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ACQUISITIONS

February 22, 1994

Honorable Don Edwards  
Chairman, Subcommittee on Civil  
and Constitutional Rights  
House Judiciary Committee  
2307 Rayburn House Office Building  
Washington, D.C. 20515-0516

Honorable William J. Hughes  
Chairman, Subcommittee on Intellectual  
Property and Judicial Administration  
House Judiciary Committee  
241 Cannon House Office Building  
Washington, D.C. 20515-3002

Dear Congressmen Edwards and Hughes:

The Sentencing Commission is pleased to respond to your letter requesting an "analysis of how the [Senate crime] bill would affect the sentencing goals articulated in the Sentencing Reform Act and the operation of the guidelines." The Commission has completed an initial review of the entire bill.<sup>1</sup> Focusing exclusively on the mandate you have given us for this evaluation, the staff has advised the Commission that the implications of the Senate bill are broad and complex.<sup>2</sup>

To illustrate the breadth of the bill on federal sentencing policy, H.R. 3355, as passed by the Senate, contains 11 sections that would establish or increase mandatory minimum penalties. The bill contains 17 sections that direct the Sentencing Commission to take a specified action, most typically to increase guideline penalties. Dozens of other provisions likely would affect sentencing in other ways (e.g., by increasing statutory maximum penalties, providing "flexibility" with respect to the application of certain mandatory minimums, subjecting juveniles to adult penalties in certain circumstances, and requiring a prison impact assessment for certain legislative proposals affecting penalties).

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<sup>1</sup> Commissioners Carnes and Mazzone join me in supporting the analysis and recommendations contained in this document. Commissioner Nagel wishes to be shown as abstaining. Commissioner Gelacak does not support the release of this analysis and the recommendations contained therein pending further review of supporting documentation and further discussion by the Commission; in particular, with its *ex officio* member from the Department of Justice.

<sup>2</sup> The bill would appear to have significant court resource, prison management, and other criminal justice system implications that are beyond the scope of the Commission's responsibility and expertise.

Honorable Don Edwards  
February 22, 1994

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The sheer number of sentencing-related provisions in the bill, each with its own scope and unique definitions, inherently implies a degree of complexity. However, the bill's complexity is compounded by the fact that a number of otherwise distinct provisions have overlapping impact. For example:

- the bill contains two "three-time loser" provisions that mandate a life sentence for a third qualifying offense; the provisions significantly overlap in terms of covered offenses.
- the bill contains three provisions that increase penalties for using a firearm during the commission of certain offenses; the provisions overlap in terms of coverage and could lead to divergent sentences of imprisonment in similar cases.

These and other complexities make drafting a comprehensive analysis of the Senate crime bill a time-intensive undertaking. Consequently, knowing your need for information in a timely manner, I am transmitting with this letter Part I of a two-part response to your request. Analyzed in this first installment are most of what, at this juncture, appear to be the more significant provisions based on the criteria you have given us. In addition, the Commission has included several preliminary prison impact assessments on various provisions of the Senate bill. I will transmit an analysis of the remaining provisions as soon as possible.

I would like to take this opportunity to point out that some critical comments directed toward the criminal justice system in general — "revolving door" prisons; early release through parole; too generous "good time" provisions; and lenient and/or unequal sentencing by individual judges — do not apply to the federal system. The Sentencing Reform Act (SRA), together with the sentencing guidelines that it mandated, has already addressed these issues. The sentencing guidelines, in effect nationwide since 1989, ensure that federal sentences are certain, firm, and proportional. Specifically, the SRA has:

- abolished parole and implemented determinate, "real time" sentencing;
- restructured good time credits to permit a maximum reduction of 54 days per year; and
- imposed a system of sentencing guidelines that structure judicial discretion so that in the overwhelming majority of cases similar offenders who commit similar crimes receive similar sentences.

And, violent offenders (or any type of offender, for that matter) are not being released early from federal prison to make room for new offenders.

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February 22, 1994

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The federal criminal justice system is designed under the sentencing guidelines to attempt to maximize crime control in the most effective and efficient way. We are happy to provide assistance to Congress as it continues to seek ways to improve the present system. Should you or your staff require further information or drafting assistance with respect to recommendations included in this analysis, please contact John Steer, the Commission's General Counsel, or Win Swenson, our Legislative Counsel, at (202) 273-4520.

With highest personal regards, I am

Sincerely,

  
William W. Wilkins, Jr.  
Chairman

Enclosure

**ANALYSIS OF THE VIOLENT CRIME CONTROL  
AND LAW ENFORCEMENT ACT OF 1993 — H.R. 3355  
(AS PASSED BY THE SENATE NOVEMBER 19, 1993)**

**U.S. Sentencing Commission**

**February 22, 1994**

151236

**U.S. Department of Justice  
National Institute of Justice**

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**CRIME BILL ANALYSIS**  
**H.R. 3355, As Passed by the Senate (November 19, 1993)**  
**Prepared by the U.S. Sentencing Commission**

**INTRODUCTION**

The Sentencing Commission provides the following analysis of certain provisions of H.R. 3355, the omnibus crime bill passed by the Senate on November 19, 1993, in response to requests from members of Congress.<sup>1</sup> Provisions were analyzed with an eye toward sentencing goals articulated by Congress in the Sentencing Reform Act of 1984 (SRA),<sup>2</sup> and in light of the operation of the federal sentencing guidelines.

In examining a number of the bill's mandatory minimum provisions, the analysis builds on research that Congress directed the Sentencing Commission to undertake in legislation enacted in November 1990.<sup>3</sup> The Sentencing Commission reported this research in a comprehensive study of mandatory minimum penalties transmitted to Congress in August 1991.<sup>4</sup>

A prison impact assessment is provided for several of the provisions analyzed. The Commission's standard prison impact model, developed in cooperation with the Bureau of Prisons, was used for all of these assessments. This model assumes that factors other than

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<sup>1</sup>Representatives Don Edwards and William J. Hughes made a written request for this analysis. Other members, through their staffs, have orally requested similar information.

<sup>2</sup>Pub. L. No. 98-473, 98 Stat. 1838, 1987 (1984) (codified at 18 U.S.C. §§ 3551-3742 (1988); 28 U.S.C. §§ 991-998 (1988)).

<sup>3</sup>See Pub. L. No. 101-647 §1703, 104 Stat. 4846 (1990).

<sup>4</sup>See U.S. Sentencing Comm'n., *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 57* (1991) [hereinafter "Mandatory Minimum Report"]. In broad terms, the report concluded that mandatory minimums undercut the certainty, consistency, proportionality, and fairness Congress indicated it was seeking when it enacted the Sentencing Reform Act of 1984. The report found that the most effective way for Congress to exercise its powers to direct sentencing policy is through the guideline system it created with that legislation. For example, in some instances, as an alternative to mandatory minimums or a directive to the Sentencing Commission to increase guideline penalties in a specific way, the report suggests that Congress consider directing the Commission to study sentencing practices in the particular area of concern, report to Congress on its findings, and amend the guidelines as necessary in light of those findings. With more than 170,000 actual cases now comprising the Sentencing Commission's database, this approach, formally proposed by the Commission in the 1991 mandatory minimum report, appears to have even greater vitality today.

the proposed legislative change will remain constant. Specifically, the model assumes that arrest rates, charging practices, conviction rates, and other sentencing policies will not change over time.

This feature of the prison impact model is worth highlighting because enactment of the bill as a whole would likely mean that "other" factors would *not* remain constant. For example, as discussed in the analyses of sections 401 and 2405, the proposed legislation would present prosecutors with new and significant charging options that could have a bearing on existing enforcement approaches in cases involving firearms. If the bill as a whole were enacted, changes in "sentencing policies" beyond those called for by the provision for which a prison impact is provided will certainly occur. For example, section 2405 creates a new federal offense for using a firearm in connection with certain state-law violent or drug offenses. Successful prosecutions of this new federal offense -- of which there could be many -- might also provide a triggering conviction and life sentence under the "three-time loser" provisions of sections 2408 and 5111 of the bill.

How such "other" factors would affect the prison impact assessments included in this analysis is an exceedingly complex question the resolution of which requires conjecture. Overall, it is probably fair to say that these "other" factors have a tendency to make the generally conservative prison impact assessments here provided somewhat more conservative. That is, the probable effect of these other factors would be to increase prison impact beyond the levels indicated in this document.

### *Three-Time Loser Provisions*

**Sec. 2408. Life Imprisonment Without Release for Drug Felons and Violent Criminals Convicted a Third Time.**

**Sec. 5111. Mandatory Life Imprisonment of Persons Convicted of a Third Violent Felony.**

### Brief Description of Provisions

The Senate-passed Crime Bill contains two separate provisions added by floor amendments that have a similar objective of mandating life imprisonment for certain individuals convicted of a federal offense who have at least two prior qualifying convictions.

1. Sec. 2408

Amends section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. § 841(b)(1)(A)) to mandate a life sentence if the defendant committed a crime of violence or major drug trafficking offense (or other drug trafficking offense under certain aggravating circumstances, such as near a school) after two prior convictions for a crime of violence or drug trafficking. Defines "crime of violence" as a felony punishable by ten years or more imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Except for the threshold requirement relating to a maximum term of imprisonment, the crime of violence definition is identical to that in 18 U.S.C. § 16.

2. Sec. 5111

Amends 18 U.S.C. § 3581 to mandate a sentence of life imprisonment for a defendant convicted of a "violent felony" if the defendant has been convicted of a state or federal violent felony "on two or more prior occasions." Defines violent felony as a federal or state offense that is a "crime of violence" under 18 U.S.C. § 16, and "(A) involves the threatened use, use, or risk of use of physical force against the person of another," (B) is punishable by a maximum term of imprisonment of five years or more, and (C) is not classified as a misdemeanor.

**Current Statutory Law**

The Controlled Substances Act currently has several provisions that mandate life imprisonment for recidivist drug traffickers. Proposed section 2408 in the crime bill would build on 21 U.S.C. § 841(b)(1)(A), which currently mandates life imprisonment for a defendant convicted of either

(1) trafficking in a quantity of drugs sufficient to trigger a ten-year mandatory minimum, or

(2) distributing drugs

(a) to persons under 21,

(b) near protected locations such as schools,

(c) to pregnant individuals, or

(d) through the use of minors

who has two prior state or federal felony drug trafficking offenses. In the firearms offense area, 18 U.S.C. § 924(e), the Armed Career Criminal enhancement, mandates a minimum sentence of 15 years (maximum of life) for a defendant convicted under 18 U.S.C. § 922(g) (felon-in-possession) who has three previous convictions for a "violent felony," and/or "serious drug offense," "committed on occasions different from one another." Another firearms offense, 18 U.S.C. § 924(c), currently mandates life imprisonment for a second conviction of using a more dangerous firearm (machinegun, destructive device, firearm equipped with silencer or muffler).

### Operation of the Sentencing Guidelines

The sentencing guidelines contain a career offender sentencing requirement (USSG §§4B1.1-4B1.2) that, in essence, is a "three-time loser" provision. In general, it provides a guideline range at or near the statutory maximum for the current offense if the defendant is convicted of a crime of violence or drug trafficking offense and has at least two prior convictions for either violence or drug trafficking. Additionally, guideline 4B1.4 provides a range of sentences above the 15-year mandatory minimum for Armed Career Criminals.

### Discussion

Though similar in purpose, sections 2408 and 5111 are substantively and operationally different. Neither provision, by its terms or in the debate surrounding its adoption by the Senate, reflects any express consideration of currently applicable federal sentencing policy, particularly the career offender provisions of the sentencing guidelines. Each provision is likely to result in unwarranted sentencing disparity in the treatment of otherwise similarly situated offenders due to 1) wide variations among states and within the federal system regarding the maximum statutory penalties assigned to criminal conduct of comparable severity, and 2) differences in the manner in which prosecutorial discretion is exercised with respect to the current offense and qualifying predicate offenses.

At the same time, the provisions are likely to produce unwarranted uniformity in sentencing for very dissimilar defendants because of the extremely broad definition of crime of violence. The breadth of the definitions in either three-time loser provision is such that they will inevitably sweep in defendants who dramatically differ in the relative seriousness of their criminal records and level of dangerousness to society. The provisions are, therefore, at once both under-inclusive when viewed from the goal of ensuring similar sentencing of all defendants who have engaged in repetitive criminal conduct of comparable levels of seriousness, and over-inclusive when viewed from the goal of producing proportionately different sentences among offenders whose present and past criminal conduct is significantly different.

Furthermore, although each provision purportedly requires a life sentence only for three-time violent (or drug trafficking) offenders, neither is a true, three-time recidivist penalty statute. In fact, under section 5111, the mandatory life sentence potentially could

apply to conduct that preceded, rather than followed, the qualifying "predicate" convictions (see discussion below).

Significantly, because of limited federal jurisdiction over offenses involving personal violence, it can be expected that a three-time loser provision (particularly one aimed at personal crimes of violence) will impact heavily and perhaps disproportionately on Native Americans who are convicted of committing crimes on federal lands. In comparison to current law and the career offender guideline, both provisions would increase substantially federal prison population in the long term. Importantly, the greatest increase in punishment would occur for defendants convicted of the least serious federal offenses that qualify as a crime of violence.

Each of these concerns is discussed below in greater detail.

1. *Current sentencing policy; proportionality concerns.* In adopting these two recidivist provisions, the Senate made no mention of current federal sentencing policy, any perceived inadequacies of current policy that might have motivated the three-time loser provisions, or the manner in which the provisions would change, supersede, or complement current policy. *Yet, in point of fact, the federal criminal justice system already has a three-time loser sentencing provision that Congress mandated in the Sentencing Reform Act of 1984.<sup>5</sup> Significantly, the legislative history to that Act reflects a deliberate decision by Congress to reject a statutory three-time loser mandatory minimum penalty in favor of a "more effective" instruction to the Sentencing Commission to address the underlying policy concerns through guidelines.<sup>6</sup>*

The career offender guideline was drafted by the Commission in response to this directive. Consistent with Congress's express instruction, it provides a sentence at or near the statutory maximum for the offense of which a defendant presently stands convicted, if the defendant has two prior felony state or federal convictions involving drug trafficking or violence.

Conceptually, this guideline is similar to proposed section 2408 of the crime bill, except that instead of a mandatory life sentence being required in every case, regardless of the degree of seriousness, the guideline requires a sentence at or near the maximum penalty Congress has authorized for the violent or drug offense the defendant has recently committed. "Real-time" sentences under the career offender guideline are substantial, averaging slightly more than 17 years (205.6 months), with a median of 15 years, 8 months. A sentence of life currently is required for the most serious offenders.

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<sup>5</sup>28 U.S.C. § 994(h).

<sup>6</sup>See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983) [hereinafter "Senate Report"].

