusion that crack cocaine was more dangerous than powder cocaine because of its especially deleterious effects on the communities where it was becoming increasingly prevalent.¹⁵¹ Congress has since altered the penalties applicable to crack cocaine in the Fair Sentencing Act of 2010, as discussed in more detail below.

In 1988, the Omnibus Anti-Abuse Act established a five-year mandatory minimum penalty for possessing more than five grams of crack cocaine, in addition to increasing the mandatory minimum penalty for engaging in a continuing drug enterprise (from 10 to 20 years of imprisonment).¹⁵² The 1988 Act also extended the mandatory minimum penalties for drug trafficking crimes to include conspiracies to commit those substantive offenses, thereby broadening the scope of mandatory minimum penalties to include virtually all offenders in drug trafficking organizations.¹⁵³

3. *Mandatory Minimum Penalties for Firearms Offenses*

With respect to firearms offenses, in 1984 Congress amended 18 U.S.C. § 924 to provide a mandatory penalty of five years of imprisonment for using or carrying a firearm during a “crime of violence,”¹⁵⁴ and elsewhere established mandatory sentencing enhancements for

¹⁴⁸ See Pub. L. No. 99–570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b)(1)).

¹⁴⁹ See *id.*

¹⁵⁰ 132 CONG. REC. 26,447 (Sept. 26, 1986) (statement of Sen. Chiles) (“Those who possess 5 or more grams of cocaine freebase will be treated as serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be treated as major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine.”)

¹⁵¹ See, e.g., 132 CONG. REC. 31,329-30 (Oct. 15, 1986) (statement of Sen. Chiles) (“And so we find that people, when they are addicted, will go out and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit. That, of course, has caused crime to go up at a tremendously increased rate in our cities and in our States – the crimes of burglary, robbery, assault, purse snatching, mugging, those crimes where people are trying to feed that habit.”); 132 CONG. REC. 27,176 (Sept. 30, 1986) (statement of Sen. Hart) (“Then along came crack-cocaine – and the high was available to all. So too, however, were the lows: The raging paranoia, the addiction rooted deep in the brain’s chemical structure, and worst, the senseless deaths.”); 132 CONG. REC. 5983 (Mar. 21, 1986) (statement of Rep. Rangel) (“What is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.”).

¹⁵² See Pub. L. 100–690, §6371, 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 844); *id.* § 6481(a) (amending 21 U.S.C. § 848(a)).

¹⁵³ See *id.* § 6470(a) (amending 21 U.S.C. §§ 846, 963).

¹⁵⁴ See Pub. L. No. 98–473, § 1005(a), 98 Stat. 1837, 2138-39 (1984) (amending 18 U.S.C. § 924(c)).

possessing dangerous ammunition during drug and violent crimes.¹⁵⁵ Two years later, in 1986, Congress expanded the scope of section 924(c) to include carrying or using a firearm during a drug trafficking crime.¹⁵⁶ Congress also substantially expanded the armed career criminal provision at section 924(e), and its mandatory minimum penalty of 15 years of imprisonment, to cover firearms possession offenses committed by those with three convictions for crimes broadly defined as “violent felonies” and “serious drug offenses.”¹⁵⁷

In 1998, Congress again amended 18 U.S.C. § 924(c) in three ways,¹⁵⁸ primarily in response to the Supreme Court’s decision in *Bailey v. United States*, in which the Court interpreted the prior version of section 924(c) to require the defendant’s “active employment” of a firearm in the predicate offense.¹⁵⁹ First, prior law had established a mandatory minimum penalty of five years of imprisonment for an offender who “use[d] or carrie[d]” a firearm during and in relation to a crime of violence or drug trafficking crime.¹⁶⁰ Congress amended the statute also to require a mandatory minimum penalty of five years of imprisonment if the offender “possesses a firearm” “in furtherance of any such crime.”¹⁶¹ Second, Congress established more severe mandatory minimum penalties for certain offenders depending on whether, in violating section 924(c), a firearm was “brandished” or “discharged”— requiring mandatory minimum penalties of seven years and 10 years of imprisonment, respectively.¹⁶² Finally, Congress increased the mandatory minimum penalty for second or subsequent convictions under section 924(c) from 20 years to 25 years of imprisonment.¹⁶³ Thus, in addition to responding to the decision in *Bailey*, Congress also amended section 924(c) to ensure that more serious offenses carried progressively higher mandatory minimum penalties.¹⁶⁴

¹⁵⁵ See Pub. L. No. 98–473, § 1006(a), 98 Stat. 1837, 2139 (1984) (codified as amended at 18 U.S.C. § 929).

