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An Evaluation of the Probable Impact of Selected Proposals for Imposing Mandatory Minimum Sentences in the Federal Courts

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AN EVALUATION OF THE PROBABLE IMPACT OF SELECTED PROPOSALS FOR IMPOSING MANDATORY MINIMUM SENTENCES IN THE FEDERAL COURTS

By

James Eaglin

Anthony Partridge

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CHAPTER I - GENERAL FINDINGS

Introduction

This report presents the findings of research undertaken by the Federal Judicial Center to generate data on the probable impact of various congressional proposals for imposing mandatory minimum sentences. The study was conducted in cooperation with the Probation Division of the Administrative Office of the United States Courts. Specifically, the objective of the study was to determine the frequency with which federal judges imposed sentences in fiscal 1976 that would have conflicted with the provisions of selected proposals for mandatory minimum sentences.

The study had its genesis in the referral to the Judicial Conference of S. 2698, a bill providing for mandatory minimum sentences introduced by Senator Edward Kennedy in November 1975.[1] In introducing the bill, Senator Kennedy had not attempted to assess the extent to which it would require changes in sentences that were already being imposed.[2] At its April 1976 meeting, the Judicial Conference took a position in opposition to the legislation, acting on a committee report that noted the absence of "demon-

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1. S. 2698, 94th Cong., 1st Sess., 121 Cong. Rec. S20513 (daily ed. Nov. 20, 1975).

2. See 121 Cong. Rec. S20512-3 (daily ed. Nov. 20, 1975).

strated need" justifying the additional burdens that would be imposed by some of the bill's procedural provisions.[1] It was apparent that neither Senator Kennedy nor the Judicial Conference had data available to them that would support a reasonable estimate of the impact of the bill on sentences meted out. This study was developed to generate such data.

In considering the desirability of legislation providing for mandatory minimum sentences, there are a number of issues to be considered. Obviously, there is room for debate about the appropriateness of the particular minimum sentences that would be mandated. And even if it is found that a "need" has been demonstrated, in the sense that judges' sentences are out of line in some substantial numbers with the legislative view of what is appropriate, there is still room for debate about whether mandatory minimum sentences are a desirable legislative response. This report does not attempt to deal comprehensively with all the issues relevant to a consideration of mandatory-minimum legislation. Rather, its purpose is to make a modest contribution to the consideration of such legislation by providing information, not previously available, about the extent to which existing sentencing practice is inconsistent with the requirements that some mandatory-minimum proposals would impose.

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1. Report of the Proceedings of the Judicial Conference of the United States, April 7, 1976, at 10.

As of the time of this writing, Congressional interest in sentencing legislation is focussed principally on proposals for developing guidelines for the exercise of judicial sentencing discretion.[1] Such guidelines would, in concept, provide direction to the sentencing judge in selecting the most appropriate sentence for a defendant, rather than merely providing a lower limit. It is unclear to what extent any guideline legislation that may emerge would forbid imposition of sentences below certain levels, and thus incorporate the mandatory-minimum concept. It may be noted that the pending "Criminal Code Reform Act of 1977," introduced by Senator McClellan with Administration support on May 2, 1977, generally permits judges to depart from the guideline sentences even to the extent of granting probation in cases where the guideline calls for incarceration, but does impose mandatory minimum sentences for certain firearms offenses and for certain offenses involving commerce in opiates.[2] Some of the other bills that have been

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1. See S. 1437, 95th Cong., 1st Sess., § 991 (1977) (appearing at page 301 of the bill print); S. 181, 95th Cong., 1st Sess., 123 Cong. Rec. S406 (daily ed. Jan. 11, 1977); S. 204, 95th Cong., 1st Sess., 123 Cong. Rec. S556 (daily ed. Jan. 12, 1977); S. 979, 95th Cong., 1st Sess., (1977). Hearings on sentencing guidelines were held by the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee on June 7, 8, 9, 20, and 21, 1977.