Though sometimes criticized for its harshness, the Commission is not aware of any opinion, including among prosecutors, that the career offender guideline is unduly lenient. Moreover, in view of the lengthy period of incarceration typically required under the career offender guideline, defendants sentenced under this provision will remain in prison for many years. The concern that recidivist criminals are responsible for most serious crime may be entirely legitimate with respect to many state sentencing systems characterized by discretionary sentencing and early parole. However, it cannot realistically be based on a studied determination that the current federal system, which includes this demonstrably stringent career offender guideline, is not addressing this concern.

Unlike the proposed statutory three-time loser provisions, the career offender guideline does, however, temper its sentence severity with some measure of proportionality based on the seriousness of the current offense. To illustrate, career offenders whose instant offense is kidnapping (an offense for which life is the maximum penalty) receive an average of more than 30 years' (364 months') imprisonment under the guidelines. Offenders convicted of the less serious offense of aggravated assault (an offense carrying penalties ranging from three to ten years,<sup>7</sup> depending on the particular statute violated) receive an average of six and one-half years' imprisonment.

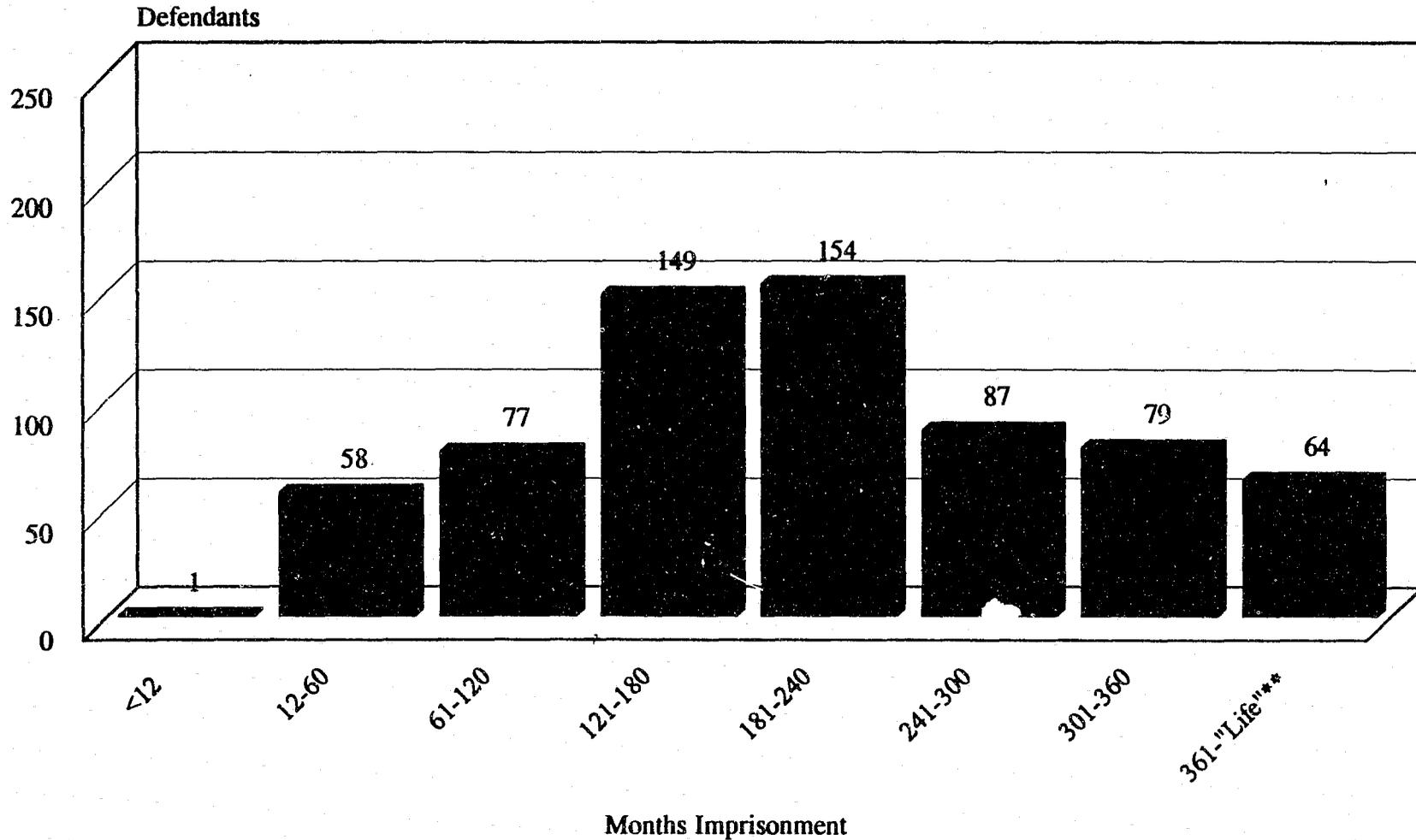
Figure I shows the distribution of sentences under the career offender guideline during fiscal year 1992. As the figure shows, variations in the severity of the most recent offense committed by qualifying career offenders results in some variation in sentences under this guideline. On the other hand, while the career offender guideline maintains a measure of proportionality, the figure illustrates that most career offender sentences are at least 15 years (180 months), with many sentences at or near life expectancy (actual life in the most serious cases).

Under the proposed crime bill provisions, both those defendants convicted of somewhat less serious offenses, such as an assault, and those convicted of more serious offenses, such as kidnapping, would receive the same mandatory life sentence. The proposals would therefore impose a life sentence without regard to the relative seriousness of the current (and past) offenses, provided they meet the prescribed criteria. Moreover, since the current career offender guideline already requires sentences at or near life for the most serious offenders, the proposals in the crime bill would visit the greatest increase in sentences on offenders convicted of the least serious qualifying offenses. The provisions, therefore, lack the relative proportionality of the career offender guideline and invite potentially unjust applications. For example, under section 2408, a defendant convicted of two assaults in a barroom brawl 20 years ago who is now convicted of breaking the lock on

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<sup>7</sup>Of course, an aggravated assault charged under federal law would qualify as a crime of violence under the proposed three-time loser provisions only if punishable by at least five years under section 5111 or at least ten years under section 2408.

**Figure 1**  
**Sentences for Career Offenders\***  
 (October 1, 1991 through September 30, 1992)



\*Excludes offenders who upon motion of the government received a reduced sentence for providing substantial assistance in the investigation of another person. See 28 U.S.C. § 994(n), 18 U.S.C. § 3553(e).

\*\*Life expectancy data indicate that a sentence over 430 months would effectively be a life sentence for the average career offender. The guidelines authorize imposition of an actual "life" sentence, however, for the most serious cases.

Source: U.S. Sentencing Commission, Fiscal Year 1992 data file

a railroad boxcar could be sentenced to spend the rest of his natural life in prison, just as would a three-time rapist who clearly deserves no lesser sentence.

2. *Disparate application and lack of proportionality due to wide variations in relative seriousness of qualifying violent and drug trafficking offenses.* Both "three-time loser" provisions attempt to target defendants convicted of three or more relatively serious violent or, in the case of section proposed 2408, violent and/or drug trafficking offenses. The mandatory life penalty provisions distinguish seriousness of offense and offender in two ways: (1) by limiting their reach to offenses of a relatively more serious type; *i.e.*, "violent" offenses, or in the case of section 2408, violent and drug trafficking offenses, and (2) by including only offenses that have a statutory maximum period of imprisonment equal to or exceeding a minimum threshold — five years in the case of section 5111 and ten years in the case of section 2408.

(a) Over-inclusiveness of definitional criteria for violence and drug trafficking.

Both sections 2408 and 5111 define violent offenses by using primarily the criteria codified in 18 U.S.C. § 16,<sup>9</sup> a provision enacted as part of the Comprehensive Crime Control Act of 1984 and currently used in the federal criminal justice system for various bail release determinations. See 18 U.S.C. § 3141-3156.

A wide range of federal and state property destruction offenses of considerably varying seriousness would appear to be encompassed within these broad criteria. For example, the following federal offenses would appear to be included under either section 2408, section 5111, or both: breaking or entering railroad cars (18 U.S.C. § 2117) or other forms of commercial burglary, destruction of more than \$100 of government property (18 U.S.C. §§ 1361, 1363), destruction of U.S. mail (18 U.S.C. §§ 1702, 1703), setting fire to government forest or range land (18 U.S.C. § 1855), and numerous other property offenses that carry a maximum imprisonment term of at least five years. Because state-law offenses are also covered, the range of crimes that involve at least "a substantial risk that physical force against the property of another may be used in the course of committing the offense" (section 2408), or that involve property destruction under circumstances presenting

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<sup>9</sup>18 U.S.C. § 16 defines "crime of violence" as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

at least a "risk of use of physical force against the person of another" (section 5111), is as vast and varied as the laws of the 50 states and the District of Columbia.

(b) Disparate application due to wide variations in statutory penalties among states. Section 2408 encompasses felony crimes of violence only if punishable by ten or more years' imprisonment,<sup>9</sup> whereas section 5111 covers such offenses if punishable by five years or more. Because penalties for the same offense may vary greatly from state to state, the inclusion of state-law violent offenses that have a statutory penalty exceeding a minimum threshold proves to be an ineffective and inconsistent means of ensuring that only the more serious violent crimes will be included. Other factors being equal, a state with generally high statutory penalties (but which may be coupled with early release practices such as parole and/or extremely generous good time) will tend to have a greater number of "violent" offenses potentially meeting the three-time loser penalty threshold than will a state with significantly lower maximum statutory penalties for the same offenses (but which also may employ a determinate, no-parole system with reduced good time). This wide variation in state penalty structures and sentencing systems, in turn, will lead to disparate application of a federal recidivist provision that can be triggered by prior state-law offenses.

For example, the offense of involuntary manslaughter is punished by up to four years' imprisonment in California and Colorado, up to five years in Illinois, and up to ten years in Georgia and Connecticut.<sup>10</sup> Consequently, such an offense committed in California or Colorado would not constitute a countable crime of violence within the meaning of either section 5111 or section 2408. If, however, the offense occurred in Illinois, it would count under section 5111, but not under section 2408. If it occurred in Georgia or Connecticut, it would count under either section. If the same offense occurred within federal jurisdiction, it would not qualify under either provision (assuming the defendant was convicted under 18 U.S.C. § 1112 (three-year statutory maximum)).

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<sup>9</sup>This provision enlarges upon the three-time loser feature currently embodied in the Controlled Substances Act. The existing provision mandates a life sentence for a serious federal drug offense preceded by two or more prior felony drug trafficking offenses. The predicate drug offenses need be punishable only by more than one year. The section thus introduces an internal disparity among offense types (*i.e.*, prior drug trafficking offenses count if punishable by more than one year, prior violent offenses if punishable by ten or more years). It also has the indirect effect of increasing punishment for drug offenses by triggering the mandatory life sentence through any combination of qualifying drug offenses or crimes of violence.

<sup>10</sup>U.S. Department of Justice, Bureau of Justice Statistics, *Felony Laws of the 50 States and the District of Columbia, 1986 (1987)*. These states were chosen solely for illustrative purposes. No attempt was made to comprehensively survey current state penalties for offenses meeting the proposed three-time loser criteria. A review of penalties from other states likely will show similar examples.

Similarly, the offense of aggravated assault/aggravated battery would not count under either provision if it occurred in California (four-year statutory maximum); it would not count under section 2408 if it occurred in Illinois (five-year maximum) or in Arkansas (six-year maximum).

On the other hand, relatively non-serious property destruction offenses could qualify as crimes of violence based upon statutory maximum penalties in some states. For example, the offense of criminal mischief, even if relatively non-serious in actuality, would be a countable crime of violence/violent felony under either section 2408 or section 5111 if it occurred in Arkansas or Georgia, and under section 5111 (but not under section 2408) if it occurred in Colorado or Connecticut.

As these examples indicate, substantial penalty variations among states inevitably will result in a hit-and-miss, widely disparate application of either three-time loser provision. Their applicability will depend as much on the particular state where the prior convictions were obtained as on the relative seriousness of the previous convictions.

3. *Disparate application due to variations in prosecutorial practices.* Both three-time loser provisions lend themselves inevitably to disparate application as a result of the manner in which prosecutorial charging and plea bargaining practices are exercised in relation to the current and qualifying predicate offenses.

For example, under section 2408 (and current law), a small-scale drug sale would qualify as a predicate drug trafficking offense if the defendant pleaded to a felony, even if a probation sentence was imposed. In contrast, if the same defendant had been permitted to plead to simple possession (generally a misdemeanor), it would not count as a predicate offense, even if the defendant had been sentenced to and actually served a year in prison. Similarly, a defendant who engaged in an aggravated assault might later be determined to have committed a violent crime if the prosecutor insisted on a plea to that charge, even though the defendant received probation. Had the defendant successfully negotiated a plea to simple assault, the offense would not be countable under the three-time loser provisions, even if a sentence of imprisonment had been imposed.

The way in which the current offense is charged, rather than the nature and severity of the underlying conduct, similarly will affect whether the three-time loser provisions apply. Section 2408 is particularly susceptible to disparate application due to the manner in which prosecutorial discretion is exercised prior to sentencing for the current offense. The mandatory life sentence under that provision is triggered only if the prosecutor files an information with the court setting forth the predicate offenses qualifying the defendant for sentencing as a three-time loser. In its study of mandatory minimum penalties, the Commission found that prosecutors did not seek enhanced penalties for drug offenses based

upon prior convictions approximately 63 percent of the time.<sup>11</sup> Consequently, if similar patterns hold, the three-time loser penalties embodied in section 2408 would apply to less than one-half the cases meeting the statutory criteria.

Another permissible exercise of prosecutorial discretion that could impact greatly on the frequency with which defendants meeting the criteria of either three-time loser provision are actually sentenced to life is that of prosecutorial substantial assistance motions under 18 U.S.C. § 3553(e) or Federal Rule of Criminal Procedure Rule 35(b). Under current law and the guidelines, these departures can occur only upon the prosecutor's initiative. Substantial assistance departures from the analogous three-time loser, career offender guideline occur at a significantly higher rate than the rate for all substantial assistance departures under the guidelines. Specifically, in FY 1993 the rate of substantial assistance departures from the career offender guideline was 22.5 percent, compared to 16.9 percent for all guideline cases; in FY 1992, it was 19.3 percent, compared to 15.1 percent for all cases.<sup>12</sup> Based on these data, if prosecutors initiate substantial assistance departures under a three-time loser provision at a rate similar to or exceeding the departure rate from the somewhat analogous career offender guideline, it should be expected that more than one-fifth of the defendants meeting three-time loser criteria in fact will not receive life sentences because of prosecutor substantial assistance motions.

4. *Application to defendants who are not three-time recidivists.* Contrary to the manner in which they tend to be described, the three-time loser provisions are not limited in their application to three-time *recidivists*. That is to say, they do not apply solely to those individuals who, at the time of sentencing in federal court, have twice before been processed through, and failed to learn their lessons from, the state and/or federal criminal justice system (each time committing new serious crimes after the prior sentence).