¹⁵⁶ See Pub. L. No. 99–308, § 104, 100 Stat. 449, 456 (1986) (amending 18 U.S.C. § 924(c)).

¹⁵⁷ See Career Criminals Amendment Act of 1986, Pub. L. No. 99–570, § 1402, 100 Stat. 3207, 3207-39 to 40. Previously, § 924(e) applied only to those convicted of burglaries and robberies. *Id.*

¹⁵⁸ Pub. L. No. 105–386, 112 Stat. 3469 (1998).

¹⁵⁹ 516 U.S. 137, 143 (1995).

¹⁶⁰ See 18 U.S.C. § 924(c) (1994). Both prior and present versions of section 924(c) establish longer, 10- and 30-year mandatory minimum penalties for certain types of firearms, such as assault weapons, short-barreled shotguns and rifles, machineguns, destructive devices, and firearms equipped with silencers or mufflers. *See id.*

¹⁶¹ Pub. L. No. 105–386, 112 Stat. 3469 (1998).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 144 CONG. REC. 1,715–16 (Feb. 24, 1998) (statement of Rep. McCollum); 144 CONG. REC. 1,718 (Feb. 24, 1998) (statement of Rep. Buyer). 144 Cong. Rec. 1,717 (Feb. 24, 1998) (statement of Rep. Myrick). As originally passed by the House, the amendment would have imposed substantially more severe sentences than the enacted version: requiring 10 years of imprisonment for possession, 15 years of imprisonment for brandishing, and 20 years of imprisonment for discharging the firearm, along with more severe penalties for subsequent convictions. H.R. 424, 105th Cong. § 1 (1998) (as passed by the House of Representatives, Feb. 24, 1998), *reprinted in* 144 CONG. REC. 1,715 (Feb. 24, 1998). The Senate’s version contained less severe penalties (five years for possession, 10 years

4. *Mandatory Minimum Penalties for Child Sexual Exploitation and Related Offenses*

Congress also has enacted mandatory minimum penalties to combat child sexual exploitation. When Congress outlawed the production of child pornography in 1978, it established a mandatory minimum penalty of two years of imprisonment for repeat offenders.¹⁶⁵ By 1996, Congress had increased the penalties for production of child pornography to require a mandatory minimum penalty of 10 years of imprisonment for first-time offenders, 15 years of imprisonment for offenders with a prior conviction of a child sexual exploitation offense, and at least 30 years of imprisonment for offenders with two such prior convictions.¹⁶⁶ Similarly, Congress prescribed mandatory minimum penalties of 20 years of imprisonment when it established offenses in 1988 for the buying or selling of children.¹⁶⁷ In addition, since 1978, Congress has set mandatory minimum penalties for recidivist offenders who possess, receive, and traffic in child pornography.¹⁶⁸

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003¹⁶⁹ established new mandatory minimum penalties and increased existing mandatory minimums for certain child sexual abuse and child pornography crimes. Among other changes, Congress increased the mandatory minimum penalties for producing child pornography and related conduct from 10 to 15 years of imprisonment for first-time offenders, from 15 to 25 years of imprisonment for repeat child exploitation offenders, and from 30 to 35 years of imprisonment for offenders with more than two prior child exploitation convictions.¹⁷⁰ The Act further increased the mandatory minimum penalty for the buying or selling of children

for discharge, and no separate penalty for brandishing), *see* S. 191, 105th Cong. § 1 (as passed by Senate, Nov. 13, 1997), *reprinted in* 143 CONG. REC. S12712 (daily ed. Nov. 13, 1997), and the final amendment was the product of a compromise between the House and Senate versions, *See* 144 CONG. REC. 25,036 (Oct. 9, 1998) (statement of Rep. McCollum).

