
TRIAL BY LEGISLATURE: WHY STATUTORY MANDATORY MINIMUM SENTENCES VIOLATE THE SEPARATION OF POWERS DOCTRINE

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“The best available evidence, the writings of the architects of our constitutional system, indicates that [the words of the Constitution were] intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”

– Chief Justice Earl Warren in *United States v. Brown*¹

I. INTRODUCTION

The punishment of criminals is a unique and policy-laden endeavor in any society. Criminal punishment allows a society to deprive individuals of fundamental rights such as life, liberty, and property. Where such essential rights of the individual citizen are at stake, punishment must be limited and tailored to certain narrow circumstances. In the United States, certain procedures and standards of fairness must be followed before a citizen can be subjected to criminal punishment.² One such procedure is the trial of a citizen by a jury of his peers.³ Another guarantee of fairness under the Constitution is the separation of powers.⁴ This doctrine guards criminal defendants from a tyrannical government by ensuring that the legislative, executive, and judicial branches each play a distinct role in criminal proceedings, and that each branch has the means to check the power of the other branches during such proceedings.⁵ The separation of powers doctrine protects citizens’ fundamental rights by preventing each branch from criminalizing and punishing citizens unilaterally.⁶

The separation of powers is one of the core foundational ideals of the U.S. Constitution, and its guarantee of fairness and protection must continue as long as the Constitution stands. Over time, however, application of the separation of

¹ *United States v. Brown*, 381 U.S. 437, 442 (1965).

² See, e.g., U.S. CONST. amend. V.

³ U.S. CONST. amend. VI.

⁴ See generally U.S. CONST. arts. I–III (delineating the separate and yet overlapping roles of the legislative, executive, and judicial branches).

⁵ See Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 994 (2006).

⁶ See *id.*

powers doctrine has eroded. The current system of criminal law in the United States is an unbalanced regime in which the legislative and executive branches share incentives and tacitly cooperate with each other, to the exclusion and increasing marginalization of the judiciary.⁷ This is especially true in the area of criminal sentencing, where the legislature has created statutes that establish terms of punishment for certain crimes by mandating minimum prison terms for the violation of those statutes. These mandatory minimum sentences provide plenary decision-making power to prosecutors of the executive branch, while heavily restricting the discretion of the judiciary.⁸ Mandatory minimum sentences place an absolute bar on a judge's ability to set a sentence lower than that written in the applicable statute.⁹ Although the constitutionality of such mandatory minimum sentences has been challenged under the separation of powers doctrine in certain circuit courts,¹⁰ the Supreme Court has not decided what separation of powers requires when the government proceeds in a criminal action.¹¹

This Note demonstrates that separation of powers requires all three branches of the government to participate in criminal sentencing. Specifically, it shows that statutory mandatory minimum sentences are unconstitutional because they aggregate all of the sentencing power in the legislative and executive branches and deny judges sentencing discretion in violation of the separation of powers doctrine. Part II discusses the history of sentencing procedure in the United States, examining what led to the enactment of statutory mandatory minimum sentences. Part III explains the current sentencing regime at the federal level. Part IV discusses the separation of powers doctrine as described in our founding documents, including the Federalist Papers and the Constitution. Part V argues that mandatory minimum sentences violate the separation of powers doctrine, contradict numerous federal statutes, provide judges no discretionary outlet in sentencing, and are destructive to society on a policy level. Part V also argues that the optimal sentencing system is one in which mandatory minimum sentences are abolished, federal judges are required to rely on sentencing guidelines that establish an advisory range for prison terms, and meaningful

⁷ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

⁸ Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 248 (2005) ("The combination of complex Guidelines, overlaid on a system of statutory minimum mandatories and fact-based enhancements has turned prosecutors into primary decisionmakers whose choices can, to a far greater extent than was ever before possible, unilaterally constrain the judge's discretion.").

⁹ See 18 U.S.C. § 3553(e) (2003).

¹⁰ *United States v. Vargas*, No. 05-4627-CR, 2006 WL 3228787, at *1 (2d Cir. 2006); *United States v. Huerta*, 878 F.2d 89 (2d Cir. 1989).

¹¹ Barkow, *supra* note 5, at 992.

review is conducted at the appellate level for the reasonableness of a trial judge's sentence.

II. HISTORY OF CRIMINAL SENTENCING IN THE UNITED STATES

A. *The Common Law Tradition of Judicial Discretion*

In feudal England and most other Western European nations, criminal punishment was arbitrary and subject to the desires of monarchs or the local nobles who were delegated the monarch's authority to punish.¹² This resulted in little to no consideration of the proportionality of the punishment to the offense.¹³ In fact, feudal officials imposed capital punishment for almost every violation, from murder and treason to minor theft.¹⁴ As the rule of law developed, trial court judges in England and then in the United States developed a vast degree of discretion in sentencing for misdemeanors.¹⁵ On the books, felonies remained capital offenses or carried other mandatory punishments, but in practice judges employed certain mechanisms through which they were able to use their discretion and avoid the prescribed sentence.¹⁶ During the eighteenth century, judges in England and the United States used their power under the common law to create complex technical rules and procedures that allowed them to circumvent convicting those defendants whom they did not deem fit for punishment.¹⁷ Three of these methods focused on the sentencing phase: the benefit of clergy, the suspension of the imposition of sentences, and the recommendation of executive pardons.¹⁸

The benefit of clergy began as a judicial power to grant clemency from the death penalty to convicted clergymen.¹⁹ Over time it developed into a safety valve measure in which a judge could eliminate capital punishment for any defendant who was able to read.²⁰ Suspension of sentences was another method through which a judge could avoid any mandatory sentence he deemed to be too harsh.²¹ Although colonial judges initially lacked the explicit authority to do so, they often suspended sentences for rehabilitation or otherwise, and

¹² CYNDI BANKS, *CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE* 138 (2d ed. 2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Susan F. Mandiberg, *Why Sentencing by a Judge Satisfies the Right to Jury Trial: A Comparative Law Look at Blakely and Booker*, 40 *McGEORGE L. REV.* 107, 118 (2009).

¹⁶ *Id.*

¹⁷ *Id.* at 119 (explaining jury nullification, a practice remaining today by which juries have the power to acquit criminal defendants that they do not think deserve punishment, even if they believe those defendants are guilty).

¹⁸ *Id.* at 119–22.

¹⁹ *Id.* at 119–20.

²⁰ *Id.*

²¹ *Id.* at 120–21.

a suspension of sentence could be indefinite.²² Suspension of sentences eventually led to the creation of the probation system, and by the mid-1900s suspended sentences combined with probation were common.²³ Finally, the executive pardon during colonial times functioned differently from the way it does today. Although it was inevitably up to the King or the President to pardon a defendant, the Executive relied so heavily upon the recommendation of the judge as to essentially make the choice that of the judiciary.²⁴ Judges retained this power until the nineteenth century in the United States, and today federal judges have far less influence over the pardoning of criminal defendants.²⁵

These examples of judicial discretion in the early days of the Republic—even in the face of apparently mandatory legislative sentences—show that historically, there is no precedent for denying a judge the ability to affect a criminal sentence. On the contrary, judges held wide discretionary power over the outcome of all misdemeanors, and they utilized a number of safety valves to avoid even the “mandatory” punishments for felonies. Statutory mandatory minimum sentences deprive judges of their traditional safety valve techniques, and these judicial tools will not work today. This, in turn, deprives citizens of the benefits of the judiciary’s constitutional check on legislative and executive powers.