Section 5111 is perhaps more accurately described as a multiple offense enhancement provision, requiring only that the defendant "[have] been *convicted* of a violent felony on 2 or more prior occasions" (*emphasis added*). The section does not require that the prior convictions be for offenses separated by an arrest (much less a conviction and sentence). Nor does it require that the defendant have committed the current federal offense following criminal justice system intervention for the two prior offenses. Indeed, all three offenses may have occurred essentially on the same occasion, provided they were sequentially processed to produce convictions on three different occasions (with the federal conviction being the last obtained, even if the federal offense might have been the first committed).

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<sup>11</sup>See Mandatory Minimum Report, *supra* note 4.

<sup>12</sup>These departure rates do not include post-sentencing substantial assistance reductions under Rule 35(b). Hence, the combined rate of substantial assistance departures would be higher.

For example, a defendant may have burglarized three warehouses on the same night, the first on a military base and the other two on private property just outside the base gate. If, through arrangement of state and federal prosecutors, the state first convicts the defendant of the two private property burglaries in separate proceedings, then the defendant's subsequent conviction in federal court of the military warehouse burglary (the first of the three offenses committed) would result in a life sentence. As this example illustrates, section 5111's construction permits applications that are at odds with its ostensible purpose of removing permanently from society only those who commit a serious violent offense after two or more unrepentant experiences with the criminal justice system for similar conduct.

Section 2408 comes closer to being a true recidivist enhancement. Unlike section 5111, it does require that the current offense actually have been committed "after 2 or more prior convictions for a felony drug offense or crime of violence . . . have become final." It does not require, however, that the predicate offenses be separated from one another by any criminal justice intervention — *i.e.*, arrest, conviction, or service of sentence. Consequently, section 2408 in reality is only a "two-time loser" provision because it would apply to a defendant previously convicted on only one occasion of two or more violent or drug offenses.

5. *Disproportionate impact on Native Americans.* In general, violent offenses against persons are infrequently prosecuted in federal court because of limited federal jurisdiction. When federal prosecutions do occur for such offenses, a high percentage of defendants are Native Americans.<sup>13</sup> For example, according to FY 1992 sentencing data, 58 percent of those convicted in federal court of crimes of personal violence (murder, attempted murder, manslaughter, aggravated assault, robbery of an individual, bank robbery involving murder or kidnapping, and rape/aggravated sexual abuse) were Native Americans. For these crimes of personal violence, the frequency obviously is far greater than their presence in the general United States population (about .8 percent according to 1990 census data). Table I shows the frequency with which Native Americans were represented among federal defendants sentenced for these offenses. It follows, then, that the enactment of a three-time loser provision aimed at those convicted of a third crime of personal violence can be expected to impact somewhat disproportionately on Native Americans.

6. *Definitional inconsistencies, likelihood of extensive litigation.* The definition of crime of violence in proposed section 2408 is somewhat different from the definition of violent felony in proposed section 5111. Without any explanatory rationale, both definitions depart somewhat from the existing definition in 18 U.S.C. § 16, but that definition itself has no current use in federal recidivist statutes. Neither provision employs the definition of violent felony in 18 U.S.C. § 924(e) that has established usage and a relatively well-developed body

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<sup>13</sup>See 18 U.S.C. § 1153, outlining certain offenses that are considered "major Indian crimes" prosecutable in federal court.

of case law in the context of a major recidivist statute applicable to armed career criminals and the career offender sentencing guidelines. After experimenting with other formulations, the Commission settled on a definition of "crime of violence" virtually identical to that in 18 U.S.C. § 924(e) (except that the Commission definition excludes non-residential burglary) because of its accepted usage in the recidivist context and because it more effectively targets those offenses that involve actual or attempted personal violence or a serious potential risk of physical injury to persons.<sup>14</sup>

The introduction of new and different definitional criteria is likely to lead to extensive litigation over a period of years as courts attempt to flesh out the intended meaning of new terminology, with little or no legislative history at this stage indicating how Congress intends the terms to be interpreted in relation to current law. Moreover, the varying definitions of crimes of violence inevitably will lead to confusion and inconsistent application. If enacted, the courts potentially will have to deal with six or more definitions of "crime of violence/violent felony" in various contexts: (1) 18 U.S.C. § 16 (bail release decisions), (2) 18 U.S.C. § 924(c) (use of firearm in connection with crime of violence), (3) 18 U.S.C. § 924(e) (violent felony, Armed Career Criminal Act), (4) USSG §§4B1.1-1.2 (career offender sentencing guidelines), (5) proposed section 2408, and (6) proposed section 5111.

The provisions also invite protracted litigation because determinations of whether an offense is violent may require courts to consider not only the elements of present and prior offenses of which the defendant stands convicted, but also the underlying conduct surrounding those convictions. While a "real offense" approach is clearly desirable, insofar as determining the severity of the current offense, the approach is fraught with problems when applied in a recidivist statute to offenses that may have been committed long ago. For example, prior convictions may have resulted from guilty pleas and consequently little or no record may exist to describe the real offense facts. Key prosecution and/or defense witnesses and/or physical evidence may no longer be available, and memories of witnesses may have become stale. These and other practical problems will make district court determinations difficult, time consuming, and disparate. Numerous appeals also can be expected.

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<sup>14</sup>USSG §4B1.2 defines "crime of violence" as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

## **Recommendations**

A three-time loser provision arguably would address a greater need in states that do not have a real-time sentencing guideline system like the federal system and that grant early parole and/or overly generous good-time release. The federal system, however, already has real-time, non-parolable sentences, mandatory sentencing guidelines, and the functional equivalent of a three-time loser provision in the form of a career offender guideline. In view of these reforms that Congress has already instituted, the need for the proposed new statutory provisions has not been firmly established.

**Table I**

**Guideline Cases Involving Federal Felony Convictions for Personal Violence  
(October 1, 1991, through September 30, 1992)**

TITLE 18 U.S.C. §	Description	RACE OF DEFENDANT							
		TOTAL		Native American		Other		(missing)	
		n	%	n	%	n	%	n	%
<b>TOTAL</b>		<b>235</b>	<b>100.0</b>	<b>136</b>	<b>57.9</b>	<b>88</b>	<b>37.5</b>	<b>11</b>	<b>4.7</b>
<b>113(a),(b), or (c)</b>	Aggravated Assault	<b>64</b>	<b>100.0</b>	<b>33</b>	<b>51.6</b>	<b>26</b>	<b>40.6</b>	<b>5</b>	<b>7.8</b>
<b>1111</b>	Murder	<b>52</b>	<b>100.0</b>	<b>26</b>	<b>50.0</b>	<b>23</b>	<b>44.2</b>	<b>3</b>	<b>5.8</b>
<b>1112</b>	Manslaughter	<b>49</b>	<b>100.0</b>	<b>39</b>	<b>79.6</b>	<b>8</b>	<b>16.3</b>	<b>2</b>	<b>4.1</b>
<b>1113</b>	Attempted Murder	<b>5</b>	<b>100.0</b>	<b>2</b>	<b>40.0</b>	<b>3</b>	<b>60.0</b>	<b>0</b>	<b>0.0</b>
<b>2111</b>	Robbery of an individual	<b>9</b>	<b>100.0</b>	<b>0</b>	<b>0.0</b>	<b>8</b>	<b>88.9</b>	<b>1</b>	<b>11.1</b>
<b>2113(e)</b>	Robbery/Murder	<b>3</b>	<b>100.0</b>	<b>0</b>	<b>0.0</b>	<b>3</b>	<b>100.0</b>	<b>0</b>	<b>0.0</b>
<b>2241(a) or (c)</b>	Aggravated Sexual Abuse	<b>53</b>	<b>100.0</b>	<b>36</b>	<b>67.9</b>	<b>17</b>	<b>32.1</b>	<b>0</b>	<b>0.0</b>

SOURCE: U.S. Sentencing Commission — Fiscal Year 1992 Data File.

Congress, therefore, might consider a more studied approach of first assessing the adequacy of the existing sentencing reforms in the federal system, including the career offender guideline, together with existing statutory recidivist provisions (such as the Armed Career Criminal Act), before enacting a mandatory life sentence for three-time recidivists. As an alternative to the Senate-passed provisions, the Commission could be instructed to undertake promptly such an assessment and report to Congress its findings.

If Congress determines nevertheless that a statutory three-time recidivist provision is necessary, the provision should be constructed along the following lines to achieve results more compatible with Sentencing Reform Act goals:

a. In lieu of a single comprehensive "crime of violence" definition, consideration should be given to listing the specific qualifying offenses by generic types. For example, a list similar to that in section 611 of the crime bill pertaining to predicate street gang crimes might be used. That list includes murder, voluntary manslaughter, kidnapping, robbery, extortion, arson, and certain other federal or state crimes punishable by more than one year (it should include aggravated sexual abuse/rape as well). A listing by generic types in lieu of a single definition of crime of violence would ensure that less serious offenses are excluded and avoid litigation over whether particular offenses met the definition.

b. If the provision is to reflect accurately its billing, it should be constructed as a true, three-time recidivist provision. At a minimum, this would require that prior qualifying offenses and the current offense each be separated from one another by an intervening arrest.

c. To minimize disparate impact based on the manner in which prosecutorial discretion is exercised, the provision should apply based on a *court* determination that the defendant stands convicted of the requisite current and former crimes. That is, its application should not depend on whether the prosecutor files an information setting forth the qualifying predicate convictions, as that procedure has been shown to produce widely inconsistent application.

d. Particularly if Congress elects to use a broad definition of crime of violence, consideration might be given to requiring that the prior qualifying convictions have resulted in sentences to a minimum imprisonment term. While such a feature potentially would introduce some disparity as applied to state offenses and federal, pre-guideline sentences, it is consistent with the apparent intent of the provisions to impose a maximum imprisonment sentence on those who have been imprisoned on two prior occasions for violent offenses and yet commit a third violent (or drug, in the case of section 2408) offense.

### **Prison Impact**

In comparison to current law, the proposed three-time loser provisions can be expected to increase substantially federal prison population. However, because the principal effect of the provisions would be to increase sentences for defendants who are already sentenced to lengthy

incarceration periods under the Armed Career Criminal Act and the career offender sentencing guideline, the effect of these provisions generally will not be felt for some time.

The Commission used its prison impact model to estimate the long-term (approximately 30-year) impact of the two proposals.<sup>15</sup> Proposed section 5111 is estimated under the model to increase average time served by affected defendants from approximately 15 years under current sentencing policy to 33.6 years imprisonment, an increase of 124 percent. The proposal would increase long-term federal prison population by about 5,285 inmate years or 3.9 percent. Proposed section 2408 is estimated under the model to increase average sentence length for affected defendants from 15.4 years under current sentencing policy to 30.3 years, an increase of 96.8 percent in average time served. The proposal would increase long-term federal prison population by about 10,286 inmate-years or 7.6 percent. Tables II and III summarize these impacts.<sup>16</sup>

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<sup>15</sup>The impact assessments were based on FY 1992 sentencing data and an assumption that defendants currently sentenced under the guidelines as career offenders and/or as armed career criminals would approximate the class of persons subject to the three-time loser provisions. This assumption may understate the likely effect of the provisions in the following respects: (1) prior, very dated convictions are not counted under the career offender guideline but would count under the proposed statutory provisions regardless of how long ago they occurred; (2) juvenile adjudications are not counted under the guideline but would be under section 2408; (3) prior convictions that were closely "related" or handled together for trial or sentencing may be counted under the guidelines as one prior "case"; (4) the definition of crime of violence under the career offender guideline may be somewhat narrower; and (5) crimes of violence are included under the guideline only if the offense of conviction is itself such a crime, whereas the statutory provisions seemingly require consideration of underlying conduct. On the other hand, the assumption may overstate the likely impact in other respects: (1) the career offender guideline includes prior violent or drug trafficking offenses if punishable by more than one year, while the statutory provisions have a five- (section 5111) or ten-year (section 2408) threshold requirement for crimes of violence, and (2) the guideline does not depend on filing of a prosecutorial information setting forth prior convictions, whereas section 2408 does. For all of these reasons and others, the impact estimates must be considered only rough approximations of the likely impact of the provisions.

<sup>16</sup>If both provisions were enacted, their combined impact would not be fully additive. Roughly speaking, section 2408 subsumes section 5111; however because of definitional differences and different implementation procedures, their combined impact probably would be somewhat greater than for section 2408 alone.

**Table II****§5111: Mandatory Life Imprisonment for "Three-Time Losers"**

	Number of Defendants Sentenced (per year)	Time-to-be-Served				Change	
		Pre-Amendment		Post-Amendment		Person-years*	Percent
		Person-years*	Average Sentence (in years)	Person-years*	Average Sentence (in years)		
Impacted Defendants	284	4,264	15.0	9,549	33.6	5,285	124.0
Aggregate Impact	36,845	135,770	3.7	141,055	3.8	5,285	3.9

\* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

**Table III****§2408: Mandatory Life Imprisonment for "Three-Time Losers"**

	Number of Defendants Sentenced (per year)	Time-to-be-Served				Change	
		Pre-Amendment		Post-Amendment		Person-years*	Percent
		Person-years*	Average Sentence (in years)	Person-years*	Average Sentence (in years)		
Impacted Defendants	689	10,622	15.4	20,908	30.3	10,286	96.8
Aggregate Impact	36,845	135,770	3.7	146,056	4.0	10,286	7.6

\* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

## *Gun Crime Penalties*

### **Sec. 401. Enhanced Penalty for Use of a Semiautomatic Firearm During a Crime of Violence or a Drug Trafficking Crime.**

#### **Brief Description of Provision**

Directs the Sentencing Commission to amend the sentencing guidelines to provide "an appropriate enhancement of the punishment" otherwise applicable for a crime of violence or a drug trafficking crime if a semiautomatic firearm was involved.

#### **Current Statutory Law**

Section 924(c) of title 18 currently prohibits using or carrying a firearm (including a semiautomatic) during and in relation to a crime of violence or drug trafficking crime. For most cases, the penalty for this offense is a mandatory five years' imprisonment for the first conviction. Offenses involving enhanced-danger firearms (e.g., short-barreled firearms) receive a mandatory ten-year penalty for the first conviction; automatic firearms (e.g., machineguns), silencers, and destructive devices (e.g., pipebombs) receive a mandatory 30-year penalty for the first offense. All of these penalties are served consecutively to the prison term for any underlying offense of which the defendant is also convicted. If an underlying offense has not been charged, the unvarying or "flat" section 924(c) penalty is, regardless of underlying offense seriousness, the sentence to be served.

From the standpoint of the Sentencing Reform Act goal of ensuring that similar defendants committing similar crimes are similarly punished, these features of the current section 924 statutory scheme are important. Prosecutors do not always charge section 924(c) in cases involving firearms,<sup>17</sup> and sometimes they charge a section 924(c) offense but do not charge the underlying crime in which the firearm was used. These discretionary prosecutorial decisions substantially affect the resulting sentence that is statutorily permissible and required for like criminal behavior. They also have ramifications for the manner in which the sentencing guidelines apply.

