

# **The Paul-Leahy “Justice Safety Valve Act of 2013”**



**Preventing Lives and Money From Being  
Lost Down the Drain**

**FAMM | 2013**

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For more information about the Paul-Leahy “Justice Safety Valve Act of 2013,” please contact **Molly Gill**, FAMM government affairs counsel, at [mgill@famm.org](mailto:mgill@famm.org).

## **Mandatory minimums create “unsustainable” federal prison spending**

After watching the crime rate steadily rise during the 1970s, Congress decided that it was time to “get tough” on crime. Legislators began passing new anti-crime laws that sent more people to prison and sent them for longer terms. As crime rates declined, Congress continued to pass new mandatory minimum sentencing laws – laws that require judges to impose automatic, fixed-length prison sentences for specified offenses. Mandatory minimum laws had been around since the beginning of the country, but Congress began to rely on them as solutions to a growing number of offenses, especially drug and gun crimes.

Although locking up more offenders was a logical response to combating crime – and, indeed, is believed to have played a role in reducing the crime rate<sup>1</sup> – Congress did not anticipate the cost or, more importantly, cost-ineffectiveness of longer prison terms. The results, however, should surprise no one.

According to a recent Congressional Research Service report, the number of inmates under the Bureau of Prisons’ (BOP) jurisdiction has increased from approximately 25,000 in FY1980 to nearly 219,000 in FY2012.<sup>2</sup> Our federal prisons are operating at 139 percent of capacity.<sup>3</sup> Between FY2000 and FY2012, the per capita cost of incarceration for all inmates increased from \$21,603 to \$29,027.<sup>4</sup> Over this same period, federal appropriations for the BOP increased from \$3.668 billion to \$6.641 billion.<sup>5</sup>

The CRS report, relying on information provided by the U.S. Sentencing Commission (USSC), blames this extraordinary increase in prisoners and costs to taxpayers on the ever-increasing federalization of crimes and reliance on mandatory minimum sentences. According to CRS:

Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. ... Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods.<sup>6</sup>

Nearly half of the people in federal prisons are drug offenders.<sup>7</sup> In FY2011, almost 30 percent of those sentenced in federal courts were drug offenders<sup>8</sup>; between FY1998 and FY 2012, the percentage of federal prisoners incarcerated for violent offenses dropped by almost half, from 12 percent to 6.4 percent.<sup>9</sup> Many of those serving federal drug sentences are addicts and would be better served by treatment. Most are nonviolent<sup>10</sup> and could be sanctioned in ways far less severe and costly than spending decades in an expensive, federally subsidized cage with meals and health care provided by U.S. taxpayers.

According to our Justice Department, a full 25 percent of the Department’s budget is spent on corrections.<sup>11</sup> What that means is that DOJ is being forced to spend less on prosecutors, forensics, and police in order to pay for our bloated federal prisons. We are going to catch fewer violent criminals and terrorists because our budget is being spent on keeping nonviolent drug users behind bars.<sup>12</sup> We can do better. Restoring discretion to federal courts in a way that

protects public safety but reduces prison overcrowding is a win-win proposition for the American public.

### How a safety valve works

A safety valve is a law that authorizes the sentencing court to give an offender who would otherwise receive a mandatory minimum sentence less time in prison than the required minimum.

For example, Congress enacted a drug offense safety valve in 1994 after it realized that many first-time, low-level, and nonviolent drug offenders were receiving mandatory minimums that did not fit them or their crimes. The federal drug safety valve is a strict, five-part test. If – and only if – all five requirements in the law are met, the court may sentence a person below the mandatory minimum, generally by using the federal advisory sentencing guidelines to create a sentence that fits the offender and his crime.<sup>13</sup>

Each year, about 25 percent of federal drug offenders who would otherwise be sentenced to mandatory minimums receive the benefit of the safety valve.<sup>14</sup> Since 1995, courts have waived mandatory minimums for almost 80,000 federal drug offenders, saving taxpayers millions in unnecessary prison costs. During this same period, the nation's crime rate has dropped to its lowest level in a generation.