2. S. 1437, supra, §§ 2003, 3725(e), 1811, 1823. Here, and in subsequent footnotes that cite S. 1437, the references are to the proposed sections of the criminal code, all of which would be enacted by section 101 of the bill.

introduced would go still further, and would accompany the guideline sentence for each offense with a mandatory minimum sentence in order to limit the extent to which judges could depart from the guidelines.[1]

Proposals Studied

Early in the development of the study in 1976, it was decided that it should not be restricted to the Kennedy proposal. After consultation with staff of the Justice Department and the Congress, four other proposals, among the many that had been introduced, were selected for inclusion in the study. Mandatory-minimum provisions of S. 1 were included because that bill was under active consideration in the Congress, and had been reported to the Senate Judiciary Committee by its Subcommittee on Criminal Laws and Procedures.[2] Two other proposals were considered because they had been introduced at the request of the Ford Administration; these were Senator Hiram Fong's amendments to S. 1[3] and Congressman

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1. S. 979, supra, (proposed Chapter 228 of Title 18); S. 204, supra, § 6.

2. S. 1, 94th Cong., 1st Sess., (1975). A committee print dated April 1, 1976, but not widely distributed, reflects Subcommittee amendments to the bill. In all respects relevant to the present study, it is identical to the bill as introduced. Citations to S. 1 in this report are to the proposed sections of the criminal code, all of which would be enacted by section 1 of the bill.

3. S. 1, Amendments intended to be proposed by Mr. Fong, Amdt. No. 820, 94th Cong., 1st Sess. (1975). These amendments are reproduced as Appendix A.

Robert McClory's bill, H.R.13577.[1] Finally, Senator Robert Byrd's bill, S. 2957, was chosen because of the Senator's position in the Democratic leadership of the Senate.[2] After the study was largely completed, we added S. 1437, the proposed "Criminal Code Reform Act of 1977," which was introduced by Senator John McClellan on May 2, 1977.

The sentences that would be mandated by these six proposals are set forth in Table 1 on the following pages.[3] Each of the proposals would forbid the judge from suspending sentence or granting probation in circumstances in which a mandatory minimum sentence applied, and would require that a prison sentence at least as long as the mandated minimum be imposed.[4] Each would also bar the imposition of a sentence under the Youth Corrections Act: the proposed revisions of the criminal code would eliminate the Youth Corrections Act as a general matter, while the three

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1. H.R. 13577, 94th Cong., 2d Sess. (1976).

2. S. 2957, 94th Cong., 2d Sess., 122 Cong. Rec. S1625 (daily ed. Feb. 17, 1976).

3. It may be noted that the table does not include those provisions of S. 1 that would require mandatory death penalties. In this table, and elsewhere in this report, the Kennedy and McClory proposals are referred to by the bill numbers assigned to them when they were reintroduced in the present Congress. The Kennedy bill is S. 260, 95th Cong., 1st Sess., 123 Cong. Rec. S661 (daily ed. Jan. 14, 1977); the McClory bill is H.R. 2462, 95th Cong., 1st Sess. (1977).

4. S 260, § 7(a) (proposed § 3580(a) of Title 18); S. 2957, § 5(f)(1); H.R. 2462, numerous sections; S. 1, §§ 1811, 1823; Fong amendments, page 2, line 15, to page 3, line 2; S. 1437, §§ 1811, 1823.

proposals to amend the existing code would forbid its use where a mandatory minimum sentence was required.[1]

All of the proposals except the Byrd bill and S. 1 provide that the mandatory minimum sentences will not apply if certain mitigating factors are present.[2] With one exception, the mitigating factors appear to be substantively identical in all four proposals, although there are some differences in wording. These factors are set forth as follows in the McClory bill:

> "(a) the defendant was less than eighteen years old [at the time of the offense];
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> "(b) the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution;
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> "(c) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; or
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> "(d) the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor."[3]

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1. S. 260, § 7(a) (proposed § 3580(a) of Title 18); S. 2957, § 5(f)(1); H.R. 2462, numerous sections.

2. S. 260, § 7(a) (proposed § 3580(b) of Title 18); H.R. 2462, numerous sections; Fong amendments, page 4, line 14, to page 5, line 6; S. 1437, §§ 1811, 1823.

3. H.R. 2462, § 101(a) (proposed section 401(b)(1)(C)(ii) of Comprehensive Drug Abuse Prevention and Control Act). Identical language appears at several other places in the McClory bill.