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<sup>17</sup>Failure to charge section 924(c) can occur both because it is not applicable to some offenses involving firearms and because the prosecutor has made a subjective decision not to pursue the section 924(c) charge in instances when it could apply. The Sentencing Commission's comprehensive study of federal mandatory minimum penalties found, for example, that in 45 percent of the drug cases that appeared to warrant application of section 924(c)'s mandatory penalty for firearms, no gun charges were filed. See Mandatory Minimum Report, *supra* note 4, at 57.

## Operation of the Sentencing Guidelines

Guidelines that prescribe sentences for most crimes of violence (e.g., robbery (§2B3.1), drug trafficking (§2D1.1), and firearms (§2K2.1)), contain substantial penalty increases for possession or use of a dangerous weapon. As with all aggravating factors under the guidelines, these increases for dangerous weapons are proportionate to the seriousness of the underlying offense. Thus, using a firearm during the commission of a felony will result in a guideline sentence enhancement that is greater than the five years typically resulting from an accompanying conviction under section 924(c) if the underlying offense is a particularly serious one, and perhaps a smaller enhancement if the offense is less serious. The guidelines for underlying violent crimes and drug trafficking offenses do not presently distinguish among type of firearm used. For example, a firearm brandished during the course of a robbery will result in an enhancement of five offense levels (about a 63 percent increase in sentence), regardless of the type of firearm used. On the other hand, the guideline for firearm possession and trafficking offenses presently provides an enhancement of four offense levels (about a 50 percent increase) if the firearm is of the more dangerous type regulated by the National Firearms Act.

The guidelines also address instances when the defendant is convicted of a section 924(c) count in addition to an underlying violent, drug trafficking, or firearms possession/trafficking offense. For cases in which 18 U.S.C. § 924(c) is charged and a conviction obtained, section 2K2.4 of the guidelines provides that the mandatory minimum penalty established by section 924(c) is added to (or if an underlying offense has not been charged, becomes) the guideline sentence.

This gives effect to the statutory command that the penalty for a violation of section 924(c) must run consecutively to any term of imprisonment imposed for an underlying offense. However, in order to avoid double punishment within the guidelines scheme, the weapon enhancement in the guidelines for underlying offenses is not to be applied when there is a conviction under section 924(c).

## Discussion

In response to the proposed directive, the Sentencing Commission will continue accommodating within the guidelines a mixed system of fixed, flat mandatory minimum penalties for certain conduct as well as guideline adjustments for similar conduct. This mixed sentencing system requires guidelines that are more complex for courts and practitioners to use than would be the case in the absence of mandatory minimums for section 924(c) counts. Moreover, no amount of accommodation in the guidelines can fully account for the prosecutorial discretion that arises as a consequence of this mixed system

— prosecutorial discretion that, as discussed further below,<sup>18</sup> has been found to foster unwarranted sentencing disparity.

For example, in response to the directive, the guidelines might ultimately be structured to (1) continue providing the present adjustment for the use of any firearm, regardless of type (*e.g.*, a 2-level adjustment), and (2) add a separate adjustment based on the type of firearm (*e.g.*, an additional 2-level adjustment for offenses involving a semiautomatic firearm).<sup>19</sup>

In this kind of mixed system, Table IV demonstrates how penalties might vary in a bank robbery case<sup>20</sup> depending on whether the prosecutor charged the section 924(c) offense. The table considers cases involving both manual and semiautomatic firearms.

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<sup>18</sup>See discussion of sections 2405, 2407, and 4502.

<sup>19</sup>Consistent with the current guideline approach of avoiding double counting, the guidelines likely would provide that when a defendant is convicted under 18 U.S.C. § 924(c), no adjustment in the guideline for the underlying offense based on the use or possession of the firearm or the type of the firearm would apply (or alternatively, only the adjustment based on semiautomatic type would apply).

<sup>20</sup>The scenarios assume a bank robbery in which a firearm was brandished but no injuries were inflicted, less than \$10,000 was taken, the defendant did not accept responsibility for the offense, and the defendant was in Criminal History Category II.

**Table IV**

<b>Charging Decision With Respect to section 924(c)</b>	<b>Guideline Sentence When Offense Involves Manual Firearm</b>	<b>Guideline Sentence When Offense Involves Semiautomatic Firearm<sup>21</sup></b>
18:924(c) is not charged	78-97 months <sup>22</sup>	97-121 months
18:924(c) is charged <sup>23</sup>	46-57 months plus 5 years consecutive	57-71 months plus 5 years consecutive
18:924(c) is the only offense charged <sup>24</sup>	5 years	5 years

**Recommendations**

The proposed directive to the Commission is generally in a form that can be implemented by the Commission consistent with the structure of the guidelines. In this

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<sup>21</sup>The guideline range for semiautomatic firearm use in cases in which section 924(c) is not charged assumes that the Commission implements the directive contained in section 401 by providing an additional two-level increase for the semiautomatic nature of the firearm, and that this enhancement would apply whether or not the defendant is convicted of a section 924(c) count if the court determines a semiautomatic firearm was involved.

<sup>22</sup>In this example, the "real offense" aspect of the guidelines would increase the sentence for the underlying drug offense by approximately 25 percent, even though 18 U.S.C. § 924(c) was not charged.

<sup>23</sup>Because section 924(c) is charged in this example and thus the five-year consecutive penalty would apply, the guideline range does not include an additional enhancement for the firearm.

<sup>24</sup>The guideline "range" when section 924(c) is the *only* offense charged — i.e., no underlying offense has been charged — is section 924(c)'s flat, fixed penalty. Commission research indicates that both of these selective charging practices — dropping or failing to charge either the underlying offense or the section 924(c) gun conduct — occur and result in sentences that are lower than would otherwise apply if *both* offenses were charged.

regard, and from the standpoint of the objectives Congress enunciated in the Sentencing Reform Act,<sup>25</sup> the proposed directive is an improvement over previous provisions that would have created a new mandatory consecutive sentence for this offense.

On the other hand, Congress could reasonably conclude that current guideline base offense levels and adjustments already adequately account for semiautomatic firearms. The guideline penalties generally have been designed to address the "heartland"<sup>26</sup> for each offense; that is, they are designed to cover typical cases. Information available to the Sentencing Commission indicates that between 50 and 70 percent of firearms in use today have a semiautomatic function. Even a revolver can be classified as a semiautomatic weapon. Thus, the heartland of firearms offenses appears to involve semiautomatic firearms, and this heartland arguably has been fully captured in the current guideline base offense levels and adjustments.<sup>27</sup> Hence, when examining the issue in this way, a more measured alternative to the directive in section 401 would be to direct the Commission to study and report to Congress on sentence adequacy for offenses involving semiautomatic weapons. The directive could further instruct the Commission to amend the guidelines "as necessary" in light of the Commission's findings.

Should Congress decide, however, to maintain the directive in its current form, the Commission certainly stands ready to implement the congressional will. However, punishment meted out for using semiautomatic weapons to commit crimes will continue to be heavily dependent on the manner in which prosecutorial discretion is exercised regarding related section 924(c) counts. To address these broader concerns, Congress might consider an amendment to section 924(c) that would establish a range of applicable penalties for semiautomatic firearm use.<sup>28</sup> A range would allow the guidelines to vary punishment according to the seriousness of the offense when a section 924(c) offense is the only offense charged, thereby avoiding the problem of creating a guideline enhancement for semiautomatic weapon use that in some circumstances might not be susceptible to

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<sup>25</sup>See especially 28 U.S.C. §§ 991, 994-95. See also Senate Report, *supra* note 6, at 50-60; Mandatory Minimum Report, *supra* note 4.

<sup>26</sup>See USSG Ch. 1, Pt. A (4)(b), intro. comment.

<sup>27</sup>Perhaps of some relevance to this observation is the fact that the Senate-passed crime bill does not propose any across-the-board increase in section 924(c) penalties for firearms of a semiautomatic type, but, rather, increases those penalties only when a semiautomatic assault weapon is involved. See discussion of section 4502, *infra*.

<sup>28</sup>As noted, the only penalty for first-time semiautomatic use under section 924(c) is a flat, five-year penalty. Section 4502 of the Senate crime bill would provide a flat, ten-year penalty for semiautomatic assault weapon use.

implementation by the sentencing court.<sup>29</sup> For example, a range working up from the current floor of five years to a maximum of ten years might be considered for semiautomatic weapon use.

This step would generally increase the compatibility between the guidelines and cases involving section 924(c) counts, and, in particular, would lessen the risk of differing sentencing outcomes due to subjective charging decisions by individual prosecutors. At the same time, because the guidelines *do* substantially enhance sentences when an underlying offense involves firearm use, albeit in an incremental and proportionate manner, this approach would not sacrifice the tough, certain, and *consecutively* assessed punishment for firearms that Congress quite understandably is seeking.

### Prison Impact

Section 401 directs the Commission to provide an appropriate enhancement for the use of a semiautomatic weapon during the commission of a crime of violence or a drug trafficking offense.

While it is uncertain how the Commission would amend the guidelines in response to this amendment, it was assumed that the Commission would increase offense levels by two if the firearm involved was a semiautomatic and that this enhancement would apply even if the defendant also was convicted of a section 924(c) offense. The guidelines for which this enhancement would be applicable are: §§2A2.2, 2A2.3, 2A2.4, 2A4.1, 2B3.1, 2D1.1, 2D1.11, and 2K2.1. Each of these guidelines represents either a crime of violence or a controlled substance offense.

Because the data currently collected by the Commission do not include information describing the type of firearm involved,<sup>30</sup> four different assumptions were made to model the provision's impact: (1) all firearms are semiautomatic; (2) 75 percent are semiautomatic; (3) 50 percent are semiautomatic; and (4) 25 percent are semiautomatic. Table V summarizes the impact of this proposed amendment under these alternative assumptions.

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<sup>29</sup>A guideline provision requiring an increase in the sentence for semiautomatic weapon use would be ineffectual for cases (1) in which the guideline sentence for the underlying offense was *already* at or near the statutory maximum penalty for that offense due to the presence of other aggravating factors, and (2) when a section 924(c) count alone was charged. Coupling the directive with an amendment creating a statutory range in section 924(c) would help to address these problems.

<sup>30</sup>While case documents could be reviewed to extract this information, this undertaking would be labor intensive and time consuming.

**Table V**

**§401: Enhanced Penalty for Use of Semi-Automatic Weapons**

	Percent Applicability	Number of Defendants Sentenced (per year)	Time-to-be-Served				Change	
			Pre-Amendment		Post-Amendment		Person-years*	Percent
			Person-years*	Average Sentence (in years)	Person-years*	Average Sentence (in years)		
Impacted Defendants	100	3,462	33876	9.8	40,035	11.6	6,559	18.2
	75	2,597	25407	9.8	30,026	11.6	4,619	18.2
	50	1,731	16938	9.8	20,018	11.6	3,080	18.2
	25	866	8469	9.8	10,009	11.6	1,540	18.2
Aggregate Impact	100	36,845	135,770	3.7	141,929	3.9	6,559	4.5
	75	36,845	135,770	3.7	140,389	3.8	4,619	3.4
	50	36,845	135,770	3.7	138,849	3.8	3,080	2.3
	25	36,845	135,770	3.7	137,309	3.7	1,540	1.1

\* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

SOURCE: United States Sentencing Commission — fiscal year 1992 data file.

As the table displays, defendants sentenced pursuant to §§2A2.2, 2A2.3, 2A2.4, 2A4.1, 2B3.1, 2D1.1, 2D1.11, and 2K2.1 who received an enhancement for involvement of a firearm currently serve an average of 9.8 years imprisonment. If section 401 were enacted and the aforementioned guidelines were amended to include a two-level enhancement for involvement of semiautomatic weapons, these defendants could expect to serve an average of 11.6 years imprisonment. The proposed amendment therefore would increase time served for these defendants by approximately 18.2 percent. Over the long term (approximately 30 years), it could be expected that the federal prison population would increase by as much as 6,559 inmates or approximately 4.5 percent (100% of the firearms being semiautomatic), or as little as 1,540 inmates or approximately 1.1 percent (25% of the firearms being semiautomatic).

**Sec. 413. Enhanced Penalties for Firearms Possession by Violent Felons and Serious Drug Offenders.**

**Brief Description of Provision**

Directs the Commission to amend the guidelines to "appropriately enhance penalties" in cases in which a defendant convicted under 18 U.S.C. § 922(g) has one or two prior convictions for a "violent felony" or "serious drug offense" (as defined under 18 U.S.C. § 924(e)(2)).

**Current Statutory Law**

Section 922(g) of title 18, commonly called the "felon in possession" statute, makes it an offense for certain persons, including convicted felons, to possess a firearm. Persons convicted of violating 18 U.S.C. § 922(g) are subject to a maximum term of imprisonment of ten years, regardless of prior criminal history. No mandatory minimum penalty applies to this offense (unless the defendant is determined, under 18 U.S.C. § 924(e), to be an Armed Career Criminal; *i.e.*, a section 922(g) defendant with three or more prior convictions for a violent felony or serious drug offense).

**Operation of the Sentencing Guidelines**

The principal firearms guideline (§2K2.1) currently provides substantial penalties for a felon who possesses a firearm in contravention of 18 U.S.C. § 922(g) after previously being convicted of one or more "crime[s] of violence" or "controlled substance offense[s]." The firearms guideline draws its definitions of "crime of violence" and "controlled substance offense" from 18 U.S.C. § 924(c), 28 U.S.C. § 994(h), and from the criminal history provisions of Chapter Four of the guidelines.

## Discussion

The proposed directive is generally in a form that can be implemented by the Commission consistent with the structure of the guidelines. However, it requires penalty enhancements for which the guidelines already generally provide, and because it uses terms (and accompanying definitions) that are different from the current, parallel guideline terms, it would likely bring confusion to this area of guideline application.

The directive requires a penalty enhancement when a felon in possession of a firearm has either one or two prior convictions for a "serious drug offense" or "violent felony." The directive's definition of "serious drug offense" derives from 18 U.S.C. § 924(e). This proposed definition is narrower than the definition of "controlled substance offense" currently used in the guidelines. The current guideline definition requires only that the drug offense be punishable as a controlled substance trafficking offense; the proposed new definition requires that the drug offense (whether federal or state) have a maximum term of imprisonment of ten years or more. Thus, the proposed definition precludes, for example, counting a federal conviction under 21 U.S.C. § 843(b) (four-year statutory maximum for use of communication facility to facilitate distribution or manufacture of controlled substance), an offense to which many drug traffickers historically have negotiated a guilty plea. Further, where one state has a five-year maximum for certain drug conduct while another state has a ten-year maximum for the identical conduct, the proposed definition would produce disparate results.

The proposed definition of "violent felony" is broader than the current guideline definition of "crime of violence." The former counts any burglary, including a burglary of an abandoned commercial building which typically would involve little risk of personal harm to victims. The latter counts only burglaries of a dwelling which, because dwellings are by definition a place where people reside, does inherently involve a substantial risk of harm.