B. *Sentencing in the Eighteenth and Nineteenth Centuries*

Judicial discretion regarding mandatory sentences for felonies allowed early American judges to prevent such legislatively-prescribed punishments as confinement in public stocks, whipping in the town square, or lengthy incarceration sentences.²⁶ But not long after the American Revolution, judges no longer needed these discretionary methods, as the “excessive rigidity” of the early mandatory or fixed sentencing system gave way to a less definite regime.²⁷ In the early 1800s, states first began allowing for “good time” reduction of prison sentences.²⁸ As the nineteenth century progressed, parole—the practice of setting a maximum prison term at commitment, but allowing inmates to become eligible for early release after serving some fraction of that sentence—became common.²⁹ In addition, a number of states began to enact straightforward inde-

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 121–22.

²⁵ *Id.*

²⁶ *United States v. Grayson*, 438 U.S. 41, 45 (1978).

²⁷ *Id.* at 46; Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 528, 529–30 (1958).

²⁸ Tappan, *supra* note 27, at 529.

²⁹ *Id.* at 530 (“Indeed, in 1900, although only eleven jurisdictions had enacted indeterminate-sentence laws, twenty had adopted parole.”).

terminate-sentence laws.³⁰ This shift toward criminal sentences of indefinite and varying lengths mirrored a contemporaneous shift in society's views regarding the goals of criminal sentencing. By the late 1800s, the focus of criminal sentencing was shifting from punishment and retribution to rehabilitation of the offender.³¹

C. *The Indeterminate Sentencing Period: One Hundred Years of Judicial Discretion*

Around 1878, a reform movement spurred by the National Prison Association asserted that the main goal of incarceration should be rehabilitation.³² This focus on rehabilitation drastically shifted the approach to criminal sentencing in the United States.³³ The movement's foundation was a belief in sentencing tailored to the individual, which required flexibility and increased judicial discretion.³⁴ The belief that "the punishment should fit the offender and not merely the crime" became the sentencing norm and remained the central ideology behind criminal punishment into the 1970s and 1980s.³⁵

This sentencing structure, known as the indeterminate sentencing period, was characterized by a focus on the offender, rehabilitation of the criminal, broad judicial discretion, individual justice, and statutorily-established ranges for prison terms.³⁶ Congress would set wide sentencing ranges for crimes, and judges had "almost unfettered discretion" to decide the appropriate sentence within that range.³⁷ In the mid-1900s, the growth of an elaborate probation system further expanded the sentencing power of judges.³⁸ Overall, Congress specified penalty ranges corresponding to crimes, but the judge almost always had the freedom to decide whether the offender should be imprisoned, fined, or subject to some lesser restraint, such as probation.³⁹ To make this decision, the judge needed as much information as possible, so Congress passed statutes that enabled wide judicial access to and consideration of outside factors.⁴⁰ The judge considered all the circumstances surrounding a particular offense and deter-

³⁰ *Id.* ("The indeterminate sentence originally meant a term without a maximum or minimum" or "for a period of unlimited duration.").

³¹ *Grayson*, 438 U.S. at 46.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 45.

³⁶ See Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17 (1899).

³⁷ *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

³⁸ *Id.*

³⁹ *Id.* at 363.

⁴⁰ *Grayson*, 438 U.S. at 50; see also 18 U.S.C. § 3661 (1948) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). This language remains good law today,

mined the sentence based in part on aggravating or mitigating factors.⁴¹

Parole commissioners, who were considered to be members of the executive branch, also controlled how long criminal offenders actually served in prison.⁴² Parole officers had virtually limitless power to decide when a particular inmate had been rehabilitated and could return to society, regardless of the amount of the prison sentence he had actually completed.⁴³ It became commonplace for individuals not to serve the entire length of their prison sentences at the discretion of their parole officers.⁴⁴ The widespread availability of parole, the complex system of probation, and the broad sentencing ranges available for each crime increased uncertainty in the actual length of time each inmate would serve.⁴⁵ Congress and the public became aware of large sentencing disparities, with defendants who committed the same crime frequently serving disparate amounts of time in prison.⁴⁶

Uniformity in sentencing thus became the major concern of both lawmakers and judges by the late 1970s.⁴⁷ Congress sought a means to lessen sentencing disparities to the highest degree possible.⁴⁸ Judges faced the challenge of making the right decisions so as to be fair in each case but at the same time avoid arbitrary or capricious results on a larger scale.⁴⁹

This developing desire for uniformity in sentencing led to the first experimentation with statutory mandatory minimums in the 1950s and 1960s.⁵⁰ Congress passed some initial mandatory minimum statutes, but they were largely unfruitful and quickly repealed upon the realization that such mandatory sentences resulted in severe, often excessive, punishments for minor offenders.⁵¹ Recognizing that statutory mandatory minimums were not the answer, Congress next created the United States Sentencing Commission (“Sentencing

despite the obvious restrictions that statutory mandatory minimum sentences place on a judge’s sentence-determination process.

⁴¹ *Grayson*, 438 U.S. at 46.

⁴² *Mistretta*, 488 U.S. at 364–65.

⁴³ *Id.* at 365.

⁴⁴ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (“[R]elease by the Parole Commission . . . was likely.”).

⁴⁵ *Id.* at 4–5.

⁴⁶ *Id.*

⁴⁷ *Mistretta*, 488 U.S. at 365.

⁴⁸ U.S. SENTENCING COMM’N, GUIDELINES MANUAL 2–3 (2008).

⁴⁹ *United States v. Grayson*, 438 U.S. 41, 48 (1978).

⁵⁰ See Kelly Baker, *Issues in Mandatory Minimum Sentencing: Considering Traditional and Alternative Methods of Crime Control in the United States Justice System* 3 (2006) (unpublished graduate student essay, James Madison University), available at <http://www.jmu.edu/writeon/documents/2006/Baker.pdf>.

⁵¹ See *id.*

Commission”) to resolve the uniformity problem.⁵²

D. *The 1980s—The Establishment of the Sentencing Commission and a Return to Determinate Sentencing*

Significant social and political events led to the creation of the Sentencing Commission in 1984. The 1960s were a volatile time of dissent and rebellion against racial discrimination, the Vietnam War, and patriarchal institutions; drug use reached a fever pitch.⁵³ Middle America became frightened and launched a movement within the political establishment to get “tough on crime.”⁵⁴ By the late 1960s, efforts were made to put more criminals behind bars for longer periods of time in order to incapacitate them and reduce the crime rate.⁵⁵ Such efforts led to the creation of many new law enforcement agencies, such as the Law Enforcement Assistance Administration (“LEAA”), which President Lyndon Johnson’s administration launched in 1968.⁵⁶ The federal government’s determination to crack down on crime, particularly drug offenses, was heightened during President Richard Nixon’s administration, where “law and order” became the catch phrase for new crime-prevention legislation.⁵⁷

The general philosophical attitude regarding the purpose of criminal punishment also changed.⁵⁸ The public no longer considered rehabilitation a sound penological theory, and lawmakers questioned whether it was even an attainable goal in most cases.⁵⁹ This change in attitude was caused by, or at least coincided with, the steady increase in street and drug crime from 1960-1990.⁶⁰ These multiple forces culminated in the joint “War on Drugs” and “War on Crime” campaigns of the 1980s.⁶¹

One result of these campaigns was the Sentencing Reform Act of 1984 (“SRA”). The SRA created a new federal agency, the Sentencing Commission,⁶² which had the authority and expertise to create sweeping nationwide sentencing laws.⁶³ Congress placed the Commission within the judicial

⁵² *Mistretta*, 488 U.S. at 367 (citing 28 U.S.C. §§ 991, 994, 995(a)(1) (1984)).

⁵³ John Bellamy Foster et al., *Prisons and Executions—The U.S. Model: A Historical Introduction*, MONTHLY REV., July–Aug. 2001, available at <http://www.monthlyreview.org/0701editr.htm>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *Mistretta v. United States*, 488 U.S. 361, 365 (1989).