¹⁶⁵ *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, § 2(a), 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. § 2251).

¹⁶⁶ *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(4), 110 Stat. 3009 (amending 18 U.S.C. § 2251(d)).

¹⁶⁷ *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100–690, § 7512(a), 102 Stat. 4181 (codified as amended at 18 U.S.C. § 2251A).

¹⁶⁸ The Protection of Children Against Sexual Exploitation Act of 1977 established a mandatory minimum penalty of two years of imprisonment for repeat offenders who traffic and are in receipt of child pornography. *See* Pub. L. No. 95–225, § 2(a), 92 Stat. 7 (codified as amended at 18 U.S.C. § 2252). Later amendments extended these penalties to trafficking and receipt child pornography offenders who had at least one conviction for a broad range of child sexual exploitation offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 160001, 108 Stat. 1796 (amending 18 U.S.C. § 2252(b)). In 1996, Congress established a mandatory minimum penalty of at least two years of imprisonment for offenders with a prior sexual exploitation conviction who possess child pornography. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(5), 110 Stat. 3009 (amending 18 U.S.C. § 2252(b)(2)).

¹⁶⁹ Pub. L. No. 108–21, 117 Stat. 650 [hereinafter PROTECT Act].

¹⁷⁰ PROTECT Act, § 103(b)(1)(A) (amending 18 U.S.C. § 2251).

from 20 to 30 years of imprisonment,¹⁷¹ and the mandatory minimum penalty for possession of child pornography by a recidivist offender from two to 10 years of imprisonment.¹⁷² Finally, Congress established new mandatory minimum penalties for existing offenses, most notably by requiring at least five years of imprisonment for receipt and distribution of child pornography,¹⁷³ as well as a new mandatory minimum penalty of five years of imprisonment for enticing a minor to travel in interstate commerce for criminal sexual activity.¹⁷⁴

Congress viewed the PROTECT Act's enhanced and new mandatory minimum penalties as necessary to address child exploitation offenses, primarily by correcting what it perceived as unduly lenient sentences for defendants who commit those crimes. The conference committee concluded "[t]he increased mandatory minimum sentences are responsive to real problems of excessive lenience in sentencing under existing law."¹⁷⁵ The conference committee found that mandatory minimum penalties were necessary because "courts have been disposed to grant downward departures from the guidelines for child pornography possession offenses . . . based on the misconception that these crimes are not serious."¹⁷⁶ Senator Hatch, who introduced the Act in the Senate, observed before final passage that "[t]he sentencing reforms will prevent sentencing abuses in cases involving child and sexual crimes where too often we have seen lenient sentences imposed."¹⁷⁷

Three years later, in the Adam Walsh Child Protection and Safety Act of 2006,¹⁷⁸ which included the Sex Offender Registration Notification Act (SORNA),¹⁷⁹ Congress again increased existing mandatory minimum penalties and established new mandatory minimum penalties for certain sex offenses. The Adam Walsh Act, among other provisions, added a new mandatory minimum penalty of at least 15 years of imprisonment for sex trafficking,¹⁸⁰ increased the mandatory minimum penalty from five to 10 years of imprisonment for enticing a minor to

¹⁷¹ *Id.* § 103(b)(1)(B) (amending 18 U.S.C. § 2251A(a), (b)).

¹⁷² *Id.* § 103(b)(1)(D) (amending 18 U.S.C. § 2252(b)(2)).

¹⁷³ *Id.* § 103(b)(1)(C) (amending 18 U.S.C. § 2252(b)(1)); *id.* § 103(b)(E) (amending 18 U.S.C. § 2252A(b)(1)).

¹⁷⁴ *Id.* § 103(b)(2)(A) (amending 18 U.S.C. § 2422(b)).

¹⁷⁵ H.R. CONF. REP. NO. 66, at 43 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 685.