## Recommendations

From the standpoint of principles Congress enunciated in the Sentencing Reform Act of 1984, the directive is preferable to mandatory minimums penalties proposed in past crime bills. However, because the guidelines already contain sentencing enhancements for conduct highly similar to that targeted by the directive, Congress may wish to take a more gradual approach than requiring that the Commission "shall amend" the guidelines at this juncture. Directing the Commission to "study and, as necessary, amend the guidelines" to ensure that penalties are adequate would permit a more informed decision by the Commission and Congress as to whether further penalty increases are needed. At the same time, this modified version of the proposed directive would ensure that if sentence inadequacy is found, a guideline amendment would be made. Congress could add to the directive a requirement that the Commission "report to Congress on the results of its study" to foster Congress's ability to maintain oversight in this area.

If this section is enacted, it is strongly recommended that the directive be modified to use the guideline terms "crime of violence" and "controlled substance offense" in lieu of "violent felony" and "serious drug offense," respectively. This modification would, as noted, avoid confusion and inconsistent application.

**Sec. 2405. Mandatory Prison Terms for Use, Possession, or Carrying of a Firearm or Destructive Device During a State Crime of Violence or State Drug Trafficking Crime.**

**Brief Description of Provision**

Adds a new paragraph "(4)(A)" to 18 U.S.C. § 924(c) to expand the scope of this provision to cover state crimes involving the use of a firearm. Specifically, requires a flat, mandatory ten-year term of imprisonment for possession of firearm during and in relation to a "crime of violence" or "drug trafficking crime" if the crime can be prosecuted in a state court. (The new provision would mandate penalties of 20 years for discharge of a firearm in connection with a state law offense, and 30 years for possession of enhanced-danger firearms (e.g., machinegun) in connection with a state law offense. In the case of a second conviction, the mandatory terms increase to 20 years, 30 years, and life, respectively). Instead of making it an offense to "use or carry" a firearm in connection with a crime of violence or drug trafficking offense, as is the case with existing law involving underlying *federal* offenses, this provision punishes those who "knowingly possess" a firearm in connection with an underlying state crime.

**Current Statutory Law**

Section 2405 would establish new federal offenses. Current law (18 U.S.C. § 924(c)) provides for a mandatory, consecutive five-year prison term for using or carrying a firearm in relation to a federal crime of violence or drug trafficking offense but does not make it a federal crime to use a firearm in connection with an underlying *state* law offense.

**Operation of the Sentencing Guidelines**

Guidelines for crimes of violence (e.g., Robbery (§2B3.1)), drug trafficking offenses (§2D1.1), and firearms offenses (§2K2.1) provide substantial penalty enhancements for possession or use of a dangerous weapon in connection with an underlying offense. However, because possession of a firearm in connection with a state law crime is not now a federal offense, there are not as yet guidelines to govern sentencing for the offenses that would be established by section 2405.

## Discussion

The mandatory minimum penalties in Section 2405 have the kind of structural features that the Sentencing Commission's 1991 mandatory minimum report<sup>31</sup> found can undercut consistent and proportionate sentencing.

*Charge-based Disparity* — As noted, although federal law currently does not make it an offense to possess a firearm in connection with a *state* drug trafficking offense or *state* crime of violence, current federal law does make it an offense to use or carry a firearm in connection with a *federal* drug trafficking or violent offense. Moreover, virtually all *federal* drug trafficking offenses can be prosecuted under state law. Thus, if section 2405 were enacted, federal prosecutors generally would have a choice of characterizing a drug offense in which a gun was carried as *either* a violation of existing 18 U.S.C. § 924(c)(1) (involving an underlying *federal* drug trafficking offense) or a violation of the new section 924(c)(4)(A) established by section 2405 of the bill (involving an underlying *state* drug trafficking offense). This would exacerbate a problem of charge-based sentencing disparity that already exists. As will be discussed, the label that can be arbitrarily given to the offense — state or federal — will significantly affect the sentence.

It is already the case that, under the mandatory minimum penalties established by 18 U.S.C. § 924(c), an individual prosecutor can significantly affect the sentence by how a drug trafficking offense in which a gun was involved is charged, thereby creating an impact that may bear little or no relation to the underlying seriousness of the offense. Charging decisions, in other words, can cause similar offenders to be treated substantially differently.<sup>32</sup> Enactment of section 2405, which would allow a prosecutor to choose between seeking a five- or a ten-year enhancement for most drug trafficking offenses involving firearms, could be expected to compound this effect.

Table VI illustrates how a defendant could face strikingly different prison sentences depending on the prosecutor's charge selection if section 2405 were enacted. The table assumes that the defendant has been convicted of a fairly typical drug trafficking offense involving the sale of five kilograms of cocaine in which a gun was kept nearby by one of the sellers involved in the transaction.<sup>33</sup> (In the table, a charge under 18 U.S.C. § 924(c)(1)

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<sup>31</sup>Mandatory Minimum Report, *supra* note 4.

<sup>32</sup>See Table IV ("Manual Firearm" column) in discussion of Section 401 for an illustration of this effect under existing law.

<sup>33</sup>The example assumes that neither aggravating factors, such as the defendant's being a leader or organizer of the operation, nor mitigating factors, such as the defendant's minor role or acceptance of responsibility, apply. The example assumes relatively minor criminal history, placing the defendant in Criminal History Category II.

indicates that the prosecutor charged the gun conduct as occurring in conjunction with an underlying *federal* offense; a charge under proposed 18 U.S.C. § 924(c)(4)(A) indicates that the prosecutor charged the gun conduct as occurring in conjunction with an underlying *state* offense.)

The table shows that, with this charge-based mandatory sentencing scheme in place, sentences could range from a low of 60 months (5 years) to a high of 288 months (24 years) based almost exclusively on the prosecutor's charging decisions. Consistent with Congress's stated aim of seeking to reduce unwarranted sentencing disparity,<sup>34</sup> the sentencing guidelines are designed to minimize undue effects of charging decisions. However, as the table demonstrates, the guidelines' ability to even out the effects of charging decisions is sharply constrained when flat, mandatory minimums are built into federal sentencing law.

*Unwarranted Sentencing Uniformity* — A second concern regarding section 2405 is that its definitions of underlying conduct — *i.e.*, the definitions for "drug trafficking offense" and "crime of violence" — are sufficiently broad that dissimilar offenders would receive the same ten-year sentence. For example, "drug trafficking" will include simple possession of a controlled substance for personal use, if the state in which the offense occurred has a statutory maximum for simple possession of more than one year. (Research indicates that some states do have statutory maximums of more than one year for simple possession and some do not. This raises separate disparity concerns quite apart from charge-based disparity. It means that the same crime might or might not qualify for the ten-year penalty depending on the state in which it occurred.) "Crime of violence" is defined broadly to include not only crimes in which persons are threatened or harmed, but also property offenses such as stealing a radio from a car.

Thus, while section 2405's ten-year penalty would apply to the most serious categories of armed offenders, it would appear to apply equally to:

-- a person who bought a single dose of cocaine from his car window with a licensed firearm in the glove compartment;

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<sup>34</sup>See 18 U.S.C. § 991 (b)(1)(B); Senate Report, *supra* note 6, at 49-50 ("disparity [in sentencing] is fair neither to the offenders nor to the public"; it creates a "system that lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime").

-- a person who stole \$150 worth of roofing materials at night from a warehouse while carrying an unloaded revolver<sup>35</sup>.

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<sup>35</sup>Courts have consistently held that an unloaded gun satisfies the criteria for the mandatory enhancement under 18 U.S.C. § 924(c). See *United States v. Munoz-Fabela*, 896 F.2d 908 (5th Cir.), cert. denied, 111 S. Ct. 76 (1990); *United States v. Martinez*, 912 F.2d 419 (10th Cir. 1990); *United States v. Coburn*, 876 F.2d 372 (5th Cir. 1989); *United States v. York*, 830 F.2d 885 (8th Cir. 1987), cert. denied, 108 S. Ct. 1047 (1988); *United States v. Gonzalez*, 800 F.2d 895 (9th Cir. 1986).

Table VI

**Sentencing Impact of Prosecutorial Charging Decision  
Under Amended 18 U.S.C. § 924(c)**

Charging Decision	Guideline Sentence
Underlying federal drug trafficking offense is the only offense charged <sup>36</sup>	168-210 months
18:924(c)(1) and underlying federal drug trafficking offense charged <sup>37</sup>	135-168 months plus 5 years consecutive
18:924(c) is the only offense charged <sup>38</sup>	5 years
18:924(c)(4)(A) and underlying federal drug offense charged <sup>39</sup>	135-168 months plus 10 years consecutive
18:924(c)(4)(A) is the only offense charged	10 years

<sup>36</sup>The Commission's mandatory minimum report, *supra* note 4, at 57, found that 45 percent of the time that a firearm mandatory minimum appeared applicable in a drug trafficking case the charge carrying the mandatory minimum was not filed. In such cases, the guidelines provide a "real offense" enhancement for gun possession that will increase the sentence for the underlying offense by about 25 percent.

<sup>37</sup>Because section 924(c)(1) is charged in this example and thus the mandatory consecutive five-year penalty would apply, the guideline sentence does not include an additional enhancement for the firearm.

<sup>38</sup>When section 924(c)(1) is the only offense charged, the guideline "range" is the flat, 60-month sentence mandated by this section.

<sup>39</sup>Because section 924(c)(4)(A) is charged in this example and thus the mandatory ten-year penalty would apply, the guideline range presumably would not also include an additional enhancement for the firearm.

## Recommendations

If Congress decides to federalize the state gun crimes targeted by section 2405, the sentencing goals Congress enunciated in the Sentencing Reform Act would be better served by eliminating the flat, fixed penalties now contained in the provision. The proposed mandatory minimum penalty approach will likely promote significant charge-based sentencing disparity and, coupled with the broad definitions for "drug trafficking offense" and "crime of violence," will penalize dissimilar offenders the same.

A better approach would be to set a statutory maximum for the offense and allow the sentencing guidelines to prescribe specific imprisonment ranges up to that maximum. As under the guidelines generally, the ranges would vary depending on the widely varying conduct and criminal history that violators of this provision could be expected to present.

## Additional Technical Issues

1. Section 2405 specifies a definition for "possession" of a firearm that may vary from the extensive case law interpreting the term "uses or carries" now found in section 924(c). For example, the requirement that the defendant touch the firearm possessed during a crime of violence may be construed to preclude conviction of a defendant who directs another to discharge a firearm at a police officer. On the other hand, the parent who, under pressure from her drug-dealing son, takes a phone message from a customer and relays it, while the son's revolver lies in a drawer nearby may be subject to the adjustment. For these reasons, Congress should consider abandoning this definitional departure from current law.

2. Section 2405 prohibits suspension of a sentence, but suspension of sentence is no longer an authorized procedure under the Sentencing Reform Act. Thus, the language proscribing suspension of sentences is unnecessary; no sentence may now be suspended under current law.

3. Section 2405 prohibits "release" for "any reason whatsoever" during the term of imprisonment. Release by parole is no longer authorized for any sentence imposed under the sentencing guidelines, and other releases are restricted to limited circumstances (*e.g.*, to attend the funeral of a relative, or to receive authorized training not available in the institution), subject to the discretion of the Bureau of Prisons and consistent with Commission policy statements and existing law under 18 U.S.C. § 3622. This provision should be deleted as unnecessary.

## Prison Impact

In contrast to provisions in the crime bill whose effect would be to alter penalties for existing federal offenses, section 2405 would establish new federal offenses. As a consequence, the Commission's prison impact model, which relies on data from sentences

imposed under current federal law, cannot provide an estimate of section 2405's prison impact.

However, analyzing published data, Commission staff sought to identify an approximation of the prison impact if federal enforcers sought to have section 2405 apply to a reasonably high percentage of the state law offenses to which it *could* apply. Table VII illustrates the findings.

Excluding drug offenses, burglaries, and other felonies in which a firearm may have been involved but for which reliable conviction data could not be found, Commission staff projected that section 2405 could be applied in 59,829 cases. Given that this number excludes certain frequently occurring gun cases — most notably drug cases involving firearms — the number cannot be said to reflect section 2405's full potential applicability. On the other hand, by including all state convictions for major categories of gun offenses,<sup>40</sup> the number does provide a sense of the provision's potential scope should federal authorities use it fully in cases that would arguably most justify higher federal penalties.

Based on this estimation of high usage, Table VII shows that section 2405 would increase the overall average of sentences served in the federal system from 3.7 years to 6.8 years. Total impact on the federal prison population would be to increase federal prison population by 383.9 percent over a period of about 9 years.

Prosecution of a high percentage of the state cases to which section 2405 could potentially apply would require a substantial allocation of enforcement resources apparently not yet provided for. For this reason, section 2405's impact on prison resources could be significantly less than projected in the high impact alternative summarized in Table VII. Unfortunately, there appear to be no reliable bases on which to predict which of the relatively large number of cases to which section 2405 potentially *could* apply will, in fact, be prosecuted federally if the provision is enacted.

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<sup>40</sup>For purposes of the analysis, convictions in which a firearm charge was the most serious charge, rapes, robberies, and aggravated assaults involving firearms were counted.

**Table VII**

**§2405: Mandatory Prison Terms for Use, Possession, or Carrying of a Firearm or Destructive Device  
During the Course of a State Crime of Violence or State Drug Trafficking Crime.  
(Alternative A: High Usage Impact)**

		Number of Defendants Sentenced (per year)*	Time-to-be-Served				Change	
			Pre-Amendment		Post-Amendment			
			Person- years**	Average Sentence (in years)*	Person- years**	Average Sentence (in years)*	Person- years**	Percent
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	--	--
	New Cases	59,829	--	--	521,183	8.7	521,183	--
	Total Cases	96,674	135,770	--	656,953	6.8	521,183	383.9

\* All defendants sentenced in federal court under the sentencing guidelines.

\*\* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

**SOURCE: United States Sentencing Commission — fiscal year 1992 data file.**

**Table VIII**

**§2405: Mandatory Prison Terms for Use, Possession, or Carrying of a Firearm or Destructive Device during the Course of a State Crime of Violence or State Drug Trafficking Crime.  
Alternative B: Low Usage Impact Scenarios**

		Number of Defendants Sentenced (per year)*	Time-to-be-Served				Change	
			Pre-Amendment		Post-Amendment		Person-years**	Percent
			Person-years**	Average Sentence (in years)*	Person-years**	Average Sentence (in years)*		
<i>Scenario 1</i>								
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	—	—
	New Cases	500	—	—	4,356	8.7	4,356	—
	Total Cases	37,345	135,770	—	140,126	3.8	4,356	3.2
<i>Scenario 2</i>								
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	—	—
	New Cases	1,000	—	—	8,711	8.7	8,711	—
	Total Cases	37,845	135,770	—	144,481	3.8	8,711	6.4
<i>Scenario 3</i>								
Aggregate Impact	Current Cases	36,845	135,770	3.7	135,770	3.7	—	—
	New Cases	1,500	—	—	13,067	8.7	13,067	—
	Total Cases	38,345	135,770	—	140,126	3.9	13,067	9.6

\* All defendants sentenced in federal court under the sentencing guidelines.