TABLE 1--MANDATORY MINIMUM SENTENCES IN PROPOSALS STUDIED

Offense	S. 260 (Kennedy)	S. 2957 (Byrd)
Burglary of a dwelling at night (18 U.S.C. § 13)	2 years; repeat offenses, 4 years	
Aggravated assault	2 years; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Second degree murder (18 U.S.C. § 1111)	2 years; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Rape within the special maritime and territorial jurisdiction (18 U.S.C. § 2031)	2 years; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Robbery with the special maritime and territorial jurisdiction (18 U.S.C. § 2111)	2 years if serious bodily injury inflicted; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Robbery of U.S. property (18 U.S.C. § 2112)	2 years if serious bodily injury inflicted; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Robbery of a bank, credit union, or savings and loan association (18 U.S.C. §§ 2113(a), (d))	2 years if serious bodily injury inflicted; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Burglary, or larceny of more than $100, of a bank, credit union, or savings and loan association (18 U.S.C. §§ 2113(a), (b))	2 years if serious bodily injury inflicted; repeat offenses, 4 years	2 years; repeat offenses, 4 years
Killing a person or forcing a person to accompany in connection with robbery, burglary, or larceny of a bank, credit union, or savings and loan association (18 U.S.C. § 2113(e))		Death if person killed. Otherwise, 10 years; repeat offenses, 12 years

(Table continued)

TABLE 1--MANDATORY MINIMUM SENTENCES IN PROPOSALS STUDIED (continued)

Offense	S. 260 (Kennedy)	S. 2957 (Byrd)
Use or possession of a dangerous weapon in the commission of a crime	2 years for use or possession of a dangerous weapon during the commission of an offense; repeat offenses, 4 years (18 U.S.C. § 924(c), amended to increase scope)	2 years for use or unlawful possession of a dangerous weapon during the commission of a felony (18 U.S.C. § 924(c), amended to increase scope)
Kidnapping (S. 1, § 1621)		
Manufacture, distribution, possession with intent to manufacture or distribute, importation and exportation of narcotics (referred to herein as "commerce"); various other narcotics offenses	2 years for commerce in heroin; repeat offenses, 4 years (21 U.S.C. §§ 841, 960)	
Aircraft hijacking (S. 1, § 1631)		
Violent offense committed after conviction for a previous violent offense (S. 1, various provisions)		

H.R. 2462 (McClory)	S. 1	Fong Amendments to S. 1	S. 1437
	3 years for displaying or using a firearm or destructive device during the commission of a crime; 1 year for possessing a firearm or destructive device or displaying or using any other dangerous weapon or an imitation firearm or destructive device during the commission of a crime; repeat offenses, 2 years additional (§ 1823)	8.4 months for displaying or using a firearm or destructive device during the commission of a crime (repeat offenses, 18 months); 6 months for possessing a destructive device or displaying or using any other dangerous weapon or an imitation firearm or destructive device during the commission of a crime (repeat offenses, 8.4 months) (S.1, § 1823)	2 years for displaying or using a firearm or destructive device during the commission of a crime; 1 year for possessing a firearm or destructive device during the commission of a crime (§ 1823)
		3 years if victim is not voluntarily released alive and in a safe place prior to trial; otherwise, 18 months	
3 years for commerce in an opiate or for attempt or conspiracy to commit the "commerce" offenses; repeat offenses, 6 years; 3 years additional for distribution to a minor (21 U.S.C. §§ 841, 845, 846, 960, 962, 963)	10 years for commerce in an opiate weighing 4 ounces or more, for possession of an opiate weighing 4 ounces or more, or for distribution of an opiate to a person under 18 who is at least 5 years younger than the offender; 5 years for commerce in an opiate weighing under 4 ounces; repeat offenses, 10 years (§ 1811)	3 years for commerce in an opiate weighing 4 ounces or more, for possession of an opiate weighing 4 ounces or more, or for distribution of an opiate to a person under 18 who is at least 5 years younger than the offender; 18 months for commerce in an opiate weighing under 4 ounces (repeat offenses, 3 years); 18 months for commerce in a Schedule I or II narcotic that is not an opiate (S. 1, §§ 1811, 1812)	2 years for commerce in an opiate (§ 1811)
		3 years	
		6 months or 1/10 of maximum term authorized, whichever is greater, up to 3 years	

The one respect in which there is a substantive difference is that the current version of the Kennedy bill establishes the age cutoff in the first exception at sixteen rather than eighteen; the version introduced in the 94th Congress had the cutoff at eighteen years, as do the other bills.