### The Justice Safety Valve Act of 2013

The Justice Safety Valve Act of 2013 was introduced in the U.S. Senate by Senators Patrick J. Leahy (D-VT), chairman of the Senate Judiciary Committee, and Senator Rand Paul (R-KY) on March 20, 2013. The bill amends 18 U.S.C. § 3553 by adding a subsection that would create a new safety valve for federal mandatory minimum sentences. The legislation gives judges authority to sentence offenders below the minimums if those sentences do not fulfill the goals of punishment listed in 18 U.S.C. § 3553(a) (see Appendix B). The text of the new safety valve is below:

18 U.S.C. § 3553(g). Authority To Impose a Sentence Below a Statutory Minimum to Prevent an Unjust Sentence. –

- (1) GENERAL RULE - Notwithstanding any provision of law other than this subsection, the court may impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements of subsection (a).
- (2) COURT TO GIVE PARTIES NOTICE - Before imposing a sentence under paragraph (1), the court shall give the parties reasonable notice of the court's intent to do so and an opportunity to respond.
- (3) STATEMENT IN WRITING OF FACTORS - The court shall state, in the written statement of reasons, the factors under subsection (a) that require imposition of a sentence below the statutory minimum.
- (4) APPEAL RIGHTS NOT LIMITED - This subsection does not limit any right to appeal that would otherwise exist in its absence.

Factors the judge must consider under § 3553(a) include whether the mandatory minimum sentence will protect the public, create an unwarranted sentencing disparity among similarly-culpable offenders, provide a just punishment, and deter others from committing similar crimes.

### The benefits of a new federal safety valve

For policymakers concerned with improving the criminal justice system in ways that keep their communities and neighborhoods safe while not asking more from taxpayers than is necessary, a sentencing safety valve has many benefits:

- **Protect public safety.** Safety valves do not mean that people will avoid prison time, just that they won't get any *more* prison time than is necessary. Safety valves reserve scarce prison space and resources for people who pose a real threat to the community, and they help prevent prison overcrowding.
- **Give courts flexibility to punish enough – but not too much.** Safety valves allow courts – in some circumstances – to sentence a person below the mandatory minimum if that sentence is too lengthy, unjust or unreasonable, or doesn't fit the offender or the crime. For example, a safety valve allows the court to avoid unreasonable outcomes, such as a first-time drug courier getting the same sentence as a major drug kingpin.
- **Save taxpayers money.** When courts sentence people below the mandatory minimum, people spend less time in prison than they otherwise would be required to, which costs taxpayers less in corrections costs. These savings can be returned to taxpayers or invested in more effective anti-crime strategies, e.g., more police and investigators on the street.

Some worry that adoption of a safety valve will harm law enforcement by eliminating the threat of a severe, mandatory sentence. This threat, they believe, helps prosecutors convince defendants to plead guilty and cooperate against other offenders.<sup>15</sup> In response, it must be noted that passage of a safety valve will not eliminate prosecutors' leverage. A safety valve does not require a judge to give a lower sentence; it simply allows him or her to do so in special circumstances where the mandatory minimum is not reasonable or necessary. Many defendants will still choose to plead guilty to avoid the mandatory minimum, rather than "rolling the dice" and hoping a jury will acquit them or that a judge will find them eligible for a lower sentence.

Additionally, the Justice Safety Valve Act does not give judges unlimited discretion. It has several safeguards built into its structure to prevent abuse:

- Judges are not required to use the safety valve
- Judges must base their below-minimum sentences on the criteria listed in 18 U.S.C. § 3553(a), then consider the sentencing guidelines, not merely substitute their own judgment for the dictates of Congress
- Offenders do not have a right to a sentence below the mandatory minimum

- Before judges apply the safety valve, the Justice Department has the right to argue that the mandatory minimum sentence is the correct one
- Judges must place their reasons for sentencing below the mandatory minimum on the record, in writing
- If the judge gets the sentence wrong, the decision can be appealed and reversed.

This proposed safety valve is not a “get out of jail free” card. People will still go to prison. The new safety valve simply ensures that no one goes to prison for longer than is necessary to keep society safe. And that means our prison beds and budget are saved for those who pose the biggest danger to us.