¹⁷⁶ *Id.*

¹⁷⁷ 149 CONG. REC. 9,387 (Apr. 10, 2003) (statement of Sen. Hatch). By contrast, Senator Feinstein spoke against the extensive use of mandatory minimum penalties in the final version: "I am disappointed that Congress is poised, once again, to demonstrate that we are 'tough on crime' by enacting new mandatory minimum sentences." *Id.* at 9,376–77 (statement of Sen. Feinstein). She argued that the final bill expanded "the mandatory sentencing scheme that is gradually replacing the guidelines system." *Id.*

¹⁷⁸ Pub. L. No. 109–248, 120 Stat. 587 [hereinafter the Adam Walsh Act].

¹⁷⁹ Pub. L. No. 109–248, 120 Stat. 587, 590 [hereinafter SORNA].

¹⁸⁰ *Id.* § 208 (amending 18 U.S.C. § 1591(b)(1)).

engage in criminal activity,¹⁸¹ and established a mandatory minimum penalty of at least 20 years of imprisonment for engaging in a child exploitation enterprise.¹⁸² SORNA created new offenses relating to failing to register as a sex offender, for which Congress provided mandatory minimum penalties triggered by specific aggravating circumstances. Those mandatory minimum penalties apply to offenders who, having failed to register as a sex offender, commit a crime of violence (consecutive mandatory minimum penalty of five years of imprisonment)¹⁸³ or certain federal felonies involving a child (consecutive mandatory minimum penalty of 10 years of imprisonment).¹⁸⁴

5. Mandatory Minimum Penalties for Identity Theft Offenses

Congress enacted the Identity Theft Penalty Enhancement Act in 2004, which established new mandatory minimum penalties for identity theft offenses.¹⁸⁵ The Act's key provision requires imprisonment for two years for aggravated identity theft, defined as knowingly transferring, possessing, or using another person's means of identification during and in relation to enumerated identity theft offenses.¹⁸⁶ The Act further requires the sentencing court to impose the penalty consecutively to any sentence imposed for the underlying identity theft offense.¹⁸⁷ Congress viewed these enhanced penalties as necessary to correct lenient sentences imposed for identity theft offenses. As the House Judiciary Committee reported, "many perpetrators of identity theft receive little or no prison time," which "has become a tacit encouragement to those arrested to pursue such crimes."¹⁸⁸

G. RECONSIDERATION OF CERTAIN MANDATORY MINIMUM PENALTIES: THE FAIR SENTENCING ACT OF 2010

Congress repealed and amended mandatory minimum penalties for crack cocaine offenses in the Fair Sentencing Act of 2010.¹⁸⁹ These mandatory minimum penalties had drawn widespread criticism since their enactment in the 1980s. Beginning in 1995, for example, the

¹⁸¹ *Id.* § 203 (amending 18 U.S.C. § 2422(b)).

¹⁸² *Id.* § 701 (codified at 18 U.S.C. §2252A(g)).

¹⁸³ *Id.* § 141 (codified at 18 U.S.C. §2250(c)).

¹⁸⁴ *Id.* § 702 (codified at 18 U.S.C. § 2260A).

¹⁸⁵ Pub. L. No. 108–275, 118 Stat. 831 (2004).

¹⁸⁶ *Id.* § 2(a) (codified at 18 U.S.C. § 1028A(a)).

¹⁸⁷ *Id.* (codified at 18 U.S.C. § 1028A(b)(2)).

¹⁸⁸ H.R. REP. NO. 108–528, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 781.

¹⁸⁹ Pub. L. No. 111–220, 124 Stat. 2372.

Commission submitted four reports to Congress calling for changes to federal cocaine sentencing policy.¹⁹⁰

The Act altered the mandatory minimum penalties established by the 1986 and 1988 Acts by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively.¹⁹¹ There was broad bipartisan support for these changes among members of Congress.¹⁹² Members cited various reasons for supporting the Act, including lack of evidentiary support for the 100-to-1 ratio,¹⁹³ racial disparities produced by the existing penalties,¹⁹⁴ and the unfairness of the existing mandatory penalties.¹⁹⁵ Demonstrating an increased focus on the offender, the Act also directed the Commission to provide for higher guideline sentences for all drug offenders based on the presence of specified aggravating factors, such as bribing a law enforcement official to facilitate the offense, maintaining an establishment for manufacturing or distributing controlled substances, or obstructing justice while holding an aggravating role in the offense. The Act

¹⁹⁰ See U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995); U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENT’G COMM’N, REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (2007).