⁵⁹ *Id.*

⁶⁰ Stuntz, *supra* note 7, at 524–26.

⁶¹ Foster, *supra* note 53.

⁶² Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–59 (1984); 28 U.S.C. §§ 991–98 (1984).

⁶³ *Mistretta*, 488 U.S. at 368.

branch.⁶⁴ Congress also required that at least three of the Commission's seven members be federal judges.⁶⁵ In a 1989 Supreme Court case, *Mistretta v. United States*, the petitioner, John Mistretta, argued that the SRA violated the separation of powers doctrine due to the placement of the Sentencing Commission within the judicial branch, and that it violated the non-delegation doctrine because Congress exceeded its limited authority to delegate lawmaking power to the other branches.⁶⁶ The Court disagreed with Mistretta and held that the SRA did not violate either doctrine, and that the Sentencing Commission was valid.⁶⁷

The Sentencing Commission's duty was to establish a set of federal sentencing guidelines that would mandate a sentencing range for every imaginable crime.⁶⁸ The Sentencing Commission was to accomplish this feat through many hours of extensive research.⁶⁹ Current Supreme Court Justice Stephen Breyer, an original member of the Sentencing Commission, said the group worked intensely for a year and a half from the time of its appointment in 1985 to create a set of guidelines that would fulfill its congressional mandate.⁷⁰ The Commission took an empirical approach that began with the review of over 10,000 presentence reports setting forth what judges had done in the past.⁷¹ The Commission next engaged in extensive hearings, deliberation, and consideration of substantial public comments.⁷² It analyzed data and statistics and examined the many hundreds of criminal statutes in the United States Code.⁷³ The task of establishing uniform standards for criminal sentences was incredibly complex because the list of potential relevant factors to criminal behavior is extensive, these factors can occur in multiple combinations, the "possible permutations of factors is [thus] virtually endless," and the punishment analysis based on these factors is highly "context specific."⁷⁴ The final sentencing ranges were to have the power of law and to function as mandatory guidelines for all federal judges.⁷⁵ Judges had very little authority to impose a sentence either higher or lower than the established guidelines' range.⁷⁶ The creation of the Sentencing Commission and the subsequent Federal Sentencing Guidelines

⁶⁴ *Id.*

⁶⁵ *Id.* (citing 28 U.S.C.A. § 991 (1984)).

⁶⁶ *Id.* at 371.

⁶⁷ *Id.*

⁶⁸ *Id.* at 367 (citing 28 U.S.C. §§ 991, 994, 995(a)(1) (1984)).

⁶⁹ See *Rita v. United States*, 551 U.S. 338, 349–50 (2007); *Mistretta*, 488 U.S. at 369; U.S. SENTENCING COMM'N, GUIDELINES MANUAL 2, 4, 11 (2008).

⁷⁰ Breyer, *supra* note 44, at 6.

⁷¹ *Rita*, 551 U.S. at 349.

⁷² U.S. SENTENCING COMM'N, GUIDELINES MANUAL 2, 4, 11 (2008).

⁷³ *Id.*

⁷⁴ *Id.* at 3.

⁷⁵ See Breyer, *supra* note 44, at 1.

⁷⁶ 18 U.S.C. § 3553(b)(1) (2006) (held unconstitutional by *United States v. Booker*, 543 U.S. 220 (2005)).

(“Guidelines”) thus substantially limited the sentencing discretion of federal judges.

In addition to the new mandatory Guidelines system, Congress enacted new statutory mandatory minimum sentences in the 1980s.⁷⁷ For example, in 1984, the same year it passed the SRA, Congress passed the Armed Career Criminal Act, mandating fifteen-year prison terms for certain armed offenses.⁷⁸ In 1986, the year before the Guidelines were officially confirmed into law, Congress passed the Anti-Drug Abuse Act, which mandated a five-year sentence for drug distribution and a ten-year sentence for drug importation.⁷⁹ Congress created the Sentencing Commission expressly to serve as an expert body with the time, experience, and authority to establish appropriate uniform criminal sentences. Yet at the same time, Congress continued to impose its own sentences for certain crimes without consulting its body of experts.⁸⁰ Since the 1980s, mandatory minimum statutes have drastically increased in number.⁸¹ As a result, the Guidelines now overlap with, and often contradict, at least 171 federal criminal statutes that prescribe a mandatory minimum sentence.⁸²

Legal scholars, criminal attorneys, and federal judges began to find fault with the severe increase in the criminalization of conduct and the establishment of harsher punishments for relatively minor offenses.⁸³ Many thought the system of coexisting statutes was confusing and ineffective.⁸⁴ They opposed the denial of sentencing discretion that judges had enjoyed in one form or another since before the drafting of the Constitution.⁸⁵ Despite the heavy critiques, this convoluted system remained in place until the groundbreaking Supreme Court case of *United States v. Booker* in 2005.⁸⁶

⁷⁷ Baker, *supra* note 50, at 3.

⁷⁸ Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, 98 Stat. 2185.

⁷⁹ Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207.

⁸⁰ See, e.g., *id.*

⁸¹ *House Hearing Looks at Mandatory Minimum Sentencing Issues*, THE THIRD BRANCH, July 2007, <http://www.uscourts.gov/ttb/2007-07/househearing/index.html> (noting the Sentencing Commission’s finding that there are now at least 171 mandatory minimum provisions within the canon of federal criminal statutes, all of which operate separately from the Sentencing Commission’s own Guidelines).

⁸² *Id.* (citing a case in which a statutory mandatory minimum increased the defendant’s sentence, arguably irrationally, by fifty-five years, whereas the Guidelines would have only increased his sentence by two years).

⁸³ See, e.g., Vincent L. Broderick, *The Delusion of Mandatory Minimum Sentencing; the Wrong Approach to Fighting Crime*, TRIAL, Aug. 1, 1994, available at http://www.thefree library.com/_/print/PrintArticle.aspx?id=15747138; William Anderson & Candice E. Jackson, *Washington’s Biggest Crime Problem: The Federal Government’s Ever-Expanding Criminal Code Is an Affront to the Constitution*, REASON ONLINE, Apr. 2004, <http://reason.com/news/show/29099.html>.

⁸⁴ Broderick, *supra* note 83.

⁸⁵ *Id.*

⁸⁶ *United States v. Booker*, 543 U.S. 220 (2005).

III. THE STATE OF SENTENCING TODAY

A. United States v. Booker

In 2005, the Supreme Court decided the landmark case of *United States v. Booker*.⁸⁷ In *Booker*, the Court ruled that the Sentencing Commission's Guidelines were unconstitutional due to their mandatory nature.⁸⁸ The only way to maintain the Guidelines, the Court held, was to render them merely advisory.⁸⁹

Freddie J. Booker was convicted in a jury trial of possessing 92.5 grams of crack cocaine, but during the sentencing hearing the judge, relying on the presentence report and other information, found by a preponderance of the evidence that Mr. Booker possessed an additional 566 grams of crack cocaine and had obstructed justice.⁹⁰ Based on those facts, the trial judge enhanced Mr. Booker's sentence to 360 months in prison, a punishment that far exceeded the 210–262-month Guidelines sentence range applicable to the facts found by the jury.⁹¹ The Court of Appeals for the Seventh Circuit found the sentence unconstitutional, and remanded the case with instructions to either sentence Mr. Booker based on the findings of the jury—within the mandatory Guidelines range—or to hold a separate sentencing hearing before a jury.⁹² The Supreme Court affirmed the Seventh Circuit's decision and further held that the Guidelines are unconstitutional if they are mandatory.⁹³ The Court required that sentencing judges first consider the Guidelines range, but it allowed the judge to depart from that range in either direction in light of other factors and concerns.⁹⁴

The *Booker* decision was heralded as a new day that would return discretion to federal judges after nearly twenty years since the Guidelines' adoption.⁹⁵ Federal judges would again be able to make decisions about sentencing and punishment; the Court had restored the judiciary to its traditional central role in criminal sentencing.⁹⁶ Unfortunately, *Booker* did not affect statutory mandatory minimum sentences, which continue to deprive judges of discretion and prevent these predictions from reaching fruition.