Of the four proposals that provide exceptions for mitigating circumstances, three provide for an evidentiary hearing, to be held after conviction but before imposition of sentence, to determine whether any of the mitigating circumstances exist.[1] The fourth proposal--S. 1437--does not specify the procedure to be followed.

Finally, it should be noted that all of the proposals would make some change in the anticipated length of incarceration under a mandated sentence. All except the McClory bill would bar "good time" allowances for prisoners sentenced under the mandatory-minimum provisions: the proposed revisions of the criminal code would eliminate "good time" allowances as a general proposition, while the Kennedy and Byrd bills would specifically bar "good time" when mandatory minimum sentences are imposed.[2] In addition, all of the proposals except S. 1 would bar release on parole

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1. S. 260, § 7(a) (proposed § 3580(c) of Title 18); H.R. 2462, § 103; Fong amendments, page 5, line 15, to page 6, line 9.

2. S. 260, § 7(a) (proposed § 3580(a) of Title 18); S. 2957, § 5(f)(1).

before the expiration of a mandatory minimum term.[1] Hence, under the Kennedy and Byrd bills, the Fong amendments to S. 1, and S. 1437, there would be no opportunity, short of executive clemency, for an offender to be released before the expiration of the mandatory term. This would, of course, represent a significant change in the anticipated release date of a defendant sentenced to a particular prison term.

The Study and Its Findings

To develop data about the impact of the six proposals, computer tapes maintained by the Administrative Office of the United States Courts were searched to locate sentences imposed in the fiscal year 1976 that might have been inconsistent with the proposed mandated minimums. Presentence reports were then obtained from the district courts, and were analyzed to identify those sentences that were in fact inconsistent. The information contained in presentence reports is thus the raw material on which this report is based.

For reasons explained at greater length in Chapter II, it was not feasible through this technique to evaluate every mandatory-minimum provision contained in the six proposals selected for study. Table 2 sets forth the provisions that were subjected to scrutiny.

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1. S 260, § 7(a) (proposed § 3580(a) of Title 18); S. 2957, § 5(f)(1); H.R. 2462 numerous sections; Fong amendments, page 3, lines 9-14; S. 1437, §§ 1811, 1823.

TABLE 2--MINIMUM SENTENCES INCLUDED IN STUDY

Offense	S. 260 (Kennedy)	S. 2957 (Byrd)
Aggravated assault	2 years	2 years
Second degree murder (18 U.S.C. § 1111)	2 years	2 years
Rape within the special maritime and territorial jurisdiction (18 U.S.C. § 2031)	2 years	2 years
Robbery within the special maritime and territorial jurisdiction (18 U.S.C. § 2111)	2 years if serious bodily injury inflicted	2 years
Robbery of U.S. property (18 U.S.C. § 2112)	2 years if serious bodily injury inflicted	2 years
Robbery of a bank, credit union, or savings and loan association (18 U.S.C. §§ 2113(a), (d))	2 years if serious bodily injury inflicted	2 years
Burglary, or larceny of more than $100, of a bank, credit union, or savings and loan association (18 U.S.C. §§ 2113(a), (b))	2 years if serious bodily injury inflicted	
Kidnapping (S. 1, § 1621)		
Manufacture, distribution, possession with intent to manufacture or distribute, importation and exportation of narcotics (referred to herein as "commerce)"; various other narcotics offenses	2 years for commerce in heroin (21 U.S.C. §§ 841, 960)	