¹⁹¹ See Pub. L. No. 111–220, § 2, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844).

¹⁹² The ranking member of the House Judiciary Committee, however, spoke against the Act in floor debates. See 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Lamar Smith) (“Now Congress is considering legislation to wind down the fight against drug addiction and drug-related violence. Reducing the penalties for crack cocaine could expose our neighborhoods to the same violence and addiction that caused Congress to act in the first place.”).

¹⁹³ See 155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter) (explaining that intervening research has undermined Congress’s original belief “that crack was uniquely addictive and was associated with greater levels of violence than powder cocaine”); 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren) (“We didn’t really have an evidentiary basis [for the 100-to-1 ratio], but that’s what we did, thinking we were doing the right thing at the time.”); 156 CONG. REC. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (“This disparity made no sense when it was initially enacted and makes absolutely no sense today . . .”).

¹⁹⁴ See, e.g., 156 CONG. REC. S1680–81 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin) (explaining that the “net result” of the crack-powder disparity “was that the heavy sentencing we enacted years ago took its toll primarily in the African-American community . . . and a belief in the African-American community that it was fundamentally unfair”); 155 CONG. REC. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter) (“I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.”).

¹⁹⁵ See 156 CONG. REC. H6197 (July 28, 2010) (statement of Rep. Scott) (“The legislation does not fully eliminate the 100-to-1 disparity in sentencing for crack and powder, but it does make good progress in addressing what is widely recognized as unfair treatment of like offenders based simply on the form of cocaine they possessed.”); 155 CONG. REC. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Sessions) (“I will not favor alterations that massively undercut the sentencing we have in place, but I definitely believe that the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today.”).

further directed the Commission to provide for lower guideline sentences for certain offenders who receive a guideline adjustment for minimum role.¹⁹⁶

H. MECHANISMS FOR RELIEF FROM MANDATORY MINIMUM PENALTIES

1. Introduction

For almost a century, mechanisms have been in place permitting a court to impose a sentence lower than a mandatory minimum penalty in certain cases. This section discusses the historical development of such “relief” mechanisms.

In the early 20th century, district courts avoided imposing a term of imprisonment, even for offenses carrying a mandatory minimum penalty, by suspending the sentence or by placing the defendant under the supervision of a state probation officer.¹⁹⁷ There were no federal statutes governing probation at that time. In 1916, however, the Supreme Court held that district courts lacked the authority to suspend sentences¹⁹⁸ and further observed that federal courts were without power to offer probation in the absence of congressional authorization.¹⁹⁹

In 1925, Congress responded to the Supreme Court by passing the Federal Probation Act,²⁰⁰ which expressly authorized district courts to suspend sentences and impose probation in lieu of prison terms.²⁰¹ Under the Act, a district court could avoid imposing a mandatory minimum penalty, at least where the statute in question did not expressly preclude probation or a suspended sentence.²⁰² Congress repealed this relief mechanism as part of the broader reform of sentencing policy provided by the Sentencing Reform Act.²⁰³

¹⁹⁶ See Pub. L. No. 111-220, § 6, 7, 124 Stat. 2372, 2373-74.

¹⁹⁷ See *United States v. Murray*, 275 U.S. 347, 354 (1928) (prior to 1916, “the District Courts exercised a form of probation either by suspending sentence or by placing the defendants under state probation officers or volunteers” (quoting H.R. REP. NO. 68-1377, at 1 (1925))).

¹⁹⁸ See *Ex Parte United States*, 242 U.S. 27, 37 (1916) (the *Killits* case).

¹⁹⁹ See *id.* at 52; *Murray*, 275 U.S. at 354.

²⁰⁰ Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259.

²⁰¹ 18 U.S.C. § 3651 (repealed in 1987), provided in part: “Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment . . . any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby,” may suspend the imposition or execution of sentence and place the defendant “on probation for such period and upon such terms and conditions as the court deems best.”