### Real people would benefit from an expanded federal safety valve

The existing safety valve is not broad enough, leading to absurd and expensive mandatory minimum prison terms for many nonviolent offenders. The current safety valve only applies to drug offenses, but mandatory minimums for other crimes can lead to unjust or irrational punishments. Also, under the current drug safety valve, even very minor prior convictions can knock an otherwise deserving defendant out of safety valve eligibility.<sup>16</sup> Additionally, the mere presence of even a legally-owned gun disqualifies a person from eligibility for a sentence below the minimum.<sup>17</sup> As the Martinson and Angelos cases below show, the mandatory minimum penalties even for gun offenses can sometimes produce excessive or absurd sentences. Americans shouldn’t have to pay for absurd or unjust results that don’t enhance their safety.



**Sentence:** 55 years  
**Sentence judge would have given:** 18 years  
**Cost savings:** \$1,036,000

**Weldon Angelos** is an example of one of those absurd results. Mr. Angelos made several sales of small amounts of marijuana to a government informant in Utah. At one of the sales, he had a gun strapped to his ankle and at another, the informant saw a pistol in Mr. Angelos’ car. When he was arrested, officers found other guns in his home. In the course of his drug sales, Mr. Angelos never displayed, used, or fired his guns. No one was ever threatened or injured. His prior criminal record included only a single juvenile offense, for which he received probation. Mr. Angelos was charged with multiple counts of possession of a gun during a drug trafficking offense, which carries harsh mandatory minimum sentences.

For selling a few pounds of marijuana and possessing guns that were not used, Mr. Angelos received a mandatory minimum sentence of 55 years without parole. Judge Paul Cassell, a George W. Bush appointee, was outraged by the mandatory minimum, which was longer than the sentences for airplane hijackers and serial child rapists. Judge Cassell called the mandatory 55-year gun sentence “demeaning to victims of actual criminal violence.” Judge Cassell said that if he had had discretion, he would have given Mr. Angelos no more than 18 years in prison – hardly a slap on the wrist. Mr. Angelos is only 9

years into his sentence. His mandatory minimum sentence will cost taxpayers over \$1.5 million.



**Sentence:** 15 years  
**Sentence judge would have given:** 10 years  
**Cost savings:** \$140,000

**Mandy Martinson** is another example of why Congress should pass the Justice Safety Valve Act. Ms. Martinson was living a successful, full life in Iowa until she started dating a man who abused her. When she left that relationship, she was deeply upset and slid into what she describes as a “self-destructive rampage.” To escape her pain, she began using methamphetamine and became addicted to the drug. She lost her job as a dental hygienist. She started dating and living with a drug dealer who was kind to her and provided her with drugs. He kept drugs and handguns at her house, and she occasionally counted money for him and accompanied him when he picked up drugs to sell.

When police came to arrest him, Ms. Martinson was also arrested and charged, for the first time in her life. She was held accountable for all the drugs and the two handguns involved in her boyfriend’s operation, even though she never sold drugs or used the guns herself. While awaiting trial, Ms. Martinson put her life back together. She received drug treatment, got sober, and returned to working as a dental hygienist. Nonetheless, Judge James Gritzner was forced to give Ms. Martinson a mandatory minimum sentence of 10 years for the drug offense and an additional five years for the guns found in her home. Ms. Martinson’s 15-year sentence is three years longer than her boyfriend’s. Unlike him, Ms. Martinson played such a minor role in the crime that she had no other drug offenders to turn in to prosecutors in exchange for a plea deal and a shorter sentence. The judge thought 10 years would have been enough for Ms. Martinson. Today, Ms. Martinson is only half-way through her 15-year term, and still proudly sober behind bars.



**Sentence:** Life  
**Cost:** \$1,400,000

**Stephanie George** worked hard to support her three young children, but her salary alone wasn’t enough. She dated several men who were involved in selling drugs and, in exchange for some financial support, she would occasionally deliver and sell drugs and take messages for them. Ms. George was arrested twice – once while sitting on the front porch next to a bag containing cocaine residue and another time for selling small amounts of crack to a confidential informant. She pled guilty and served nine months in a county jail with work release.

Nearly three years later, Ms. George was arrested a third time and charged, along with her drug-dealer boyfriend, for her involvement in his crack cocaine conspiracy. Despite her limited role – the judge described her as “a girlfriend and bag holder and money holder” – Ms. George received a mandatory sentence of life without parole due to her

two prior drug convictions. At sentencing, Judge Roger Vinson said, “[T]here’s no question that Ms. George deserves to be punished. The only question I have is whether it should be a mandatory life sentence ... I wish I had another alternative.” Ms. George has already served 15 years in prison. Taxpayers will pay to incarcerate her for the rest of her life.