B. Sentencing Based on Statutory Sentencing Factors

Booker held that the portion of the SRA making the Guidelines mandatory

⁸⁷ *Id.*

⁸⁸ *Id.* at 221, 226, 260, 265.

⁸⁹ *Id.* at 258–59.

⁹⁰ *Id.* at 227.

⁹¹ *Id.*

⁹² *Id.* at 227–28.

⁹³ *Id.*

⁹⁴ *Id.* at 245.

⁹⁵ See Linda Greenhouse, *Court Restores Sentencing Powers of Federal Judges*, N.Y. TIMES, Dec. 11, 2007, at A1.

⁹⁶ *Id.*

was unconstitutional, but the rest of the Act remained good law.⁹⁷ As such, 18 U.S.C. § 3553(a), which lays out the factors to be considered in determining an appropriate sentence, remains a cornerstone of guidance for federal sentencing judges.⁹⁸ This portion of the statute requires that the sentencing court “shall impose a sentence sufficient, but not greater than necessary” to comport with the goals of the statute, and that the court “in determining the particular sentence to be imposed, shall consider” all of the factors listed in the statute.⁹⁹ Some of the factors for judicial consideration listed in the statute are “the nature and circumstances of the offense,” “the history and characteristics of the defendant,” the need “to protect the public from further crimes of the defendant,” and the need to provide the defendant with “educational or vocational training, medical care, or other correctional treatment.”¹⁰⁰

C. Rita v. United States

The next related case that came before the Supreme Court, *Rita v. United States*, addressed the new level of appellate review required for challenges of criminal sentences brought after *Booker*.¹⁰¹ Prior to *Booker*, when the Guidelines were still mandatory, appeals of sentences could only be brought in very limited cases where the sentence was outside the Guidelines range.¹⁰² Here, the Court directed courts of appeals to review federal sentences based on reasonableness and to set aside those sentences that they find to be “unreasonable.”¹⁰³ The Court held that federal courts of appeals may find that because the district court’s sentence was within the advisory Guidelines range, the sentence holds a presumption of reasonableness.¹⁰⁴ Although the law allows courts of appeals to

⁹⁷ *Booker*, 543 U.S. at 245.

⁹⁸ 18 U.S.C. § 3553(a) (2003) provides that the judge “shall impose a sentence sufficient, but not greater than necessary.” In determining the appropriate sentence, the court “shall consider” the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; the seriousness of the offense; the need to deter similar criminal conduct; the need to protect the public from further crimes of the defendant; whether the defendant needs educational or vocational training, medical care, or other correctional treatment; the kinds of sentences available; the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Rita v. United States*, 551 U.S. 338 (2007).

¹⁰² *Mistretta v. United States*, 488 U.S. 361, 368 (1989); *see also* 18 U.S.C. § 3742 (2003) (held unconstitutional by *Booker*, 543 U.S. 220 (2005)).

¹⁰³ *Rita*, 551 U.S. at 340.

¹⁰⁴ *Id.* at 339.

apply a presumption of reasonableness to a within-Guidelines-range sentence, the law does *not* permit the court to presume that sentences outside the Guidelines range are unreasonable.¹⁰⁵

D. *Gall v. United States*

In *Gall v. United States*, a district court judge sentenced Brian Michael Gall to thirty-six months' probation instead of the thirty to thirty-seven months in prison suggested by the Guidelines, upon consideration of mitigating factors.¹⁰⁶ The Eighth Circuit reversed the sentence on the ground that any sentence outside the Guidelines range must be supported by "extraordinary circumstances," which was not the case here.¹⁰⁷ The Supreme Court overruled the Eighth Circuit, holding that because the Guidelines are now advisory, appellate courts must review federal sentences for reasonableness under a deferential abuse-of-discretion standard.¹⁰⁸ Appellate courts may consider the degree of variance between the sentence and the applicable Guidelines range as a factor in that review, but "extraordinary circumstances" are not necessary to justify a sentence outside the Guidelines range.¹⁰⁹ Appellate courts must simply consider the Guidelines range, consider the reasons given by the district court judge for imposing the sentence she did, and make an individualized assessment based on all the facts available.¹¹⁰ The Supreme Court found that the Eighth Circuit had not given due deference to the district court's "reasoned and reasonable" sentencing decision.¹¹¹

E. *Kimbrough v. United States*

Kimbrough v. United States reiterated the reasoning in *Gall*, but applied it specifically to the crack/cocaine ratios promulgated in the Guidelines.¹¹² The ratio of crack to cocaine established in the Guidelines is 100/1, which means that a drug trafficker dealing in crack cocaine is subject to the same sentence and same prison term as a trafficker dealing in 100 times more powder cocaine.¹¹³ The district court found that this ratio resulted in a sentence that was

¹⁰⁵ *Id.* at 354–55.

¹⁰⁶ *Gall v. United States*, 552 U.S. 38 (2007) (describing the mitigating factors as such: "Petitioner Gall joined an ongoing enterprise distributing the controlled substance 'ecstasy' while in college, but withdrew from the conspiracy after seven months, has sold no illegal drugs since, and has used no illegal drugs and worked steadily since graduation. Three and a half years after withdrawing from the conspiracy, Gall pleaded guilty to his participation.").

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 47.

¹¹⁰ *Id.* at 49–50.

¹¹¹ *Id.* at 39.

¹¹² *Kimbrough v. United States*, 552 U.S. 85 (2007).

¹¹³ *Id.*

greater than necessary to achieve the goals of sentencing, and therefore sentenced Derrick Kimbrough to the statutory mandatory minimum term of fifteen years in prison instead of the longer sentence established by the applicable Guidelines range.¹¹⁴ The Fourth Circuit vacated the sentence, holding that a sentence outside the Guidelines range, when based on the disparity between crack and powder cocaine, is per se unreasonable.¹¹⁵ The Supreme Court reversed the Fourth Circuit, holding that the crack/powder cocaine disparity set out in the Guidelines was advisory, and not mandatory, just like the rest of the Guidelines.¹¹⁶

F. *Nelson v. United States*

In *Nelson v. United States*, petitioner Lawrence Nelson was convicted of one count each of conspiracy to distribute and to possess with intent to distribute more than fifty grams of crack cocaine.¹¹⁷ The district court sentenced petitioner within the Guidelines range, stating that the Guidelines range had a presumption of reasonableness from which it would not depart.¹¹⁸ The Supreme Court held that district courts are not permitted to apply a presumption of reasonableness to the Guidelines sentencing range.¹¹⁹ Only appellate courts may apply a presumption of reasonableness to a sentence that is within Guidelines range during their review of the district court's sentence for abuse of discretion.¹²⁰

Overall, recent Supreme Court case law has made clear that the Sentencing Guidelines are in no way mandatory. These cases have also given larger grants of sentencing discretion to federal district court judges. Statutory mandatory minimum sentences stand in particular contrast to, and as a final bastion against, the Supreme Court's clear path towards greater judicial discretion in sentencing.