²⁰² See *id.*; *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (statute at issue “is no different from many other federal statutes requiring minimum sentences, which have uniformly been held to be subject to the suspension authority of § 3651”).

²⁰³ The enactment of the Sentencing Reform Act is discussed in Chapter 3, *infra*.

Nevertheless, Congress has provided other mechanisms by which a district court may impose a term of imprisonment lower than a mandatory minimum penalty prescribed by statute. These mechanisms are discussed below.

2. *Substantial Assistance to the Authorities*

Two related provisions allow a district court to impose a term of imprisonment lower than a mandatory minimum penalty in cases where a defendant provides substantial assistance in the investigation or prosecution of another person: Federal Rule of Criminal Procedure 35(b) and 18 U.S.C. § 3553(e). At the time they went into effect, section 3553(e) and Rule 35(b) were essentially identical, except that section 3553(e) applied at sentencing, and Rule 35(b) applied post-sentencing.²⁰⁴

First, Federal Rule of Criminal Procedure 35(b) allows a court, upon the government's motion, to reduce a sentence after it is imposed if the defendant provides substantial assistance in investigating or prosecuting another person. Prior to the enactment of the Sentencing Reform Act, Rule 35(b) allowed the court to reduce a sentence for any reason within 120 days after the sentence was imposed or probation was revoked,²⁰⁵ and the court had authority to change a sentence from a term of incarceration to probation.²⁰⁶ The time limit was viewed as jurisdictional; once the time limit expired, the court was without jurisdiction to consider a reduction.²⁰⁷

The Sentencing Reform Act amended Rule 35(b) and made three significant changes.²⁰⁸ First, the government was required to make a motion seeking a reduction, which deprived the court of authority to reduce a sentence on its own. Second, the time period was expanded from 120 days to one year. Third, the reduction was limited to reflect the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense, in

²⁰⁴ Although these provisions provide relief even from a statutory minimum sentence based on a defendant's "substantial assistance," the legislative history does not articulate the rationale for the substantial assistance framework. *See* United States v. Revis, 22 F. Supp. 2d 1242, 1259 (N.D. Okl. 1998) (citing G. Adam Schweikert, III, Note, *Third Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445, 1450, n. 29 (1998)), United States v. Severich, 676 F. Supp. 1209, 1212 (S.D. Fla. 1988).

²⁰⁵ The 1983 version of Rule 35(b) provided that the court, "may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of appeal. . . . Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of a sentence under this subdivision." FED. R. CRIM. P. 35(b) (1983).

²⁰⁶ *Id.*

²⁰⁷ *See* United States v. Hayes, 983 F.2d 78, 80 (7th Cir 1992) (citing United States v. Kajevic, 711 F.2d 767 (7th Cir. 1983); Gaetner v. United States, 763 F.2d 787 (7th Cir. 1985)).

²⁰⁸ "The court, on motion of the government, may within one year after the imposition of the sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." FED. R. CRIM. P. 35(b) (1986).

accordance with the guidelines and policy statements issues by the Sentencing Commission.”²⁰⁹ Thus, only the defendant’s “substantial assistance” could be considered when granting or determining the size of a Rule 35 reduction. In addition, before the Act became effective, Congress added language to Rule 35(b) authorizing the court to reduce a sentence lower than the statutory minimum.²¹⁰ Rule 35(b) was further amended in 1991 and 2002 to allow consideration of substantial assistance provided beyond one year in certain circumstances.²¹¹

Second, 18 U.S.C. § 3553(e), which was enacted two years after the Sentencing Reform Act as part of the Anti-Drug Abuse Act of 1986,²¹² grants a court limited authority to impose a sentence below a mandatory minimum penalty at the time of sentencing. Specifically, the section 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.”²¹³ Section 3553(e) further requires such a sentence to “be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.” As directed by Congress, the Commission incorporated this statutory mechanism for relief from mandatory minimum sentences into the guidelines at USSG§5K1.1 (Substantial Assistance to Authorities (Policy Statement)), which provides that the court may depart from the guidelines “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”²¹⁴

²⁰⁹ *Id.*; see also *United States v. Poland*, 562 F.3d 35 (1st Cir. 2009).