\*\* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

Nevertheless, to provide an illustration of potential impact if enforcement of section 2405 fell closer to the other end of the spectrum from that assumed in Table VII, Table VIII illustrates what might be called "low usage impact." It should be stressed that Table VIII's projections are not based on predictive data. They are simply different examples of possible impact if enforcement of section 2405 were to fall well short of its actual reach.

Scenario 1 assumes that only 500 section 2405 cases would be prosecuted annually. Under this scenario average time served for the federal prison population as a whole would increase from 3.7 to 3.8 years and aggregate prison population would grow 3.2 percent over about nine years. Scenario 2 assumes 1,000 section 2405 cases annually. Under this version of a low impact scenario, average time served for the federal prison population as a whole would still increase from about 3.7 to 3.8 years, but over time, prison population would grow 6.4 percent. Scenario 3 is the highest of these three low impact scenarios. It assumes annual prosecution of 1,500 section 2405 cases. Under this scenario, average time served by the federal prison population as a whole would increase from 3.7 years to 3.9 years, and, over time, prison population would grow 9.6 percent.

**Sec. 4502.                    Restriction on Manufacture, Transfer, and Possession of Certain Automatic Assault Weapons.**

**Brief Description of Provision**

Creates a new offense with a five-year maximum penalty that prohibits the manufacture, transfer, or possession of a semiautomatic assault weapon. Amends 18 U.S.C. § 924(c) to require a ten-year mandatory minimum for the use of a semiautomatic assault weapon in connection with a crime of violence or drug trafficking crime.

**Current Statutory Law**

Federal law generally does not prohibit the manufacture, transfer, or possession of domestically produced semiautomatic assault weapons. (Importation and assembly of imported parts of semiautomatic rifles or shotguns is prohibited under 18 U.S.C. §§ 922(r) and 925(d)(3).) Section 924(c) currently contains mandatory minimum penalties for the use of a firearm in connection with a crime of violence or drug trafficking crime, but no separate penalty is provided for semiautomatic assault weapons. Offenses involving semiautomatic assault weapons receive a mandatory prison term of five years (in addition to the sentence for the underlying offense if an underlying offense is charged and a conviction obtained) under the current version of section 924(c) and the guidelines.

**Operation of the Sentencing Guidelines**

For cases in which 18 U.S.C. § 924(c) is charged and a conviction obtained, section 2K2.4 of the guidelines provides that section 924(c)'s mandatory minimum penalty is added to the sentence for the underlying offense, or if the underlying offense was not charged, becomes the guideline sentence. If section 4502 of the proposed bill were adopted, this same mechanism would be used to ensure that a crime of violence or drug trafficking offense involving a semiautomatic assault weapon reflected the required ten-year minimum.

Because prosecutors do not always charge section 924(c) in cases involving firearms,<sup>41</sup> guidelines that prescribe sentences for most crimes of violence (e.g., Robbery (§2B3.1)), drug trafficking offenses (§2D1.1), and firearms offenses (§2K2.1), contain substantial penalty increases for possession or use of a dangerous weapon (including semiautomatic weapons) in connection with an underlying offense. No separate enhancement currently is provided for offenses involving semiautomatic assault weapons.

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<sup>41</sup>See discussion of section 401, *supra*.

## Discussion

As discussed more fully with respect to section 401 of the bill, when the sentencing guidelines are required to accommodate a mixture of fixed, flat mandatory minimum penalties and guideline adjustments for similar conduct, the resulting guidelines are considerably more complex for courts and practitioners to use than would be the case in the absence of these mandatory minimums. Moreover, as detailed in the section 401 discussion as well, no amount of accommodation in the guidelines can fully account for the prosecutorial discretion that arises as a consequence of this mixed system — prosecutorial discretion that the Sentencing Commission found can foster substantial unwarranted sentencing disparity. Adoption of a new mandatory minimum for semiautomatic assault weapons would likely contribute to these problems. It should be noted, too, that adoption of a new mandatory minimum for semiautomatic assault weapons could overlap and to a degree operate at odds with the directive in section 401 requiring the Commission to increase penalties for semiautomatic firearms.

## Recommendation

Congress should consider making section 4502 a directive to the Sentencing Commission to establish an appropriate punishment for offenses involving manufacture, transfer, and possession of semiautomatic assault weapons. This could be done simply by adding this feature to the directive already contained in section 401 of the bill. (The suggested modifications to that directive requiring that the Commission study, report, and amend, as necessary, would be equally beneficial with respect to this offense conduct.)

In addition, for reasons discussed with respect to section 401, section 924(c) should be modified to establish a range of applicable penalties for firearm use under these circumstances.

## *Drugs and Minors*

**Sec. 2407. Mandatory Minimum Prison Sentences to Those Who Sell Illegal Drugs to Minors or Who Use Minors in Drug Trafficking.**

### Brief Description of Provision

Amends 21 U.S.C. §§ 859 and 861 to increase existing one-year mandatory minimum penalties to ten years if the defendant is at least 21 years old and the offense involved someone under 18 years of age. Mandatory minimums for second convictions under these provisions are increased from one year to life imprisonment when the defendant is at least 21 years old and the offense involved someone under age 18.

## Current Statutory Law

Current law under 21 U.S.C. §§ 859 and 861 provides for increased statutory maximums and a one-year mandatory minimum penalty for certain drug offenses involving persons under age 21 in the case of section 859, and under age 18 in the case of section 861. More specifically, 21 U.S.C. § 859 makes this penalty scheme applicable to drug *selling* to persons under age 21. All drug sales involving controlled substances of any amount<sup>42</sup> are covered. Section 861 applies the penalty scheme to offenses involving persons under age 18. Although section 861's title indicates the provision covers "Employment of persons under 18 years of age," the provision actually encompasses conduct that is considerably broader than direct employment of minors. Also covered are such offenses as "persuad[ing]" someone under 18 years of age to assist an offender in avoiding detection for simple possession of a controlled substance, and "receiv[ing] a controlled substance" from someone under age 18.

## Operation of the Sentencing Guidelines

The sentencing guidelines currently provide for increased penalties when drug offenses involve violations of sections 859 and 861. In the absence of any mitigating factor, the guidelines prescribe a sentence exceeding five years' imprisonment when the offense involves someone under age 18.

## Discussion

Section 2407 raises three concerns that were highlighted in the Commission's 1991 mandatory minimum report.

*Unwarranted Sentencing Uniformity* — As with other mandatory minimum penalties, a concern with requiring an unvarying, ten-year minimum penalty for the conduct proscribed by §§ 859 and 860 is that dissimilar offenders would be treated similarly, thereby undercutting the Sentencing Reform Act's goals of establishing fair and proportionate sentencing. Undoubtedly, the increased mandatory minimums that would be required by section 2407 could apply to hardened drug traffickers actively involved in recruiting minors into the drug trade. On the other hand, the same sentences would also apply to small-scale, routine transactions between a minor who is already heavily involved in drug trafficking and a defendant, roughly the minor's peer,<sup>43</sup> who was substantially less involved. Recent studies have shown that some adolescents

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<sup>42</sup>The one excluded offense is a drug sale involving five grams or less of marijuana. See 18 U.S.C. § 859(a).

<sup>43</sup>Section 2407's proposed amendment to sections 859 and 861 would require at least a three-year age difference for the increased penalties to apply.

operate as relatively independent entrepreneurs engaging in hundreds of drug sales a year.<sup>44</sup> A neighborhood friend who bought a single marijuana cigarette<sup>45</sup> or single dose of crack from one of these sellers and was just a few years older would, under section 2407, be subject to the same ten-year enhancement as the career drug trafficker actively recruiting minors as street sellers or couriers.

*"Cliffs" in Sentencing* — Under the penalty scheme proposed by section 2407, slight factual differences that may indicate only marginal differences in offense seriousness can have an enormous, "cliff-like" impact on the sentence. Drawing from the example above, the neighborhood friend who bought a single marijuana cigarette would receive little or no time in prison if the seller had turned 18 that day.<sup>46</sup> Under the bill, if the purchaser bought the cigarette a day earlier from the same person, the minimum prison sentence would be ten years. Conviction of two marijuana cigarette purchases from someone exactly 18 years old would expose the purchaser to no more than one year in prison. Under the bill, a second conviction for purchasing a marijuana cigarette from someone who was slightly younger than 18 years old would require a life sentence.

*Charge-based bargaining* — Given the potential breadth and cliff-like effect of the proposed section 2407 penalty scheme, it seems likely that offenses under this provision would encourage selective charging practices by prosecutors. As noted earlier,<sup>47</sup> subjective charging decisions can lead to substantial unwarranted sentencing disparity.

### **Recommendations**

The problems of overbreadth, "cliffs," and charge-based sentencing disparity largely can be eliminated by deleting the provision and adopting section 5130 of the Senate bill. Section 5130 directs the Sentencing Commission to ensure that the guidelines provide "an appropriate enhancement if the defendant involved a minor in the offense." The section would apply to sentences for *all* federal Class A misdemeanors and felonies, drug trafficking or otherwise. Section 5130 also enumerates a number of criteria that the Commission must take into account

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<sup>44</sup>See, e.g., James A. Inciardi, *The Crack Violence Connection Within a Population of Hard-Core Adolescent Offenders in Drugs and Violence: Causes, Correlates, and Consequences* 92 (M. DeLarosa et. al, eds., 1990).

<sup>45</sup>Small-scale purchases of marijuana under section 861, unlike very small-scale sales of marijuana under section 859, are not excluded from coverage.

<sup>46</sup>The maximum sentence for simple possession of a controlled substance other than crack cocaine is one year in prison. See 21 U.S.C. § 844(a). Accordingly, the sentencing guidelines generally allow prison sentences of 0-6 months for simple possession where no prior criminal record is involved.

<sup>47</sup>See discussion of sections 401 and 2405.

in drafting the required guideline enhancements. These criteria should ensure appropriately tough and rational sentencing in this area.

### Additional Technical Issue

The prohibitions in section 2407 against courts "suspend[ing] sentence" should, in any case, be deleted. Suspended sentences have not been authorized under federal law since 1987.

### Prison Impact

Section 2407 would increase minimum<sup>48</sup> penalties from one year to ten years for offenders at least 21 years of age who were involved with persons under age 18. For purposes of generating an approximate prison impact assessment for this provision, it was assumed that defendants convicted under either section 859 or 861 who were at least 21 years old would be subject to the minimum ten-year penalty.<sup>49</sup> As Table IX shows, there were 130 defendants who were at least 21 years old at the time of their offense and convicted in FY 1992 under the relevant statutes. Because these defendants typically received an additional, significant prison sentence for the underlying drug conduct under the current guidelines, the average time this group will serve in prison is 8.6 years, substantially above the one-year minimum. With the proposed change, average time served would increase to 11.2 years imprisonment. The increase in time served by these defendants would be approximately 30 percent. Over time, this change in average sentence length would increase federal prison population by 336 inmates, or 0.2 percent.

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<sup>48</sup>Under present sections 859 and 860 — as well as under the proposed amended versions of these sections — the minimum required sentence is not added to the sentence for the underlying conduct, but rather serves as a floor beneath which the total sentence may not fall. Thus, if the sentence for the underlying drug offense is five years, the current versions of sections 859 and 860, requiring a minimum of one year in prison, would have no additional impact.

<sup>49</sup>Because 1) the proposed ten-year penalty also requires that the defendant involve someone under age 18 and 2) section 859 requires that the defendant involve someone under age 21, the assessment may slightly overstate actual impact. Data currently collected by the Commission do not include the age of the person with whom the defendant has dealings in a section 859 or 861 offense.

**Table IX****Impact of a Ten-Year Mandatory Minimum for Defendants Convicted of 21 U.S.C. §§ 859 and 861**

	Number of Defendants Sentenced (per year)	Time-to-be-Served				Change	
		Pre-Amendment		Post-Amendment		Person-years*	Percent
		Person-years*	Average Sentence (in years)	Person-years*	Average Sentence (in years)		
Impacted Defendants	130	1,123	8.6	1,460	11.2	337	30.0
Aggregate Impact	36,845	135,770	3.7	136,107	3.7	337	0.2

\* Person-years of imprisonment is equivalent to the "steady-state" prison population. The concept of a "steady-state" population envisions a prison system in which the number of defendants admitted into the system is equal to the number of inmates discharged from the system. By focusing on the "steady-state" prison population, the impact of the policy change is isolated from other changes in the system which may impact the prison population. In general, person-years can be thought of as the long-term prison population.

SOURCE: United States Sentencing Commission — fiscal year 1992 data file.

## *Low-Level Drug Defendant "Safety Valve"*

### **Sec. 2404. Flexibility in Application of Mandatory Minimum Sentence Provisions in Certain Circumstances.**

#### **Brief Description**

Amends 18 U.S.C. § 3553, the sentence imposition section of the Sentencing Reform Act, to authorize courts to impose a sentence that is (1) consistent with sentencing guidelines and policy statements and (2) unconstrained by an otherwise applicable statutory mandatory minimum, in the case of defendants convicted of certain drug trafficking or possession offenses who meet specified criteria. In general, the criteria are designed to limit the exception from statutorily mandated minimums to those defendants who are non-violent, did not play a significant role in the drug offense, and do not have a serious prior record.

#### **Existing Law and Guideline Application**

The sentencing guidelines for drug offenses were designed by the Sentencing Commission so that a typical defendant whose offense involves a quantity of drugs equal to the threshold quantity triggering a mandatory minimum under 21 U.S.C. § 841(b) — and who is subject to no aggravating or mitigating adjustments under the guidelines — would face a guideline range whose lower limit is slightly above the applicable mandatory minimum penalty. For example, a typical defendant with no prior criminal record convicted of possession with intent to distribute 500 grams of cocaine powder who is subject to a mandatory minimum of five years would have a guideline range of 63-78 months; if the same defendant had five kilograms of cocaine, he would be subject to a ten-year mandatory minimum and a guideline range of 121-151 months.

The guidelines do provide, of course, several possible mitigating adjustments, but the mandatory minimum penalties set by statute "trump" any guideline sentence that otherwise might be lower. Consequently, if the defendant's offense involved a quantity of drugs that triggers a mandatory minimum penalty, a mitigating adjustment based on, for example, a defendant's minor role in the offense which might otherwise adjust the sentence downward below a mandatory minimum (for example, to a guideline range of 97-121 months) is effectively blocked from reducing the sentence below that minimum statutory penalty. Similarly, if the mandatory minimum is triggered, a court is barred from departing below that minimum based upon a valid mitigating factor not considered by the Commission in the guidelines. The only avenue permitting a sentence below a mandatory minimum penalty is that recognized in 18 U.S.C. § 3553(e) and Rule of Criminal Procedure 35(b). These provisions permit a court to sentence below a mandatory minimum based on a government motion recognizing a defendant's substantial assistance in the prosecution of other persons.