G. *The Sentencing Hearing*

An important part of the federal sentencing process is to hold a sentencing hearing pursuant to Rule 32 of the Federal Rules of Criminal Procedure.¹²¹ The sentencing hearing is a separate procedure from the jury trial to determine guilt. According to Rule 32, the probation officer must conduct a presentence investigation and submit a report to the court before the court imposes a sentence.¹²² The presentence report includes information such as the following: all applica-

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Nelson v. United States*, 129 S. Ct. 890 (2009).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 892.

¹²⁰ *Id.*

¹²¹ FED. R. CRIM. P. 32.

¹²² *Id.*

ble Guidelines and policy statements of the Commission; the defendant's offense level and criminal history category; the sentencing range and types of sentences available; any basis for departing from the Guidelines range; the defendant's history and characteristics such as a criminal record, financial situation, and any information relevant to the sentencing factors in 18 U.S.C. § 3553(a).¹²³ Regardless of the specifications of the presentence report and the sentencing factors, the statute specifies that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."¹²⁴

At the sentencing hearing, both the defendant and prosecutor can challenge facts stated in the presentence report. Either side can present evidence, including witnesses. The court must give the defendant, the defendant's attorney, and an attorney for the government an opportunity to speak. The victim(s) must also be provided an opportunity to speak.¹²⁵ Because of the detailed level of procedure and the reliance on facts and evidence, the sentencing hearing is often called a sentencing trial. It is a separate mini-trial to determine what the appropriate, fair, and just sentence is for each defendant, based on all of the evidence. The sentencing trial can be conducted in front of a jury.¹²⁶

H. *The Role of the Executive Branch in Sentencing*

The executive branch also plays a critical role in sentencing today. Federal prosecutors decide which charges to bring against each defendant.¹²⁷ The prosecutor's decision dramatically impacts the length of any prison term to which the defendant is sentenced, because the charge dictates the Guidelines range and the application of a statutory mandatory minimum sentence.¹²⁸ The criminal law is overly-broad and yet ever-expanding.¹²⁹ This means that in most offenses, more than one criminal statute has been violated.¹³⁰ The prosecution can determine which of these violations to charge against the defendant, including filing no charges or filing all applicable charges.¹³¹ The more violations the prosecution chooses to charge, the longer the potential sentence against the defendant.¹³² This is called charge-stacking, and it is useful to federal prosecu-

¹²³ *Id.*

¹²⁴ 18 U.S.C. § 3661 (1984).

¹²⁵ FED. R. CRIM. P. 32.

¹²⁶ *See* United States v. Booker, 543 U.S. 220 (2005).

¹²⁷ Stuntz, *supra* note 7, at 510 ("[P]rosecutorial discretion—meaning prosecutors decide whom to charge, and for what.").

¹²⁸ *See id.* at 519–20.

¹²⁹ *Id.* at 507, 510.

¹³⁰ *Id.* at 519–20.

¹³¹ *Id.*

¹³² *Id.*

tors as an aid in plea bargaining.¹³³ Bringing multiple charges against a defendant for the same criminal episode increases the potential sentence.¹³⁴ This in turn increases the defendant's logical desire to plead guilty and avoid the full possible sentence, especially if the charge-stacking triggered a mandatory minimum sentence.¹³⁵

Finally, only the prosecution has the power to lessen a defendant's sentence to below a statutory mandatory minimum.¹³⁶ If the prosecution determines that a defendant has "substantially assisted" them in their prosecution of other offenders, at their own discretion, the prosecution can submit an order on the defendant's behalf to lessen the sentence below the mandatory minimum.¹³⁷ The legislature provided the judge no such safety valve.¹³⁸

IV. THE SEPARATION OF POWERS DOCTRINE

A. *Separation of Powers in the Federalist Papers*

The separation of powers doctrine is one of the most fundamental concepts in the founding of our nation. James Madison and Alexander Hamilton discussed the doctrine in great depth in the *Federalist Papers*. Madison defined the separation of powers as "the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct."¹³⁹ The tenet was so basic to a properly functioning democratic government that Madison said, "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."¹⁴⁰

The separation of powers was very important to the founders of the United States because the country had just successfully rebelled against the tyranny of an oppressive English monarch. One common thread in the beginning of our nation was the fear of power. Too much power in any one hand, or any one branch of government, would devastate a republican form of government.¹⁴¹ As Madison put it, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."¹⁴² Although the nation had just separated itself from the

¹³³ *Id.* at 520 ("Charge-stacking, the process of charging defendants with several crimes for a single criminal episode, likewise induces guilty pleas, not by raising the odds of conviction at trial but by raising the threatened sentence.").

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ 18 U.S.C. § 3553(e) (2003).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ THE FEDERALIST NO. 47 (James Madison).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

English monarchy, the founders did not solely fear excessive power in the executive branch. Quite to the contrary, the founding fathers were more concerned that the legislative branch of the government might very easily take over the powers of the other two branches.¹⁴³

Particularly in a democracy, writers of the constitution, citizens, and members of government must always be aware that:

[I]n a representative republic, where the Executive magistracy is carefully limited, both in the extent and the duration of its power; and where the Legislative power is exercised by an assembly . . . it is against the enterprising ambition of this department [the legislature], that the people ought to indulge all their jealousy, and exhaust all their precautions.¹⁴⁴

Despite the large grant of power to Congress in the Constitution, the Legislative Branch is not immune from claims of tyranny. In fact, as Madison wrote, because of the large scope of congressional authority, the legislative branch needed to be watched warily. Due to its particular constitutional powers, Congress was in the unique position to more easily encroach upon the authority delegated to the other two branches.¹⁴⁵

Legislative encroachment upon the duties of the judiciary was Hamilton's real concern. Because the judicial branch is naturally "feeble," it is in "continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches."¹⁴⁶ The constant threat to the powers of the judicial branch impedes it from performing its important role in the government, which is to act as an intermediary between Congress and the people.¹⁴⁷ The judicial branch is in the best position to protect the people's constitutional rights from an infringing Congress or executive, because it has the least power to annoy or injure those rights.¹⁴⁸

Although the separation of powers allots a specific role to each branch of government, the real ideal of the doctrine is for all of the branches to work together when implementing their authority. Overlap in the duties of the branches is necessary and desired, and only when all three branches are "con-

¹⁴³ THE FEDERALIST NO. 48 (James Madison) (warning against "the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations").

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (warning that because Congress' "constitutional powers [are] at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments").

¹⁴⁶ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁴⁷ *Id.* ("[I]n a republic [the judiciary] is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.").

¹⁴⁸ *Id.*

nected and blended” will a free government be maintained.¹⁴⁹ Each branch must have some independent authority and each branch must be capable of checking the others.¹⁵⁰

B. *Separation of Powers in the U.S. Constitution*

The structure of the U.S. Constitution reveals the Framers’ preoccupation with separating and limiting the powers of the government, specifically in criminal proceedings against the people.¹⁵¹ First, Article I provides express limits on the power of Congress to act as the judiciary. It prohibits Congress from labeling specific individuals or groups as criminals through Bills of Attainder.¹⁵² It denies Congress the power to pass ex post facto laws which would unfairly criminalize past conduct.¹⁵³ It restricts Congress’ ability to suspend the writ of habeas corpus, through which citizens can seek relief from unlawful detention.¹⁵⁴ The Constitution also protects individuals in criminal proceedings from the joint powers of the legislative and executive branches by creating an independent and impartial judicial branch.¹⁵⁵ The judiciary is charged with checking the power of Congress in a number of ways; for example, it enforces the Ex Post Facto Clause and Bill of Attainder Clause.¹⁵⁶ The judiciary also ensures fair process to a criminal defendant before that defendant is convicted of a crime.¹⁵⁷ In the event that the judiciary and Congress somehow fail in their mission of justice, the executive branch acts as a check with its ability to grant pardons after conviction.¹⁵⁸ This is a brief example of the nuanced web of overlapping powers when the federal government brings a criminal case against a citizen.