H.R. 2462 (McClory)	S. 1	Fong Amendments to S. 1	S. 1437
		3 years if victim is not voluntarily released alive and in a safe place prior to trial; otherwise, 18 months	
3 years for commerce in an opiate or for attempt or conspiracy to commit the "commerce" offenses (21 U.S.C. §§ 841, 845, 846, 960, 962, 963)	10 years for commerce in an opiate weighing 4 ounces or more, or for distribution of an opiate to a person under 18 who is at least 5 years younger than the offender; 5 years for commerce in an opiate weighing under 4 ounces; repeat offenses, 10 years (§ 1811)	3 years for commerce in an opiate weighing 4 ounces or more, or for distribution of an opiate to a person under 18 who is at least 5 years younger than the offender; 18 months for commerce in an opiate weighing under 4 ounces; repeat offenses, 3 years (S. 1, § 1811)	2 years for commerce in an opiate (§ 1811)

In most of the offense categories studied, few sentences were found that conflicted with the legislative proposals. For transactions in opiates, bank robbery, and aggravated assault, however, the number of sentences inconsistent with some of the proposals was considerable.

For transactions in opiates, the number of sentences inconsistent with four of the proposals studied was in the neighborhood of 400 sentences in fiscal 1976; the number was predictably much higher for the one proposal whose mandatory minimum sentences are markedly more severe.

For bank robbery, some 378 sentences were imposed in fiscal 1976 that were inconsistent with Senator Byrd's two-year minimum.

For aggravated assaults, about 100 sentences were found to be inconsistent with the Kennedy and Byrd two-year minimums, although this may in part be a function of the standard used in this study for defining "serious bodily injury." That standard may be less demanding than the courts would apply in interpreting the bills if they became law.

To some extent, the smaller numbers of inconsistent sentences in other categories reflect the frequency of the various offenses in the federal system. There are more bank robbers than rapists prosecuted in the federal courts. Because of limitations imposed by the study design, it is not possible to say what proportion of the sentences that would be covered by each of the

studied provisions were inconsistent with the provision. It is nevertheless clear that most federal judges, in most circumstances, sentence consistently with all but the most severe of the proposals under study, which is the S. 1 provision on transactions in opiates.

Among the sentences found that were inconsistent with the six proposals, a considerable number were sentences of incarceration under the Youth Corrections Act. Although a Youth Corrections Act sentence for a covered offense is inconsistent with all of the mandatory-minimum proposals, it should not be assumed that inconsistency is synonymous with relative leniency. The offenses covered by the six proposals are generally regarded as serious offenses. Those studied are treated by the Parole Commission as being in the "very high" or "greatest" severity category. Under current Parole Commission Guidelines, defendants convicted of these offenses who have the most favorable parole prognoses are unlikely to be released before having served twenty months of a Youth Corrections Act sentence, and those with less favorable prognoses would be expected to serve longer.[1] In many cases, the Youth Corrections Act sentence would undoubtedly produce a longer period of incarceration than the eighteen-month, two-year, or three-year regular sentences that some of the bills would establish as minimums.

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1. 41 Fed. Reg. 37316, 37324 (1976) (to be codified in 28 C.F.R. Chapter 1, Part 2).

Four of the six mandatory minimum proposals provide relief from the mandated sentences for certain mitigating factors--youth, duress, impaired mental capacity, and the fact that the defendant was an accomplice whose role in the commission of the crime was a minor one. Virtually no defendants in the study qualified for the exception based on youth, a fact that is assumed to reflect the federal policy of treating young offenders as juveniles rather than prosecuting them for the substantive offenses to which the mandatory minimum sentences would attach.[1] For the offenses studied, the duress exception also was found to be of minor numerical significance. The exception for impaired mental capacity would apparently be applicable with some frequency, the impairment almost always being caused by alcohol. Impaired capacity was most often found among defendants sentenced for crimes committed within the special maritime and territorial jurisdiction, but it also appeared a number of times in bank robbery cases. The exception for minor participation appears to be numerically unimportant except in the narcotics cases.

For some of the defendants with inconsistent sentences, the presentence reports suggested the presence of circumstances that the judge may have considered mitigating but that none of the proposals would give credit for. Foremost among these was cooperation with the government in the prosecution of other offenders,

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1. See 18 U.S.C. §§ 5031, 5032.

a factor that was particularly common among the narcotics offenders. This study almost certainly understates the number of cases in which cooperation occurs, since it is known that prosecutors sometimes communicate the fact of cooperation to a judge outside the presentence report. Another factor found that many regard as mitigating was the presence of narcotics addiction, particularly among apparently small-time sellers of narcotics. There were also a few cases in which the defendant was in poor health or had made restitution at the time of sentencing, and a few in which a sentence of probation was apparently given to facilitate the defendant's deportation.

