

# Memorandum

**From:** Paul J. Hofer, J.D. Ph.D., Policy Analyst, Federal Public and Community Defenders  
**Regarding:** Estimate of Sentencing Impact of the Justice Safety Valve Act of 2013  
**Date:** September 17, 2013; Revised October 9, 2013

Senators Patrick Leahy and Rand Paul have introduced the “Justice Safety Valve Act of 2013,” which would authorize judges to “impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements” of the principles and purposes of sentencing found at 18 U.S.C. §3553(a). It also requires judges to give the parties notice of their intention to sentence below the statutory penalty and an opportunity to respond, and to provide written reasons for such a sentence. The legislation “does not limit any right to appeal that would otherwise exist in its absence.” Nor does it amend any current mandatory penalties, nor direct any change to the sentencing guidelines; the existing “safety valve” for first-time, non-violent drug offenders is retained. Allowing judges to sentence below the statutory minimum when it exceeds the minimum guideline recommendation, or below the guideline range when necessary to achieve the purposes of sentencing, would likely have reduced the sentences of **about 3,107** of the over 20,000 offenders convicted of charges carrying mandatory minimum penalties in FY2012.

The U.S. Sentencing Commission’s Monitoring Datafile for FY2012 was utilized to estimate the number of defendants likely to benefit from the proposed legislation. Because the act creates a novel mechanism for sentencing below the statutory minimum, it is difficult to quantify its impact with certainty. However, we can determine how many offenders were subject to statutory minimums, and how often the statutes mandated a lengthier penalty than was recommended by the sentencing guidelines.

To ensure comparability with analyses of other proposed legislation and policy changes, only the 85.5 percent of cases in which the Commission received full documentation were included in the analysis. Based on the available data, about 900 of the excluded offenders did have a statutory minimum, and 159 of these remained subject to the mandatory penalty at the time of sentencing. These offenders might also benefit from the legislation in ways that are difficult to predict.

**Cases in which the statutory penalty exceeded the guidelines’ recommendation.** Of the 74,349 defendants for whom full information is available, 19,749 were convicted of charges carrying a mandatory minimum penalty. For 7,440 of these defendants, the minimum term of imprisonment mandated by statute exceeded the *highest* prison term recommended by the guidelines. USSG §§5G1.1 and 2 direct that the statutory minimum “trumps,” or replaces, the otherwise applicable guideline range in this situation and technically becomes the “guideline sentence.” The statutory penalty *prevents* judges from sentencing within the otherwise applicable guideline range, unless the penalty is waived by the current limited safety valve for first-time, non-violent drug offenders, or by a government motion under 18 U.S.C. §3553(e) to waive the statutory minimum due to a defendant’s substantial assistance in the investigation or prosecution of another person. (These motions are usually, though not always, accompanied by a government motion under USSG §5K1.1 for a departure below the guideline range.) In FY2012, 1,086 defendants did not benefit from either of these waivers and remained subject to the trumping mandatory minimum.

In another 2,817 cases, the statutory minimum “truncates” the range, *i.e.*, it exceeds the bottom of the guideline range but is lower than the top of the range; 1,264 of these defendants did not benefit from any of the currently available waivers. Judges are prevented from imposing the lowest sentence recommended by the guidelines in these cases. In all these cases of trumping and truncating, judges are also prevented from imposing a downward departure or variance, even if mitigating circumstances present in the case justify a below-guideline sentence. In another 121 cases, the statutory minimum is equal to the guideline minimum, which also prevents judges from imposing a below-guideline sentence, even if one is needed to avoid violating the requirements of 18 U.S.C. § 3553(a).

As shown in the chart at right, defendants who seem most certain to benefit from the proposed legislation are the **1,086 offenders** whose statutory minimum exceeded the *maximum* of their guideline ranges, and who received no relief from the statutory penalty. Almost all (1,051) of these offenders were sentenced for drug trafficking offenses. The act does not *require* judges to impose a sentence below the statutory minimum in this circumstance, and it is unclear whether a sentence within the guideline range would be considered a downward departure or variance. (The current provisions at §§5G1.1 and 2, discussed above, technically make trumping statutory penalties “the guideline sentence.”) Nonetheless, many judges would likely be receptive to arguments that sentences within, or below, the guideline range are most consistent with 18 U.S.C. §3553(a) in this circumstance.

**Type of Relief, if any, from Mandatory Statutory Penalties Exceeding the Guideline Range**

	Frequency	Percent
No relief from MM	1086	14.6
Received 5K1.1 ONLY	913	12.3
Received Safety Valve ONLY	3622	48.7
Received BOTH 5K Safety	1069	14.4
Total	6690	89.9
Missing	750	10.1
Total	7440	100.0

**Cases in which downward departures or variances were prevented or limited by the statutory minimum.** Judges sentence below the guideline range without a government motion in about 18% of cases. If a guideline is considered sound and there are no aggravating or mitigating individualized circumstances in the case, most judges sentence at the bottom of the guideline range, unless prevented from doing so by a trumping or truncating statutory penalty. It thus seems likely that **many of the 1,264 defendants** whose guideline range was truncated, and who do not already receive relief from the statutory penalty, would also benefit from the act and receive a sentence at the bottom of the range, or below the range if the judge found such a sentence necessary to avoid violating the requirements of 18 U.S.C. § 3553(a).

Some additional defendants whose statutory penalties fall *below* the guideline range might also benefit from the act, if judges were prevented by the statutory minimums from reducing the sentences as much as they would like. In FY2012, 4,581 defendants had statutory penalties below the guideline range, and received no relief from the statutory penalty. Among these, judges imposed sentence at the statutory minimum for **757 defendants**.

Adding these three groups of defendants most likely to receive lower sentences if the mandatory minimum were waived as proposed in the act suggests that **about 3,107 defendants** would have received lower sentences in FY2012 if the proposed legislation had been in effect.