¹⁴⁹ THE FEDERALIST NO. 48 (James Madison) (“[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”).

¹⁵⁰ *Id.* The title of THE FEDERALIST NO. 48, “These Departments Should Not Be So Separated as to Have No Control Over Each Other,” speaks to this proposition.

¹⁵¹ Barkow, *supra* note 5, at 1012.

¹⁵² U.S. CONST. art. I, § 9.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Barkow, *supra* note 5, at 1014.

¹⁵⁶ *Id.*; see also *United States v. Brown*, 381 U.S. 437, 440 (1965). In *Brown*, the Supreme Court declared a law unconstitutional on the grounds that it was a Bill of Attainder. *Id.* Chief Justice Warren stated the Bill of Attainder Clause reflects the belief inherent in the separation of powers doctrine that politically independent judges are better suited than the other branches to declare blameworthiness and levy appropriate punishment upon individual citizens. *Id.* at 445.

¹⁵⁷ U.S. CONST. art. III, § 2 (“[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . .”).

¹⁵⁸ U.S. CONST. art. II, § 2.

The specific power to sentence criminals is not explicitly discussed in the Constitution. Because of this, federal sentencing has never been assigned by the Constitution to the exclusive jurisdiction of any one of the three branches of government.¹⁵⁹ The separation of powers doctrine applies to criminal sentencing just as it does to all other aspects of criminal proceedings. For, when a given policy can be implemented only by a combination of legislative, judicial, and executive power, “no man or group of men will be able to impose its unchecked will.”¹⁶⁰ Constitutionally speaking, all three branches of government should play a role in criminal sentencing, and each should have the authority to check the power of the others.

V. STATUTORY MANDATORY MINIMUMS VIOLATE THE SEPARATION OF POWERS DOCTRINE

A. *In General*

Statutory mandatory minimum sentences allow the legislature to improperly use its power to establish definitive punishment for crimes, improperly grant the executive branch broad authority to impose that punishment, and relegate the role of the judiciary to bureaucratic affirmation of the process. For this reason, such statutes violate the separation of powers doctrine and should be abolished.

Criminal statutes that mandate minimum prison terms benefit both legislators and prosecutors, to the detriment and exclusion of judges. This is due to the inherent partnership between legislators and prosecutors, who share the same incentives.¹⁶¹ Both legislators and prosecutors seek to win public favor by prosecuting the crimes the public wants prosecuted and by winning those cases.¹⁶² Congress has an incentive to pass criminal laws that make it easier for prosecutors to convict and punish criminals.¹⁶³ This is especially true of convictions for the crime *du jour*, the crimes that have grabbed the public’s attention and become a talking point of the day.¹⁶⁴ Legislators do not win votes by being soft on crime. Federal prosecutors are appointed, not elected, but gaining public favor through a number of prominent convictions can be a great career boost.¹⁶⁵ This politicization of the criminal law leads to its ever growing size and harsher punishments; individual justice is often left behind.

Only federal judges, who serve for life and are impartial by duty, are likely to opt for narrower criminal rules rather than broader ones.¹⁶⁶ This unique po-

¹⁵⁹ *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

¹⁶⁰ *Brown*, 381 U.S. at 443.

¹⁶¹ Stuntz, *supra* note 7, at 510.

¹⁶² *Id.* at 534.

¹⁶³ *Id.* at 531.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 543–44.

¹⁶⁶ *Id.* at 510.

sition of the judge should act as a check on the power of the other branches in our system of separation of powers. This does not happen, however, when judges lack sentencing discretion due to statutory mandatory minimum sentences, which disproportionately concentrate sentencing power in the hands of one or, at most, two branches of government.¹⁶⁷

Mandatory sentences also deny judges their discretion in setting the appropriate sentence. Although the Supreme Court based its holding in *Booker* on the Sixth Amendment right to a trial by jury, there is a strong implication that the separation of powers doctrine was also at work in that case and that the real concern was the need for judicial discretion in sentencing.¹⁶⁸ Supreme Court precedent, including *Booker*, reveals that one similarity between all sentencing systems that the Court has deemed unconstitutional is their lack of judicial discretion.¹⁶⁹ Likewise, sentencing systems deemed valid by the Court have allowed judges to use their discretion and rely on sentencing factors to make their decisions.¹⁷⁰ The Supreme Court appears to recognize when judges are not playing a sufficient role in sentencing, and has consistently found those situations to be unconstitutional.

The sentencing hearing provides more insight into the legislative and executive encroachment into judicial authority by illustrating the judicial nature of the criminal sentencing process. Under the Federal Rules of Criminal Procedure, every defendant receives a sentencing hearing after his conviction of a federal offense.¹⁷¹ At that hearing, the judge weighs facts and evidence in order to create a fair sentencing result. Mandatory minimum sentences prohibit the judiciary from fully conducting one of its basic tasks: weighing the evidence in individual cases in order to produce just outcomes. Although defendants who face statutory mandatory minimum sentences still receive a sentencing hearing, the discretion of the judge in applying the proper sentence is often curtailed through the inability to impose a less severe sentence than that required by the legislature. The legislature, with no knowledge of what might be just and fair in individual cases, oversteps its sphere of power by mandating blanket minimum sentences.

B. *The Expertise of the Judicial Branch*

Individual criminal defendants need to be protected against “the occasional excesses of the popular will.”¹⁷² It is the duty of the judiciary to protect them and to uphold our constitutional system of checks and balances that is “precise-

¹⁶⁷ *Id.*; see also Bowman, *supra* note 8, at 236.

¹⁶⁸ Mandiberg, *supra* note 15, at 113.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ FED. R. CRIM. P. 32.

¹⁷² Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

ly designed to inhibit swift and complete accomplishment of that popular will.”¹⁷³ The legislature, in theory, acts to please the people. When crime rates rise, the people want to see that the legislature is doing something to protect them. This relationship can lead to broad criminalization and punishment schemes that are “tough on crime” at the expense of the rights of individuals who are convicted of crimes. The Constitution entrusts the judiciary to protect individual defendants from unjust application of the rule of the majority. Therefore, the judiciary is the branch that should make the final sentencing determination for each individual.

Recognizing that the Sentencing Commission had a complicated job needing judicial expertise, Congress established the Sentencing Commission within the judicial branch.¹⁷⁴ The complex and labor-intensive duty of creating and monitoring Guidelines required continual review by “an expert body . . . [with] application experience.”¹⁷⁵ Essentially, Congress could not do the job on its own; it needed the help of the judiciary. However, statutes with mandatory minimum sentences violate this logic in that the judiciary plays no role in researching or establishing the mandated punishment and the judiciary cannot depart from the minimum sentence.

Congress also recognized that there are unexpected factors in criminal sentencing that the judiciary is best-equipped to handle. Before passing the SRA, which established the mandatory Guidelines system, Congress considered other competing proposals for sentencing, such as a determinate sentencing regime consisting of mandatory sentences for each crime.¹⁷⁶ But the legislature summarily rejected this regime, concluding that “a guideline system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case.”¹⁷⁷ This assertion reflects that Congress understood that there are unanticipated, mitigating or aggravating factors in criminal cases. No two cases and no two defendants are identical. This suggests that some variance should be allowed, even between cases where the same law has been broken and the same crime is charged. A judge should determine what level of variance is appropriate. Without that option, a sentencing system cannot be truly fair.

In *Booker*, the Supreme Court agreed that criminal sentencing must be conducted on a case-by-case basis.¹⁷⁸ The Court said that the SRA, “without its mandatory provision and related language remains consistent with Congress’

¹⁷³ *Id.*

¹⁷⁴ 28 U.S.C. § 991(a) (1984).