**Sentence:** 10 years  
**Cost:** \$280,000

**John Hise** was working hard to help his parents run the family’s dairy farm in Georgia when an old friend approached him with a request. The friend was involved in manufacturing methamphetamine and needed red phosphorous, a chemical used to make the drug. Mr. Hise agreed to help and over the course of a few months sold just over two gallons of red phosphorous to the friend, making about \$400. Mr. Hise ended his involvement shortly after, but officials were already investigating the meth operation. A few months later, Mr. Hise was charged as part of a 45-person drug conspiracy.

When officials searched his home, they found a small amount of marijuana for personal use, but no red phosphorous or other evidence that Mr. Hise was still involved in the conspiracy. Mr. Hise was allowed to remain at home during his case; he successfully completed a drug treatment program and complied fully with the conditions of his release. Nevertheless, Mr. Hise received a 10-year mandatory prison sentence. His prior criminal convictions – driving under the influence and possessing less than an ounce of marijuana, for which he received probation and a fine each time – made him ineligible for relief under the current drug safety valve.

### Turning off the spigot: Sentencing reform is smartest reform

Though states around the country have used different strategies for combating inefficient prison spending, the wisest have chosen front-end reforms, such as repealing or limiting the reach of mandatory minimums. Why is this approach preferable? Imagine your bathtub is overflowing and you notice that the water spigot was left wide open. What would you do first: turn off the spigot or open the tub’s drain a little? Though you might eventually do both, the obvious first step is to stop the flow of new water. You need to turn off the spigot.

To prevent expensive prison beds from continually being overfilled with low-level offenders who do not pose a real danger to public safety, Congress should turn off the spigot by reforming the laws that impose lengthy, mandatory minimum sentences. The best course is to repeal mandatory minimum laws so that judges can craft sentences to fit the unique circumstances of each crime and offender. Adoption of the Justice Safety Valve Act of 2013 is a modest and feasible alternative that would prevent mandatory minimum sentences from being imposed in cases in which they overstate the offender’s culpability and are not necessary to protect the public.

## Q&A: Facts relevant to expanding the sentencing safety valve

### 1. ***How many people received mandatory minimum sentences in FY 2010?***<sup>18</sup>

**10,694 individuals** were sentenced to mandatory minimums, including:

- 7,212 for drug offenses
- 2,222 for gun offenses
- 805 for child pornography offenses
- 673 for identity theft offenses
- 322 for sex abuse offenses.

This total - 10,694 individuals - represents 14.5 percent of all federal offenders sentenced in FY 2010, according to the U.S. Sentencing Commission.

### 2. ***What are the existing exceptions to mandatory minimum sentences?***

In FY 2010, 19,986 individuals were convicted of crimes that carried mandatory minimum terms, but 46.6 percent of those (n=9,292) did not actually receive the mandatory sentence. This is because Congress has authorized two ways for defendants to avoid a mandatory minimum at sentencing:

(1) “Substantial assistance”: Prosecutors have sole authority to make a motion for a sentence below the mandatory minimum term if the defendant cooperates with prosecutors and provides information that leads to the investigation or prosecution of others. The “substantial assistance” exception applies to all crimes carrying mandatory minimum sentences.

(2) The “safety valve” provision: This exception applies *only in drug offenses*. When a low-level, nonviolent drug offender fulfills all parts of a strict, five-part test, the judge uses the sentencing guidelines rather than the mandatory minimum to determine the appropriate sentence.