## Discussion

The provision enacted by the Senate (sometimes referred to as a mandatory minimum "safety valve" or "carve-out" provision) is significantly narrower than the proposal introduced in the Senate as S. 1596. This provision had also been incorporated into a revision of the crime bill put before the Senate for consideration by Judiciary Committee Chairman Biden. Compared to the S. 1596 version, the provision passed by the Senate substantially narrows the class of individuals to whom it might apply. A comparison of the S. 1596 proposal<sup>50</sup> and section 2404 as amended by the Senate reveals the following:

1. *Narrowed scope of the provision.* Based on fiscal year 1992 sentencing data for drug offenders, the Commission estimated that, under the current guidelines, the S. 1596 proposal could potentially impact approximately 5.4 percent (907) of all drug cases (16,684). Of this number, slightly less than one percent (155) of drug offenders would *definitely* be impacted by the proposal because (1) they would appear to meet all requirements under the proposed legislation, and (2) their guideline range, as a result of downward adjustments available under the guidelines for acceptance of responsibility and/or mitigating role, would be entirely below the otherwise applicable mandatory minimum penalty. (Assuming courts sentenced at the midpoint of the resulting guideline range, the median guideline sentence for these defendants who otherwise would be subject to a five-year statutory minimum would be slightly less than four years; for those subject to the ten-year minimum, the median guideline sentence would be slightly more than seven years). Another 4.5 percent (752) of drug offenders could receive a sentence slightly lower than the mandatory minimum penalty if the court imposed a sentence at the low end of the guideline range. These defendants are potentially impacted by the S. 1596 proposal because (1) they appear to meet all safety valve criteria, and (2) the bottom of their guideline range is below the mandatory minimum penalty.

Based on available data, the Commission cannot model the amended safety valve proposal passed by the Senate with comparable precision. It is clearly the case, however, that some of the additional criteria added by the Senate will significantly reduce the number of low-level, non-violent drug defendants who, because of mitigating factors recognized under the guidelines, potentially would be eligible for a modest reduction in imprisonment sentence under a safety valve provision.

One narrowing criterion added to section 2404 requires that the defendant have no criminal history points under the guidelines (whereas the provision initially considered by the Senate allowed one criminal history point); in addition, the defendant must have no prior foreign or domestic conviction or juvenile adjudication for a crime of violence or drug trafficking offense that resulted in a sentence of imprisonment (a further limitation not part

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<sup>50</sup>This proposal was endorsed by four of the current five voting Commissioners with Commissioner Ilene Nagel abstaining.

of the initial bill). To provide a "ballpark" estimate of the effect of the criminal history criteria in section 2404, additional analyses were conducted.

First, the impact analysis was adjusted to exclude all cases that were assigned any criminal history points under the guidelines.<sup>51</sup> This approach could be expected to somewhat overstate the number of qualifying defendants because of the possibility that some defendants who had no criminal history points nevertheless would have a prior disqualifying conviction for a crime of violence or drug trafficking.<sup>52</sup>

Under this alternative analysis, about .8 percent of all drug offenders (about 125 defendants) would be impacted, while another 3.6 percent (about 600) could be impacted if courts chose a lower sentence within the guideline range. Thus, in the aggregate, a proposal limited to low-level, non-violent defendants with zero criminal history points would potentially encompass about 4.4 percent of all drug offenders (about 725 defendants) — a 20 percent reduction in the scope of the provision compared to a comparable safety valve using not more than one criminal history point. As noted, however, the Senate-passed provision is more limiting in its criminal history feature than zero criminal history points. To estimate the impact of the additional criterion (no prior violent or drug trafficking conviction resulting in imprisonment), a detailed criminal history analysis of the defendants definitely impacted by the S. 1596 proposal was conducted. It was then assumed that the criminal history characteristics of defendants potentially impacted by the proposal (those for whom the bottom of the guideline range was below the mandatory minimum penalty) would be comparable to those defendants definitely impacted (those for whom the top of the guideline range was below the mandatory minimum). Based on this assumption and analysis, it was determined that the additional criminal history criterion would further reduce the number of definitely impacted defendants to .7 percent of all drug defendants. Similarly, the number of potentially impacted defendants would be reduced to 3.5 percent, and the aggregate number impacted would be reduced to 4.2 percent of all drug defendants.

Based on these estimates, it appears then that the criminal history criterion passed by the Senate is about 20 percent narrower than the criterion in the proposal initially

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<sup>51</sup>Under the guidelines, defendants are assigned one criminal history point for a prior probation sentence or prior sentence of imprisonment of less than 60 days. Thus, a defendant previously sentenced to a year's probation for shoplifting a pair of sunglasses would receive one criminal history point and, therefore, would not qualify under the Senate-passed safety valve.

<sup>52</sup>This could occur under the guidelines scheme because the conviction occurred many years ago, because it was a foreign or Indian tribal conviction, or for several other reasons determined by the Commission either to (1) substantially diminish the value of the prior sentence as an indicator of greater recidivism likelihood, or (2) call into question the reliability or basic fairness of using the prior sentence to enhance the current one.

considered by the Senate. Table X summarizes the expected impact of safety valve criteria relating to prior criminal record using alternative measurements of criminal history under the guidelines. Figures 2-5 illustrate each of these alternatives. As discussed above, however, each of these alternatives is somewhat broader in impact than the estimate for the proposal adopted by the Senate.

Table X

**ANALYSES OF LOW-LEVEL DRUG DEFENDANT<sup>1</sup> "SAFETY VALVES"  
USING ALTERNATIVE MEASUREMENTS OF CRIMINAL HISTORY  
(October 1, 1991, through September 30, 1992)**

DESCRIPTION	Zero Points			1 Point or Less			2 Points or Less			3 Points or Less		
	N	% <sup>2</sup>	% <sup>3</sup>	N	% <sup>2</sup>	% <sup>3</sup>	N	% <sup>2</sup>	% <sup>3</sup>	N	% <sup>2</sup>	% <sup>3</sup>
<b>All Drug Cases</b>	16,684	—	100.0	16,684	—	100.0	16,684	—	100.0	16,684	—	100.0
<b>Defendants not meeting safety valve criteria</b>	(13,486)	—	80.8	(12,700)	—	76.1	(12,450)	—	74.6	(11,926)	—	71.5
<b>Defendants meeting safety valve criteria</b>	3,198	—	19.2	3,984	—	23.9	4,234	—	25.4	4,758	—	28.5
<b>Meeting criteria, received substantial assistance departure</b>	(1,029)	32.2	—	(1,290)	32.4	—	(1,382)	32.6	—	(1,560)	32.8	—
<b>Meeting criteria, no substantial assistance departure</b>	2,169	—	13.0	2,694	—	16.2	2,852	—	17.1	3,198	—	19.2
<b>Definitely affected</b>	125	6.3	0.8	155	6.3	0.9	167	6.4	1.0	200	6.8	1.2
<b>Possibly affected</b>	601	30.2	3.6	752	30.4	4.5	807	30.8	4.8	902	30.7	5.4
<b>Combined definitely/possibly affected</b>	726	36.5	4.4	907	36.6	5.4	974	37.2	5.8	1,102	37.5	6.6
<b>Not affected</b>	1,262	63.5	7.6	1,571	63.4	9.4	1,646	62.8	9.9	1,840	62.5	11.0
<b>(Missing information)</b>	(181)	(—)	(—)	(216)	(—)	(—)	(232)	(—)	(—)	(256)	(—)	(—)

<sup>1</sup>In fiscal year 1992, 16,684 drug cases were sentenced under the guidelines. Cases that meet the criminal history standard shown above and: i) were convicted under a mandatory minimum statute; ii) had no dangerous weapon; iii) had no aggravating role in the offense; and iv) in which no death or serious bodily injury resulted.

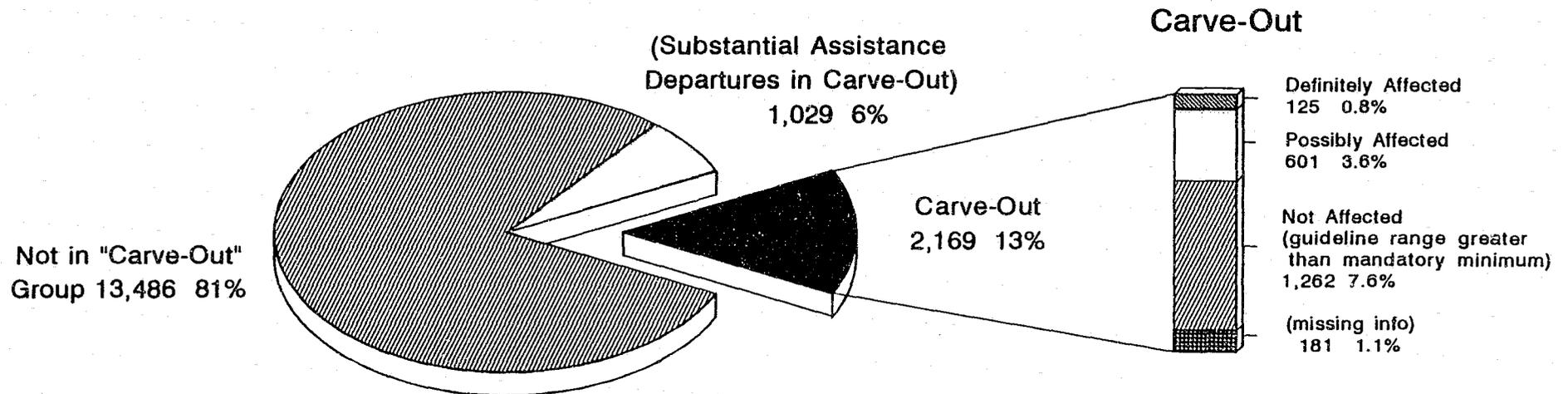
<sup>2</sup>Percent of carve-out.

<sup>3</sup>Percent of all drug cases.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92.

# IMPACT PROJECTION OF MANDATORY MINIMUM "CARVE-OUT": Qualifying Defendants with No Criminal History Points

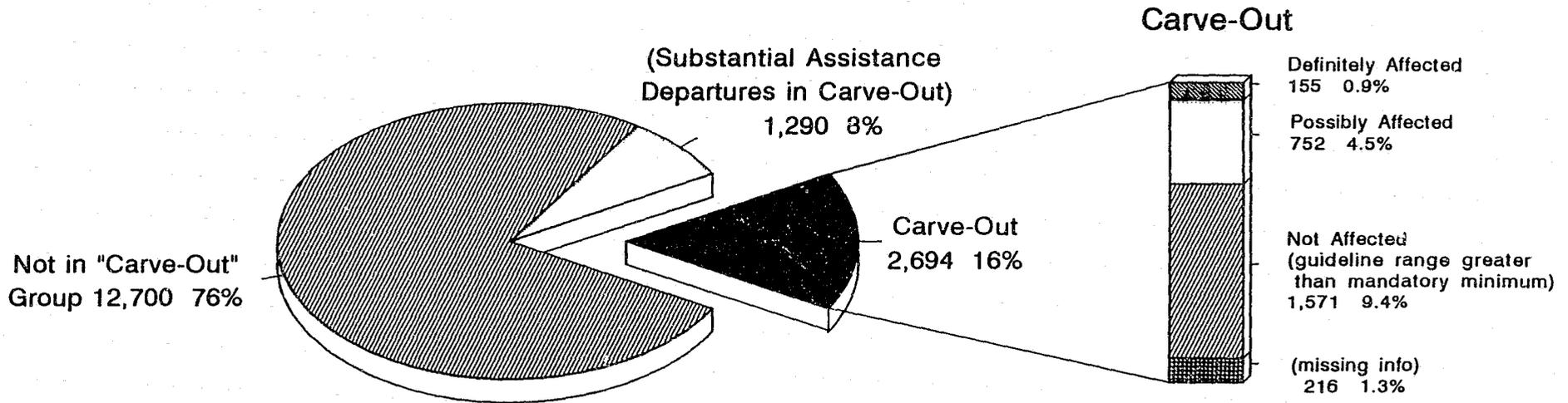
Drug Trafficking Cases Sentenced in FY 1992  
(N=16,684)



\*Drug mandatory minimum cases with mitigating factors.

# IMPACT PROJECTION OF MANDATORY MINIMUM "CARVE-OUT": Qualifying Defendants with Not More than One Criminal History Point

Drug Trafficking Cases Sentenced in FY 1992  
(N=16,684)

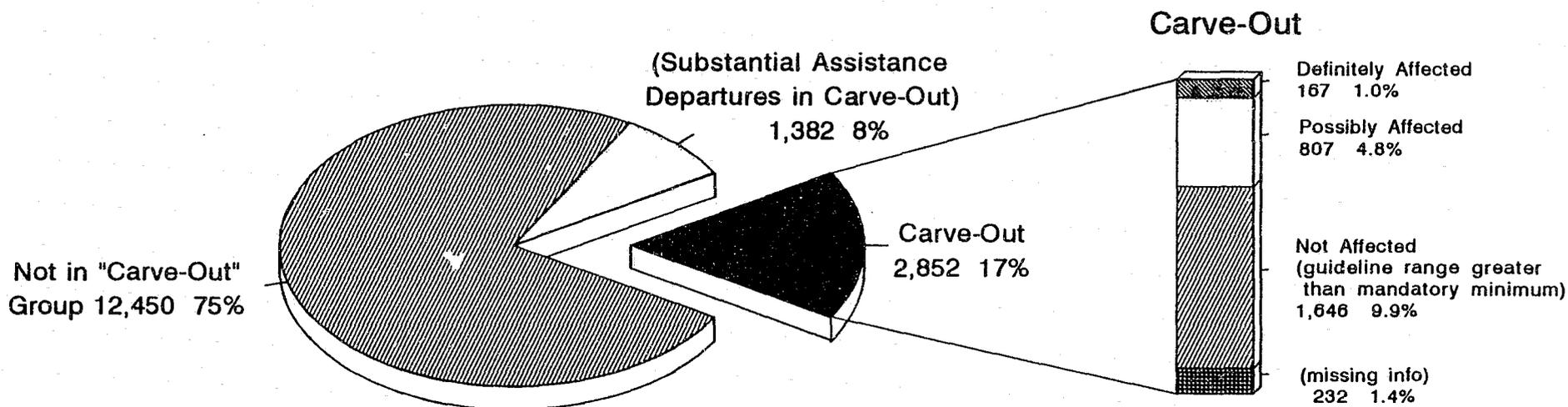


\*Drug mandatory minimum cases with mitigating factors.

SOURCE: U.S. Sentencing Commission.