²¹⁰ See *FED. R. CRIM. P. 35(b)* (1986) (“When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.”).

²¹¹ Federal Rule of Criminal Procedure 35(b)(2) provides:

Upon the government’s motion made more than one year after sentencing, the court may reduce a sentence if the substantial assistance involved:

- (A) information not known to the defendant until one year or more after sentencing;
- (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
- (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonable apparent to the defendant.

²¹² See Pub. L. No. 99–570, 100 Stat. 3207 (1986). A large piece of legislation, the Anti-Drug Abuse Act of 1986 contained twelve new acts, amended three others, and addressed numerous other topics.

²¹³ 18 U.S.C. § 3553(e). For additional discussion of section 3553(e) and relevant case law, see *infra* Appendix E(A)(2), (B)(3) of this Report.

²¹⁴ See 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

3. *The Safety Valve*

Following the Commission's 1991 report on mandatory minimum penalties,²¹⁵ the Commission worked directly with Congress to enact new legislation that would address the impact of mandatory minimum penalties on low-level drug-trafficking offenders. In July 1993, Judge William W. Wilkins, Jr., then-Chair of the Commission, testified at a hearing before the House Subcommittee on Crime and the Criminal Justice. Judge Wilkins discussed the drawbacks of mandatory minimum penalties and their incompatibility with the guidelines system as outlined in the report, and offered a legislative proposal that would “bring[] about greater coordination between mandatory minimums and the sentencing guidelines.”²¹⁶ Specifically, he proposed legislation for drug offenses that would require the Commission to use mandatory minimum penalties only in establishing base offense levels, and would otherwise permit the guidelines through downward adjustments or departures to provide for sentences below the mandatory minimum penalties.²¹⁷ Although Congress did not adopt the proposal, his testimony encouraged other legislation that resulted in a more limited relief mechanism.²¹⁸

In October 1993, the Senate considered a new bill, the Sentencing Improvement Act of 1993, the sole purpose of which was to enact a statutory “safety valve.” As proposed, the safety valve would have permitted offenders convicted of certain drug offenses to avoid mandatory minimum sentences if the defendant had no more than one criminal history point under the guidelines, did not cause or threaten to cause death or serious injury during the offense, and did not hold a leadership role in the offense.²¹⁹ When introducing the bill, Senator Kennedy explained that he “would prefer more comprehensive reform of mandatory sentencing laws,” but that the proposal was a “small but important step in the effort to recapture the goals of sentencing reform.”²²⁰ Similarly, Senator Simpson argued that the proposal would “correct” the injustice of “nonviolent first-time offenders . . . being sentenced to terms under the Federal system that, as a practical reality, even far exceed the terms served by some of the most violent criminals punished under other laws and guidelines.”²²¹

²¹⁵ See 1991 COMMISSION REPORT.

²¹⁶ See *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. (July 28, 1993) (statement of William W. Wilkins, Jr., Chairman, United States Sentencing Commission), reprinted in 6 FED. SENT'G REP. 67 (1993).

²¹⁷ *Id.*

²¹⁸ See 140 CONG. REC. S14,716 (daily ed. Oct. 7, 1994) (statement of Sen. Kennedy) (describing the enacted safety valve as “a version of the Wilkins proposal”).

²¹⁹ Sentencing Improvement Act of 1993, S. 1596, 103d Cong. (1993), reprinted in 139 CONG. REC. 26,483–85 (Oct. 27, 1993).

²²⁰ 139 CONG. REC. 26,484–85 (Oct. 27, 1993) (statement of Sen. Kennedy).

²²¹ 139 CONG. REC. 26,845 (Oct. 27, 1993) (statement of Sen. Simpson).