¹⁷⁵ U.S. SENTENCING COMM’N, GUIDELINES MANUAL 12 (2008).

¹⁷⁶ *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

¹⁷⁷ *Id.*

¹⁷⁸ *United States v. Booker*, 543 U.S. 220, 233 (2005) (“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not [be unconstitutional]”).

initial and basic sentencing intent,” which includes “maintaining sufficient flexibility to permit individualized sentences when warranted.”¹⁷⁹ The Court also said in *Booker* that a fair sentencing system “depends for its success upon judicial efforts to determine, and to base punishment upon, the real conduct that underlies the crime.”¹⁸⁰ When judges are forced by law to impose a certain sentence, they lose the ability to effectively consider the individual facts and underlying conduct of each crime. This ability is essential to a fair criminal sentencing system.

Finally, congressional intent shows that Congress always thought sentencing was a function of the judiciary. That is why, when the legislature created the Sentencing Commission in 1984, it placed the agency in the judicial branch.¹⁸¹ Congress could have established a committee within its own branch to create sentencing laws, but it did not. Congress also required that at least three of the seven members of the Commission be federal judges.¹⁸² These decisions “reflected Congress’ ‘strong feeling’ that sentencing has been and should remain ‘primarily a judicial function.’”¹⁸³ The Supreme Court emphasized the importance of the judicial branch’s role in criminal sentencing, saying that “[i]f the guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment of the judicial function.”¹⁸⁴ Thus both the legislature and the Supreme Court recognize that sentencing is a judicial function.

C. *Conflicting Language in Sentencing Statutes Regarding the Role of the Judge*

Each of the 171 or more federal criminal statutes that establish mandatory minimum terms in prison as punishment forbid the sentencing judge from imposing any lesser sentence, even if the judge finds important mitigating factors during the hearing.¹⁸⁵ In the absence of a mandatory minimum sentence, a judge can consider the defendant’s criminal record, or lack thereof, and lessen the sentence accordingly. But in cases involving statutory mandatory minimums, a judge cannot lessen the punishment below the minimum sentence. The judge simply cannot give weight to any factor that would result in a sentence less than the mandatory minimum. This alarming lack of discretion con-

¹⁷⁹ *Id.* at 264.

¹⁸⁰ *Id.* at 250.

¹⁸¹ 28 U.S.C. § 991(a) (1984).

¹⁸² *Id.*

¹⁸³ *Mistretta v. United States*, 488 U.S. 361, 390 (1989).

¹⁸⁴ *Id.* at 391 n.17.

¹⁸⁵ *House Hearing Looks at Mandatory Minimum Sentencing Issues*, THE THIRD BRANCH, July 2007, available at <http://www.uscourts.gov/ttb/2007-07/househearing/index.html>.

flicts with language in the SRA and other federal statutes.¹⁸⁶ The SRA specifies that the sentencing judge “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in” this Act.¹⁸⁷ If, upon consideration of the presentence report and all other factors at sentencing, the judge finds that the statutory mandatory minimum is excessive, he still must impose that sentence in violation of the SRA’s mandate. The SRA also commands that sentencing judges, “in determining the particular sentence to be imposed, shall consider” the seven factors listed in section 3553(a).¹⁸⁸ If, after consideration, the judge determines that “the nature and circumstances of the offense and the history and characteristics of the defendant”¹⁸⁹ call for a rather lenient punishment, and that the need “to protect the public from further crimes of the defendant”¹⁹⁰ is extraordinarily low, the judge still cannot impose a sentence lower than the mandatory minimum. This effectively renders the judge’s consideration of the factors moot, putting it in direct conflict with the SRA. Ironically, it is historically the duty of the judiciary to resolve a conflict between two statutes.¹⁹¹

D. *Usurpation of Sentencing Power Leaves Many Judges Feeling Helpless*

There are many examples of cases in which federal judges have felt trapped by their necessity, under law, to impose mandatory minimum sentences. One recent case is *United States v. Angelos*.¹⁹² Weldon Angelos was convicted of selling eight-ounce bags of marijuana to an undercover police officer on three occasions.¹⁹³ Unfortunately, he also was wearing a gun strapped to his ankle on those occasions.¹⁹⁴ Angelos never threatened anyone with the gun, showed anyone the gun, or even removed the gun from his ankle.¹⁹⁵ Nevertheless, his mere possession of the gun triggered a mandatory minimum sentence of fifty-five years in jail.¹⁹⁶ Federal Judge Paul Cassel, who was forced to impose this sentence upon Mr. Angelos, conducted a comparison survey and noted that Angelos’s fifty-five year prison term is a longer sentence than Angelos would have received if he had hijacked a plane, beaten someone to death in a fight, detonated a bomb in an aircraft, or provided weapons to support a foreign terrorist group.¹⁹⁷ In fact, the maximum sentence for all those crimes added to-

¹⁸⁶ 18 U.S.C. § 3553(a) (2003); *see also* 18 U.S.C. § 3661 (1984).

¹⁸⁷ 18 U.S.C. § 3553(a) (emphasis added).

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ 18 U.S.C. § 3553(a)(1).

¹⁹⁰ 18 U.S.C. § 3553(a)(2)(c).

¹⁹¹ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁹² *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

gether is less than the mandatory minimum under federal sentencing rules for a small-time dope dealer carrying a gun.¹⁹⁸ Judge Cassell decried the statutory mandatory minimum, saying that the sentence imposed was “unjust, cruel, and irrational.”¹⁹⁹ He expressed regret that he had no way out and had to follow the law as it was written. But Judge Cassell recommended that then-President George W. Bush commute Mr. Angelos’s sentence and urged Congress to modify the law.²⁰⁰

A second example is *United States v. Powell*.²⁰¹ Here, Judge David Hurd was forced to sentence a thirty-two-year old small-time drug dealer with an IQ of seventy-two to serve life in prison, because the defendant had two very minor drug sales when he was a juvenile, over ten years prior to the present case.²⁰² Judge Hurd responded to the situation by saying that “[t]his is what occurs when Congress sets [a] mandatory minimum sentence which distorts the entire judicial process . . . As a result, I am obligated to and will now impose this unfair and, more important, this unjust sentence.”²⁰³

A third example is *United States v. Farley*, where the defendant Kelly Brenton Farley faced a mandatory minimum sentence of thirty years to life in prison for crossing a state line with the intent to engage in a sexual act with a person under twelve years old.²⁰⁴ This sentence was mandatory even though the defendant did not engage in any sexual act with a minor. He was facing thirty years to life in prison for an intent crime. The district court judge refused to apply the mandatory minimum sentence on the grounds that the statute was unconstitutional because it violated the Eighth Amendment’s guarantee against cruel and unusual punishment.²⁰⁵

While it is still in dispute whether this statute is unconstitutional, it is clear that federal sentencing judges are unhappily locked into applying statutory mandatory minimums. Thomas Jefferson predicted this result over a century ago: “[i]f the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual.”²⁰⁶ Although federal courts have begun to oppose mandatory sentencing laws, as seen in *Booker* and *Farley*, the

¹⁹⁸ *Id.* at 1246.

¹⁹⁹ *Id.* at 1263.

²⁰⁰ *Id.*

²⁰¹ *United States v. Powell*, 404 F.3d 678 (2d Cir. 2005).

²⁰² *Id.*

²⁰³ John Caher, *Federal Judge Blasts Mandatory Minimum Sentences*, LAW.COM, Jan. 20, 2006, <http://www.law.com/jsp/article.jsp?id=1137665111038>.

²⁰⁴ *United States v. Farley*, No. 1:07-CR-196-BBM, slip op. at 2 (10th Cir. Sept. 2, 2008).