### 3. ***When Congress enacted drug mandatory minimums in the 1980s, many members said they were needed for drug kingpins and major suppliers. It soon became clear, however, that many small-time offenders were getting lengthy mandatory sentences. Congress responded in 1994 by passing the existing safety valve for drug offenses. Hasn't that solved the problem by exempting all low-level, non-violent drug offenders from the reach of mandatory minimum terms?***

No. The existing drug safety valve is too narrow. Mandatory minimums are imposed in drug cases even when they do not fit the crime or the offender. In 2011, for example, despite the fact that:

- more than half of all federal drug offenders had little or no criminal history;
- almost 85% did not have or use any weapons; and

- only 6% were considered leaders, managers, or supervisors of others, only about 23% of all drug offenders received the application of the safety valve.<sup>19</sup>

The main reasons people fail to qualify for the safety valve are:

- (1) **Criminal history:** All prior felony convictions (e.g., drug possession, possession of drug paraphernalia) are counted when determining a person's criminal history points, and even some misdemeanor and petty offenses (e.g., careless driving, insufficient funds check) are counted if they resulted in sentences of more than a year of probation or at least 30 days imprisonment. Even very minor prior convictions can exclude a person from the safety valve's coverage.
- (2) **The presence of a gun:** Mere possession of even a lawfully obtained and registered gun (see question 6 below) is enough to disqualify an otherwise nonviolent, low-level offender from the safety valve - even one who did not use or intend to use the weapon.

Prosecutors already realize that the mandatory minimums are not necessary to protect public safety in all cases. In FY 2010, nearly 20 percent of drug offenders (19.3%) who did not qualify for the safety valve received shorter sentences because prosecutors argued that they had provided the government "substantial assistance." For example, in FY 2010, federal prosecutors recommended shorter-than-statutory-minimum sentences for 25% of all "high-level suppliers and importers," those at the top of the drug trafficking chain, as well as for 44% of all "managers and supervisors."

Moreover, the breaks in sentences promoted by prosecutors were much greater than those given by judges under the safety valve. Specifically, the average extent of substantial assistance reductions in drug offenses was 48.8% (67 months) below the minimum of the governing guideline range. The average extent of safety valve reductions granted by judges in drug offenses that carried a mandatory minimum penalty was 29.8% (34 months) from the governing guideline range.

Prosecutors would not jeopardize public safety by helping individuals who they believed were dangerous criminals get back on the street sooner. Rather, they demonstrate through their actions that mandatory minimum terms are not always necessary.

**4. *Some law enforcement officials say that mandatory minimums are necessary to convince guilty individuals to plead guilty, cooperate, or otherwise save government resources from being wasted on trials. But is it true that people facing mandatory minimums are more likely to plead guilty?***

No. Mandatory minimum sentences may actually motivate people to go to trial. According to the U.S. Sentencing Commission, 94.1% of those convicted of an offense carrying a mandatory minimum pled guilty, while 97.5% of the offenders *not* facing a mandatory minimum pled guilty. The Commission also found that "the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty."

For example, the Commission found that sex offenders (both sexual abuse offenders and child pornography offenders) facing a mandatory minimum penalty proceeded to trial 15.2% of the time, which is more than twice the rate for sexual abuse offenders not facing a mandatory minimum (6.9%). In FY 2010, the trial rate for child pornography offenders facing a mandatory minimum was 6.4%, four times the rate for child pornography offenders *not* convicted of an offense carrying a mandatory minimum penalty (1.6%).

**5. *How does the existing safety valve affect eligible defendants' decisions to plead guilty?***

It is an incentive to plead guilty. Offenders who were eligible for safety valve relief pled guilty at a higher rate (99.4%) than those offenders who were not eligible for safety valve relief (94.6%).

**6. *Wouldn't an expanded safety valve that covers firearm offenses allow dangerous people to be released to the streets too soon?***

No, dangerous gun offenders will still be sent to prison. An expanded safety valve would simply authorize judges to use the sentencing guidelines rather than the mandatory minimum sentence in rare and unusual cases where the mandatory minimum does not fit.

Federal gun offenses can be serious, but few actually involve violence, threats, or injuries. In fact, in FY 2010, most offenders receiving mandatory minimum sentences under 18 U.S.C. § 924(c) (the main enhancement for possessing or using a firearm in the commission of a crime of violence or drug crime) did so for merely possessing a gun rather than brandishing or discharging it. In FY 2010, nearly 65% (n=1,391) of all § 924(c) convictions involved the five-year mandatory sentence for possession of a gun; only 22.7% (n=488) involved the seven-year mandatory sentence for brandishing a gun; and a mere 8.8% (n=188) involved the 10-year mandatory sentence for discharging a gun or possessing a short-barreled rifle, shotgun, or semiautomatic assault weapon. Under the existing safety valve, just the *presence* of a weapon during a drug offense is enough to disqualify an otherwise worthy offender from its coverage.