# IMPACT PROJECTION OF MANDATORY MINIMUM "CARVE-OUT": Qualifying Defendants with Not More than Two Criminal History Points

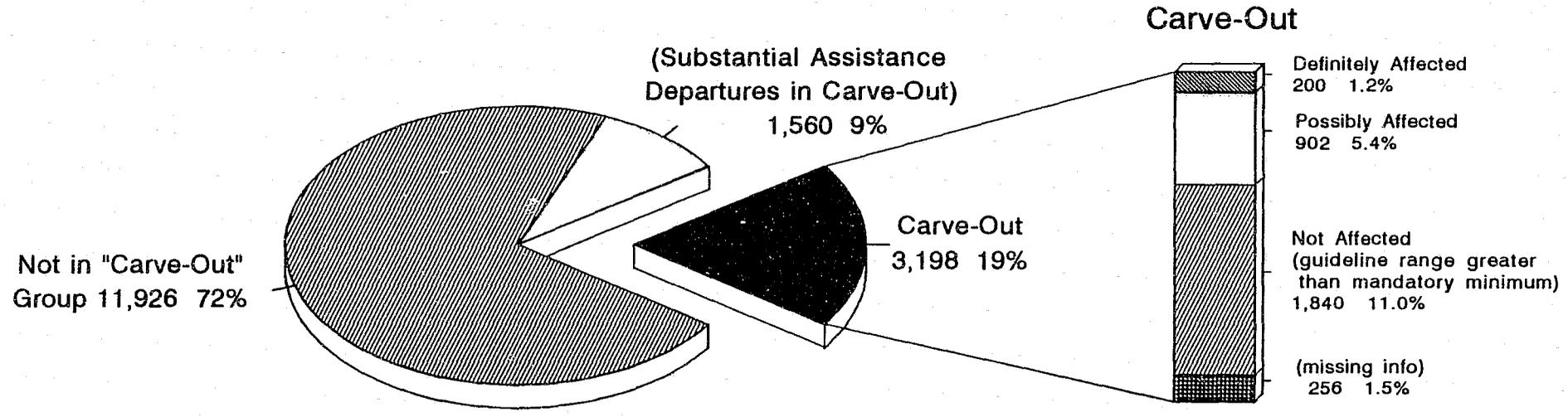
Drug Trafficking Cases Sentenced in FY 1992  
(N=16,684)



\*Drug mandatory minimum cases with mitigating factors.

# IMPACT PROJECTION OF MANDATORY MINIMUM "CARVE-OUT": Qualifying Defendants with Not More than Three Criminal History Points

Drug Trafficking Cases Sentenced in FY 1992  
(N=16,684)



\*Drug mandatory minimum cases with mitigating factors.

SOURCE: U.S. Sentencing Commission.

The Senate-passed safety valve also contains other criteria not part of the proposal initially considered by the Senate. In terms of number of excluded defendants, the criterion of greatest limiting impact (other than the criminal history requirement) appears to be the requirement that "the defendant did not own the drugs, finance any part of the offense, or sell the drugs."

Although the Commission has not precisely quantified the effect, there appears to be a significant likelihood that defendants could "own" or "sell" drugs and still meet all other criteria indicative of low-level, non-violent, first offenders.<sup>53</sup> Several Commission studies of drug offenders, including a detailed analysis of crack cocaine offenders that the Commission expects to complete soon, together form the basis for this general conclusion.

In a five-percent sample study of drug cases sentenced during FY 1992, Commission research staff found that 27.5 percent of drug offenders were street-level sellers. Focusing specifically on crack offenders, a majority (55 percent) sold crack on the street, the major drug with by far the highest frequency of defendants having this function. In contrast, only .4 percent of drug offenders (.6 percent of crack offenders) were classified as "financiers." The analysis did not attempt to ascertain the frequency with which offenders "owned" the drugs. However, if it is assumed that dealers at all levels, as well as grower/manufacturers and financiers, would be considered to be drug owners, the cumulative impact of this criterion would encompass about two-thirds of drug offenders.<sup>54</sup> This sample case study of drug offenders also found that a very high percentage of street-level crack cocaine and heroin offenders were involved with a sufficient quantity of drugs to trigger either the five- or ten-year statutory minimum.

A recently released Department of Justice (DOJ) analysis of low-level drug offenders<sup>55</sup> confirms that this feature of proposed section 2404 would further limit significantly its scope. Applying the Commission-developed functional role criteria to a sample of drug offenders, the DOJ study found that 22 percent of the non-violent, "low-

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<sup>53</sup>True financiers of drug offenses likely would be excluded by other provisions, such as the feature that precludes defendants found to have an aggravating role from receiving a sentence below an applicable statutory minimum. Broadly interpreted, however, "financ[ing] any part of the offense" could also exclude any low level defendant who advanced drugs for a later payment of money, a quite common practice in the drug trade.

<sup>54</sup>Of course, many of the offenders in this category would not benefit from the safety valve for other reasons, principally because they either received an aggravating role enhancement under the guidelines or because they were involved with such a large drug quantity that their guideline sentence would be well above applicable statutory minimums.

<sup>55</sup>U.S. Dept. of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 4, 1994).

level"<sup>56</sup> drug offenders were street-level dealers and 20 percent were mid-level dealers.<sup>57</sup> The study also found that the quantity of drugs involved in the offense does not correlate with a defendant's functional role in the way that might be expected. Notably, street-level dealers tended to be involved with smaller drug quantities than defendants who functioned as couriers or had more peripheral roles in the offense.<sup>58</sup>

The Commission attempted to estimate the combined limiting effect of proposed section 2404's prohibition of drug sellers, owners, and financiers in conjunction with the provision's criminal history criterion. As with the above-described analysis of the criminal history provision in isolation, this analysis focused on a detailed examination of characteristics for the pool of defendants who appeared to meet all criteria in S. 1596 and were definitely impacted by that proposal. Using this approach, it was found that about 50 percent of qualifying, definitely impacted defendants under S. 1596 would be disqualified under section 2404 as passed by the Senate because (1) they would be considered drug sellers, owners, or financiers, or (2) they had one criminal history point, or zero criminal history points coupled with a prior violent or drug trafficking conviction resulting in imprisonment. Extrapolating these findings to all affected drug defendants, it would appear that the safety valve passed by the Senate would definitely impact about .4 percent of all drug cases and potentially impact another 2.3 percent; therefore, the combined impact of the proposal would extend to about 2.7 percent of all drug cases.

2. *Application difficulties.* A principal motivating concern for the Commission's 1993 legislative proposal permitting courts to sentence drug defendants in accordance with the guideline system, notwithstanding any statutory minimum, was the need to reconcile and simplify application of the two competing sentencing systems of mandatory minimums and the guidelines. The safety valve proposal introduced as S. 1596 and initially considered as part of the Senate crime bill remained reasonably faithful to this goal, although it embodied a narrower reconciliation limited to low-level, non-violent defendants with minimal criminal histories. As amended by the Senate, section 2404 achieves less of the originally sought reconciliation objective, although it moves in the desired direction.

Application of the provision would be complicated by (1) the sheer number of determinations that must be made by the court, often involving criteria different from those used under the sentencing guidelines, and (2) the lack of clarity in the proposal's language. Critical terms such as "crime of violence" and "drug trafficking offense" are not defined by

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<sup>56</sup>For purposes of the study, the Department classified as "low-level" those "drug offenders with a minimal or no prior criminal history whose offense did not involve sophisticated criminal activity and whose offense behavior was not violent." *Id.*, Executive Summary, at 2.

<sup>57</sup>U.S. Dept. of Justice, *supra* note 51, at 31.

<sup>58</sup>*Id.*, at 45.

reference to either statute or the sentencing guidelines. Other terms such as "firearm" and "serious bodily injury" are defined by statutory reference in a manner that may be somewhat different from the manner in which the court must construe the same terms for purposes of applying the sentencing guidelines. These aspects of the provision would engender protracted litigation and appeals and likely result in disparate court interpretations of the provision's criteria.

3. *Use of criteria that may fail to meaningfully distinguish defendants according to their relative culpability.* As amended by the Senate, the safety valve provision adds criteria that may be over-broad and unnecessarily exclusive of defendants of lesser culpabilities and risks than others who will satisfy the criteria.

Consider, for example, the stringent criminal history requirement of the bill that categorically excludes defendants having a "violent" or "drug trafficking" conviction, regardless of the actual seriousness of the prior offense and regardless of how dated it might be. Because of this criterion, a relatively peripheral crack-house "lookout" who has a single juvenile adjudication that required a weekend in juvenile hall as a result of a school-yard fight ten years ago would be disqualified under the bill, while another low-level defendant with a string of relatively serious theft offenses committed as a juvenile just over five years ago would not be.<sup>59</sup> Similarly, a low-level defendant convicted and sentenced 20 years ago to spend a night in jail for selling a single marijuana cigarette would be disqualified, while another defendant who 12 years ago served 60 days in prison as a result of a plea to simple possession of a sizable quantity of marijuana would not be.<sup>60</sup>

As these examples illustrate, the use of prior convictions within the broad categorical offense types of violence and drug trafficking, even when coupled with a requirement of a prison sentence, may not consistently differentiate defendants according to their culpability and present risk. Instead, this approach may operate in what appears to be an arbitrary manner, raising fairness concerns in the context of particular cases.

Similarly, the Senate-added provision excluding all owners, sellers, and financiers of drugs may not correlate with culpability in a consistent manner. The Department of Justice study of low-level drug defendants found, for example, that street-level sellers subject to mandatory minimum penalties tend to be involved with lesser drug amounts than do couriers

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<sup>59</sup>Under the guidelines, juvenile adjudications receive criminal history points if the juvenile sentence was imposed within five years of the current offense. USSG §4A1.2(d). Thus, under this example, the prior juvenile adjudications would not contribute any criminal history points because of the passage of time since the adjudication occurred.

<sup>60</sup>The criminal history provisions of the guidelines similarly do not assign points for adult probation and short imprisonment sentences imposed more than ten years prior to the current offense.

and others with peripheral roles.<sup>61</sup> In a similar vein, the Commission's analyses of drug defendants found no clear, consistent relationship between drug selling and relative culpability. Particularly when applied to crack cocaine defendants, a categorical exclusion of all owner-sellers is likely to impact disproportionality on: (1) Black defendants, (2) those who tend to trade in relatively small quantities, and (3) those who sell to support a personal drug abuse habit.

### Recommendations

The Commission strongly supports a well-crafted provision to more effectively harmonize the often conflicting systems of statutory mandatory minimum penalties and the sentencing guidelines. Legislation that moves substantially in this direction for drug offenses will:

- make sentences more proportionate and fair,
- simplify the sentencing process,
- reduce the number of trials sought by defendants subject to statutory minimums who see "nothing to lose" from exercising their constitutional trial rights, thereby facilitating a reallocation of scarce resources to the prosecution, trial, and sentencing of crimes posing the greatest risk to society, and
- reduce demands on scarce prison resources, while maintaining tough guideline sentences for drug law violators.

The Commission recommends that proposed section 2404 be modified to:

- encompass a greater number of low-level drug defendants by relaxing modestly the criminal history criterion<sup>62</sup> and removing the exclusion of all drug owners, sellers, and financiers,
- simplify its application and enhance its compatibility with the guideline system that judges also must use, and

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<sup>61</sup>U.S. Dept. of Justice, *supra*, note 51, at 45.

<sup>62</sup>For example, consideration should be given to permitting defendants to qualify under the safety valve even if they have a low guideline criminal history, particularly if the exclusion of all defendants with a prior crime of violence or drug trafficking conviction resulting in imprisonment is retained.

- improve the ability of the provision to differentiate consistently and fairly among defendants according to their relative degree of culpability and risk.

#### Additional Specific Concerns and Technical Issues

In analyzing section 2404 as passed by the Senate, the Commission also notes the following more discrete concerns:

- Proposed subsection 3553(f)(2)(A) should be amended to expressly provide that conspiracy and attempt offenses under 21 U.S.C. §§ 846 and 963 are covered. While that is clearly the intent of the provision given the reference in proposed subsection 3553(f)(2)(D) to coconspirators, it is preferable to make this intent unambiguous.

- To enhance harmonization with the guidelines and reduce litigation, all terms of art in the safety valve provision (e.g., "crime of violence," "firearm," "dangerous weapon," "serious bodily injury") should be defined with reference to the sentencing guidelines.

- Proposed subsection 3553(f)(2)(D) should be harmonized with the guidelines' relevant conduct principles (*see* USSG §1B1.3) for jointly undertaken criminal activity. If defendants are to be disqualified based on firearm (or other dangerous weapon) possession by another, this should occur whether or not the defendant is convicted of a conspiracy offense. Furthermore, the defendant arguably should be disqualified if the weapon was reasonably foreseeable in connection with the defendant's jointly undertaken activity, although the defendant may have lacked actual knowledge of the weapon.

- The instruction to the Commission in subsection 2404(b)(1)(B) regarding constructing sentencing guidelines for drug offenders should be modified to permit the Commission slightly greater flexibility in assigning offense levels corresponding to statutory minimum drug quantities. Specifically, the Commission should be permitted to assign offense levels such that the guideline range for typical first offenders (having no aggravating or mitigating adjustments) will encompass or exceed the statutory minimum. (As the provision is currently worded, it could be interpreted to require the Commission to construct entirely separate guidelines at much higher penalty levels for defendants with prior drug trafficking convictions).

- The last sentence of section 2404 should be deleted. This provision adds a consecutive five-year penalty to any defendant sentenced under the safety valve who is subsequently convicted of drug trafficking or a crime of violence. The provision is unnecessary because under current law and the guidelines (1) repeat drug traffickers are already subject to double the statutory minimum and enhanced maximum penalties, and (2) the sentencing guidelines also require enhanced penalties for recidivists. Moreover, from a proportionality standpoint, it seems questionable to impose a more severe penalty on a recidivist who previously was found to be less culpable in respect to a prior offense than on a recidivist whose level of prior culpability was greater.

• A number of technical and conforming amendments to title 21, United States Code, that were contained in S. 1596 should be incorporated into the provision to ensure that the penalty statutes for drug offenses are properly coordinated with the proposed safety valve provisions.

*Miscellaneous Sentencing Provisions*

- Sec. 405.      **Revocation of Supervised Release.**
- Sec. 406.      **Revocation of Probation.**
- Sec. 2401.     **Imposition of Sentence.**
- Sec. 2402.     **Technical Amendment to Mandatory Conditions of Probation.**
- Sec. 2403.     **Supervised Release After Imprisonment.**

The Sentencing Commission strongly supports enactment of sections 405—406 and 2401—2403 concerning revocation of probation and supervised release. These provisions contain Commission recommendations clarifying the statutory provisions pertaining to revocation of probation and supervised release. Clarification of the existing statutes has become necessary in light of case law that appears to be at odds with congressional intent and sound sentencing practices. The proposed provisions have passed both Houses of Congress in largely identical form on several prior occasions and the Commission is unaware of any significant opposition to them.<sup>63</sup>

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<sup>63</sup>The Commission has drafted analyses of prior versions of these provisions and can make them available should a further explanation be deemed helpful.