²⁰⁵ *Id.*

²⁰⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245–46, available at <http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=13&division=div1> (last visited Apr. 12, 2010).

burgeoning opposition has so far had little to no effect on statutory mandatory minimum sentences.

E. *Statutory Mandatory Minimum Sentences: Poor Public and Social Policy*

It is not only lower federal court judges who are increasingly frustrated with statutory mandatory minimums. President Barack Obama echoed the separation of powers argument when he expressed his position against mandatory minimums, stating that “we have a system that locks away too many young, first-time, non-violent offenders for the better part of their lives—a decision that’s made not by a judge in a courtroom, but all too often by politicians in Washington.”²⁰⁷ Judicial criticism of mandatory minimum sentences crosses party lines, as evidenced by statements of both former Supreme Court Chief Justice William Rehnquist and current Justice Anthony Kennedy. Chief Justice Rehnquist has said that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences.”²⁰⁸ Justice Kennedy has spoken out against mandatory minimums, arguing that required jail terms are responsible for the current state of prison overpopulation and crowded jails in America.²⁰⁹ In fact, more than eighty percent of the increase in prison population between 1985 and 1995 was due to drug convictions that triggered statutory mandatory minimum sentences.²¹⁰

This highlights another problem with mandatory minimum sentences: they disproportionately affect drug and gun possession offenses.²¹¹ Statutory mandatory minimum sentences are sending non-violent offenders to prison for long terms, whereas violent offenders often serve less time.²¹² Mandatory minimum sentences also disproportionately send more people of color, more women, and more parents of young children to prison for lengthy terms.²¹³ Send-

²⁰⁷ Barack Obama, Remarks at the Howard University Convocation (Sept. 28, 2007).

²⁰⁸ Chief Justice William H. Rehnquist, Luncheon Address at the National Symposium on Drugs and Violence in America (June 18, 1993).

²⁰⁹ Brad Wright, *Justice Kennedy Criticizes Mandatory Minimum Sentences*, CNN.COM, Apr. 9, 2003, <http://www.cnn.com/2003/LAW/04/09/kennedy.congress>.

²¹⁰ DRUG POLICY ALLIANCE NETWORK, MANDATORY MINIMUM SENTENCES (2009), <http://www.drugpolicy.org/drugwar/mandatorymin>.

²¹¹ Families Against Mandatory Minimums, What Are Mandatory Minimums?, <http://www.famm.org/UnderstandSentencing/WhatAreMandatoryMinimums.aspx> (last visited Apr. 12, 2010).

²¹² *Id.*; see also *House Hearing Looks at Mandatory Minimum Sentencing Issues*, THE THIRD BRANCH, July 2007, available at <http://www.uscourts.gov/ttb/2007-07/househearing/index.html> (“It is hard to explain why a federal judge is required to give a longer sentence to a first offender who carried a gun to several marijuana deals than to a man who murdered an elderly woman.”).

²¹³ *Id.*

ing parents to jail has detrimental and often cyclical results on their children, with children of parents in jail often ending up in prison themselves.²¹⁴ Also, mandatory minimum sentences are often the least cost-effective way of handling these majority non-violent offenders, and taxpayers are paying the unnecessary price.²¹⁵

Recent studies have shown that taxpayer support of mandatory minimum sentences is beginning to decline. A recent poll conducted by the *Christian Science Monitor* reported that sixty percent of Americans oppose statutory mandatory minimum sentences.²¹⁶ Families Against Mandatory Minimums—an organization whose name itself reveals the opinion of many Americans towards mandatory minimum sentences—cites a 2003 survey that showed fifty-six percent of adults favor elimination of mandatory sentencing laws in favor of letting judges determine the appropriate sentence.²¹⁷

F. *Abolition of Statutory Mandatory Minimum Sentences*

Because statutory mandatory minimum sentences violate the separation of powers doctrine, they must be repealed or abolished. There are a number of methods through which this abolition could occur. First, Congress should recognize the growing national voice of the people against mandatory minimum sentences. More and more American citizens support judicial discretion and individualization in criminal sentencing, and oppose the blanket application of mandatory minimum sentences. Congress should listen to its constituency and repeal all statutory mandatory minimum sentences.

If Congress continues to breach its authority in enacting and maintaining statutory mandatory minimums, the Supreme Court and federal courts should exercise their authority and deem these laws unconstitutional. Although the judiciary is the least powerful branch of the tripartite government, it does have

²¹⁴ FAMILIES AGAINST MANDATORY MINIMUMS, THE CASE FOR FEDERAL MANDATORY SENTENCING REFORM 2, http://www.famm.org/Repository/Files/8136_FammFedBro_V8.pdf (last visited Apr. 12, 2010) (“Another indirect but painful cost of long mandatory minimum sentences is endured by the blameless families and children of prisoners. At least 1.5 million children have a parent in prison—an increase of more than 500,000 children since 1991. The majority of these children are under 10 years old. Without proper support, many of them are at risk of following their parents to prison. Congress could alleviate the problem by ensuring that, while people are penalized for their crimes, the punishment is not an excessive and arbitrary mandatory sentence.”).

²¹⁵ Families Against Mandatory Minimums, *supra* note 211; *Mandatory Minimum Sentencing Busts Budgets and Bloats Non-Violent Prison Rolls*, JURIST: LEGAL NEWS AND RESEARCH, Mar. 2010, available at <http://jurist.law.pitt.edu/hotline/2010/03/mandatory-minimum-sentencing-busts.php>.

²¹⁶ Amanda Paulson, *Poll: 60 Percent of Americans Oppose Mandatory Minimum Sentences*, THE CHRISTIAN SCIENCE MONITOR, Sept. 25, 2008, available at <http://www.csmonitor.com/2008/0925/p02s01-usju.html>.

²¹⁷ Families Against Mandatory Minimums, *supra* note 2101.

the authority to rule laws in violation of the U.S. Constitution void.²¹⁸ The Supreme Court began along this path in *Booker*, and it should continue in subsequent cases to render statutory mandatory minimum laws unconstitutional. This is the beauty of the separation of powers doctrine: it is both a directive and a remedy. United States federal courts should use the separation of powers doctrine as a remedy to unconstitutional statutory mandatory minimum sentences.

VI. CONCLUSION

Congress exceeds its constitutional authority when it passes criminal statutes that mandate minimum punishments. These statutes create a system of criminal punishment in the United States where the legislature and the prosecution control the future of citizens convicted of crimes. These laws deprive the judiciary of its basic constitutional function, which is weighing facts in each case to ensure a just outcome for each criminal defendant. This violates the constitutional doctrine of separation of powers. These laws persist despite lopsided results between the crime and the punishment when applied across the board to each individual defendant. Statutory mandatory minimums should therefore be abolished.

Congress should listen to the growing number of American citizens opposed to statutory mandatory minimum sentences and repeal these laws. If Congress does not take this action, the Supreme Court and other federal courts should embrace their authority and declare these laws unconstitutional. If statutory mandatory minimum sentences are abolished, we will be left with a federal sentencing regime in which the Sentencing Commission takes the time and effort to research the appropriate punishment for each crime. The resulting Guidelines will be advisory to sentencing judges. Sentencing judges will then have the discretion during sentencing hearings to review and weigh all pertinent facts. If sentencing judges depart from the advisory Guidelines, they will make a record of their reasons for doing so that can be reviewed by appellate judges for reasonableness. This would allow for individuality in sentencing, give credence to the research undertaken by the Sentencing Commission, decrease the problem of lopsided and unjust criminal punishments, and bring criminal sentencing law in accordance with the separation of powers doctrine and the U.S. Constitution.

²¹⁸ *Marbury v. Madison*, 1 Cranch 137 (1803).