Federal prosecutors already have made clear that they do not think the statutory mandatory minimum fits every offender convicted under § 924(c). In FY 2010, prosecutors filed “substantial assistance” motions in order to reduce sentences for 24.3% of offenders convicted of violating § 924(c). Offenders convicted of multiple counts under § 924(c) received sentencing relief from prosecutors at an even higher rate (36.7%). Prosecutors surely would not have supported such sentence reductions if they believed the § 924(c) offenders in question were dangerous.

**7. *Why can't those who fail to qualify for the safety valve rely on the substantial assistance exception to avoid a mandatory minimum term?***

The substantial assistance provision is, by definition, impossible to qualify for unless the offender has information to give to prosecutors that helps with the investigation or prosecution of others. Low-level offenders in drug conspiracies, such as mules and

couriers, tend to lack such information.

**8. What have the Justice Department and U.S. Sentencing Commission said about expanding the existing safety valve?**

In its 2011 report on mandatory minimums, the U.S. Sentencing Commission recommended that Congress consider expanding the safety valve to those offenders with three criminal history points (up from one). The Commission also suggested that Congress consider extending the safety valve to all crimes, rather than simply drug offenses. The Justice Department has previously suggested that it could support expanding the safety valve for drug offenses to cover offenders in Criminal History Category II.

**What others are saying about mandatory minimum reform**

*“The biggest problem from the perspective of the taxpayer, however, is that mandatory minimum sentencing policies have proven prohibitively expensive. ... The benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become a sort of poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself.”*

– Grover Norquist, President, Americans for Tax Reform<sup>20</sup>

*“I believe in punishment. I believe that there should be consequences when someone breaks the law. But depriving an individual of his freedom is the ultimate power of the state and it must be done judiciously. The punishment must be meted, based on all the factors of the crime, the defendant’s role in it, and the unique circumstances of the individual. Above all, punishment should be imposed, not by Washington lawmakers, but by judges doing the job we gave them in the constitution.”*

– David Keene, President, National Rifle Association<sup>21</sup>

*“We know that harsher punishments lead to less crime, but we also know that the millionth prisoner we lock up is a lot less dangerous to society than the first guy we lock up. In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. [Now,] I think we should be shrinking the prison population by at least one-third.”*

– Dr. Steven D. Levitt, University of Chicago economist and author, *Freakonomics*<sup>22</sup>

*“I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases mandatory minimum sentences are unwise and unjust. . . . The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are*

*wise or just. ... A court decision does not excuse the political branches or the public from the responsibility for unjust laws."*

- U.S. Supreme Court Justice Anthony Kennedy<sup>23</sup>

*"When judges mete out sentences for certain crimes, mandatory minimum laws prohibit them from weighing the relative harm caused by the crime or the relative culpability of the defendant. Mandatory minimum sentences are 'one size fits all.' These laws offend the very notion of justice, which requires that the severity of the punishment match the harm done by an individual criminal. In Exodus 21:24, we are told that our judgments should exact an 'eye for eye, tooth for tooth.' This verse limits punishment by requiring that offenders pay back 'value for value.' The Bible calls for proportionality in punishment, and stresses that penalties should match the injury."*

- Pat Nolan, Senior Vice President, Prison Fellowship Ministries<sup>24</sup>

## Appendix A: The current federal safety valve (18 U.S.C. § 3553(f))

Currently, the only safety valve in the federal code applies only to drug offenses. It is a strict, five-part test that defendants must fulfill before the judge is authorized to sentence the offender below the mandatory minimum term.

**18 U.S.C. § 3553(f): Limitation on Applicability of Statutory Minimums in Certain Cases.**—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

## Appendix B: 18 U.S.C. § 3553(a)

Under the Justice Safety Valve Act of 2013, federal judges may sentence below the mandatory minimum only if these factors justify it.