Shortly after its introduction in the Senate, the proposed Sentencing Improvement Act of 1993 was incorporated into a proposed crime bill, the Violent Crime Control and Law Enforcement Act.²²² Although the Senate rejected an amendment that would have removed the proposed safety valve provision altogether, it accepted an amendment by Senator Hatch that significantly narrowed its application to offenders with no criminal history points, who had never been imprisoned for a criminal conviction, whose offense did not result in death or serious bodily injury, who did not carry or possess a firearm or dangerous weapon during the offense, who played no leadership role, and who did not use or attempt to use physical force against another person in the course of the offense.²²³ Senator Hatch explained that his safety valve proposal was a “narrow reform needed to return a small degree of discretion to the courts for a small percentage of nonviolent drug cases.”²²⁴

The Senate passed the narrower safety valve provision as an amendment to a version of the Violent Crime Control and Law Enforcement Act already passed by the House, which contained no safety valve.²²⁵ Before conference, the House amended its bill to include a broader safety valve than passed by the Senate, by permitting up to one criminal history point and allowing eligibility regardless of whether the defendant had previously been incarcerated. The conference committee ultimately adopted the House’s broader version of the safety valve.²²⁶ The House and Senate passed the bill as recommended by the conference committee,²²⁷ creating the safety valve as codified at 18 U.S.C. § 3553(f).²²⁸

The enacted safety valve provision, entitled “Limitation on Applicability of Mandatory Minimum Penalties in Certain Cases,” provided that judges shall impose a sentence without regard to the statutory mandatory minimum penalty for offenses under section 401, 404, and 406 of the Controlled Substances Act (21 U.S.C. §§ 841 (possession with intent to distribute), 844

²²² See Violent Crime Control and Law Enforcement Act of 1993, S. 1607, 103d Cong. § 2404, (1993) (as introduced Nov. 1, 1993).

²²³ Amend. 1131 to S. 1607 (as modified Nov. 8, 1993, amending Amend. 1130 to S. 1607), *reprinted in* 139 CONG. REC. 27,839-40, 27847-48, 27914-15 (Nov. 8, 1993).

²²⁴ 139 Cong. Rec. 27,842 (Nov. 8, 1993) (statement of Sen. Hatch). Senator Hatch stated that by returning this discretion to the courts, his proposal would reduce disparities in the application of mandatory minimum penalties, particularly disparities resulting from low-level nonviolent drug offenders’ inability to obtain relief from the mandatory minimum penalty for rendering substantial assistance because they “have no information to provide the authorities.” *Id.*

²²⁵ See 139 CONG. REC. S16301 (daily ed. Nov. 19, 1993); Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., §2404 (as passed by Senate, Nov. 19, 1993), *reprinted in* 139 CONG. REC. 32,286-394 (Nov. 24, 1993).

²²⁶ See H.R. REP. NO. 103–711, at 197-98 (1994); 140 CONG. REC. 21,568-69 (Aug. 11, 1994); 140 CONG. REC. 23,617-18 (Aug. 21, 1994).

²²⁷ 140 CONG. REC. 26,618 (Aug. 21, 1994); 140 CONG. REC. 24,114-15 (Aug. 25, 1994).

²²⁸ Violent Crime Control and Law Enforcement Act of 1994, § 80001, Pub. L. No. 103–322, 108 Stat. 1796 (codified at 18 U.S.C. § 3553(f)).

(possession), 846 (conspiracy)) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 961 (conspiracy), 963 (importation)) if the following factors were met:

- (1) The defendant does not have more than one 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 by the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in § 848; and
- (5) No 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 or 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 not complied with this requirement.

The Commission subsequently incorporated the statutory safety valve provision into the guidelines at USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), which provides relief from the applicable mandatory minimum penalty for offenders who meet certain criteria as well as a downward adjustment to their guidelines offense level.²²⁹

Further discussion of the interaction of mandatory minimum penalties and the sentencing guidelines follows in Chapter 3.

²²⁹ See USSG App. C amend. 509 (effective Sept. 23, 1994). Defendants sentenced under USSG §2D1.1 and who meet the safety valve subdivision criteria set forth at §5C1.2 receive a two-level downward adjustment to their base offense levels, even if they were not convicted of an offense carrying a mandatory minimum penalty. See USSG §2D1.1(b)(16). For additional discussion of the safety valve and relevant case law, see *infra* Appendix E(B)(3) to this Report.