**18 U.S.C. § 3553(a): Factors To Be Considered in Imposing a Sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
    - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
  - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
  - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

## Endnotes

- <sup>1</sup> Anne Morrison Piehl & Bert Useem, *Prisons*, in CRIME AND PUBLIC POLICY 540-43 (James Q. Wilson and Joan Petersilia eds., 2011).
- <sup>2</sup> CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (Jan. 22, 2013) [hereinafter CRS REPORT], available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>.
- <sup>3</sup> *Id.* at Summary, 20.
- <sup>4</sup> *Id.* at Summary, 15, Tbl. 1.
- <sup>5</sup> *Id.* at Summary, 11, 12, Figure 5.
- <sup>6</sup> *Id.* at 8.
- <sup>7</sup> Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, at <http://www.bop.gov/news/quick.jsp> (last visited Mar. 18, 2013) (showing 47.4 percent of all federal prisoners as serving time for a drug offense).
- <sup>8</sup> See U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. A (2012) [hereinafter 2011 SOURCEBOOK], available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2011/sbtoc11.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm).
- <sup>9</sup> CRS REPORT at 5.
- <sup>10</sup> See, e.g., 2011 SOURCEBOOK at Tbl. 39 (showing that only 15.6 percent of drug offenders sentenced in FY2011 had weapons involved in the offense).
- <sup>11</sup> Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies, 9 (March 14, 2013), available at <http://appropriations.house.gov/uploadedfiles/hhr-113-ap19-wstate-horowitzm-20130314.pdf>.
- <sup>12</sup> See Letter to U.S. Sentencing Commission from Lanny Breuer, Assistant Attorney General, and Jonathan Wroblewski, Director, Officer of Policy and Legislation, Dep't of Justice, at 4-6 (July 23, 2012), available at [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20120815/DOJ\\_Annual%20Letter\\_priorities\\_comment.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20120815/DOJ_Annual%20Letter_priorities_comment.pdf) ("Taken together, reductions in public safety spending that have already occurred and that are likely to continue in the coming years mean that the remarkable public safety achievements of the last 20 years are threatened unless reforms are instituted to make our public safety expenditures smarter and more productive.")
- <sup>13</sup> 18 U.S.C. § 3553(f) (2012). See Appendix A for the list of the drug safety valve's five criteria.
- <sup>14</sup> 2011 SOURCEBOOK at Tbl. 44.
- <sup>15</sup> Recent evidence suggests that mandatory minimum sentences actually produce fewer guilty pleas. In its comprehensive 2011 report on federal mandatory minimum laws, the U.S. Sentencing Commission found that the threat of lengthy mandatory terms might actually motivate people to go to trial. According to the Commission, 94.1 percent of those convicted of an offense carrying a mandatory minimum pled guilty, while 97.5 percent of the offenders *not* facing a mandatory minimum pled guilty. Notably, offenders who were eligible for the safety valve pled guilty at a higher rate (99.4 percent) than those offenders who were not eligible for safety valve relief (94.6 percent). See U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 125-27 (Oct. 2011) [hereinafter MANDATORY MINIMUM REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm).
- <sup>16</sup> See MANDATORY MINIMUM REPORT at 352, 355-56.
- <sup>17</sup> 18 U.S.C. § 3553(f)(2) (2012).
- <sup>18</sup> Unless otherwise noted, the data in this section are from MANDATORY MINIMUM REPORT, *supra* note 15.
- <sup>19</sup> 2011 SOURCEBOOK at Tbls. 37, 39, 40, 44.
- <sup>20</sup> Testimony of Grover Norquist, President, Americans for Tax Reform, before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives Committee on the Judiciary (July 14, 2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-48\\_51013.PDF](http://judiciary.house.gov/hearings/printers/111th/111-48_51013.PDF).
- <sup>21</sup> Prepared Statement of David A. Keene, Chairman, American Conservative Union, submitted to the Subcommittee on Crime, Terrorism and Homeland Security of the U.S. House of Representatives Committee on the Judiciary (July 14, 2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-48\\_51013.PDF](http://judiciary.house.gov/hearings/printers/111th/111-48_51013.PDF).
- <sup>22</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 12, 2012), available at [http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0).
- <sup>23</sup> Justice Anthony Kennedy, Speech at the Annual Meeting of the American Bar Association, Aug. 9, 2003, at 3, available at <http://www.propublica.org/documents/item/325931-dcom5>.
- <sup>24</sup> Pat Nolan, *Mandatory Minimums: Unjust and Unbiblical* (2006), at <http://yifa.forumchitchat.com/post/quotMandatory-Sentences-Unjust-and-Unbiblicalquot-1239388>.