Even after taking account of all mitigating factors that were disclosed by the presentence reports and after recognizing that the Youth Corrections sentences may be inconsistent with the proposed mandatory minimums without being more lenient, a sizable number of cases remains in which the sentences meted out under existing law were more lenient than the proposals would allow and in which no reason for unusual leniency was disclosed by the presentence report. Assuming that these sentences are considered to be undesirable deviations from a general norm, the question remains whether their numbers are great enough to warrant a legislative remedy and, if so, whether mandatory minimum sentences are an appropriate approach. Although it is beyond the scope of this report to offer answers to these broad policy questions, the

study does shed light on some subsidiary issues that are worthy of consideration if legislative action is contemplated. Some of these issues are relevant not only to mandatory minimum sentences, but also to pending legislation what would establish sentencing guidelines.

First, as has already been observed, four of the proposals studied would authorize essentially the same set of exceptions for mitigating circumstances. This study suggests that, if recognizable categories of mitigating factors are to be enumerated in legislation, consideration should be given to expanding the list to include some of the other factors that have been mentioned.

Second, three of the proposals that would authorize exceptions for mitigating factors would require testimonial hearings to establish the applicability of the exceptions. The fourth does not prescribe a procedure for making the determinations. In most cases, it can be assumed that there would be no contested factual issues. But in some cases there would be, and it should be noted that the hearing would be required even in cases in which the judge would in any event impose a sentence in excess of the mandated minimum. If mandatory minimum sentences are to be imposed with exceptions for mitigating circumstances, consideration should be given to limiting the fact-finding hearings to those cases in which the judge has concluded, in the exercise of his discretion, that a sentence lower than the mandated would be appropriate.

Finally, particularly in the narcotics area, the study reinforces the familiar point that mandatory minimum sentences, although they limit the discretion of the judge, do not assure that the prescribed terms will be served by criminals who commit the covered crimes and are apprehended and convicted. Under existing law, there is no obligation on the prosecutor to pursue the most serious charge for which he has a good case; nor is there any obligation to refrain from entering agreements under which a plea is taken to a less serious charge than can be proved. Unless limitations on judicial discretion are accompanied by parallel limitations on prosecutorial discretion, the certainty of punishment sought by the advocates of legislative reform will be largely unattainable through the remedies they propose.

CHAPTER II - METHODOLOGY OF THE STUDY AND LIMITATIONS

It was noted in the previous chapter that the basic technique of the study involved two steps: examination of data tapes for sentences that might be in conflict with the provisions studied; and analysis of presentence reports to make the actual determinations.

Even though the Administrative Office data tapes carry more detail about cases than the published statistics, there were a number of reasons why reference to the data tapes alone was not sufficient for the purposes of the study. First, for some offenses, the tapes carry insufficient detail about the offense charged. Forcible rape is indistinguishable from statutory rape, for example. Attempts and conspiracies carry the same codes as the substantive crimes involved. Not surprisingly, the categories into which offenses are grouped by the Administrative Office for statistical purposes do not mesh perfectly with the proposed legislation. Second, the practice of the Administrative Office in fiscal 1976 was to code the most serious offense charged and--with a few exceptions--not to code the offense at conviction separately; hence, the data tapes do not provide reliable information on the crime for which an offender was actually sentenced. Third, the computer tapes do not provide the information from which a

determination could be made with respect to the applicability of the exceptions for youth, duress, impaired mental capacity, or minor participation in the crime. Thus, it was necessary to use the computerized file only as a starting point in the project.

Appendix B sets forth for each studied offense the specifications that were used for selecting defendants from the computerized file of defendants sentenced in fiscal 1976. In general terms, the task involved identification of those offense codes that encompassed the offenses being studied. All defendants listed under those codes were identified who had received an adult sentence of less than three years, a sentence of incarceration under the Youth Corrections Act, or a sentence that did not involve incarceration. In addition, in order to evaluate provisions of S. 1 with regard to narcotics offenses, certain narcotics offenders were identified who had received sentences of three years or more but less than ten years.

The second step was to obtain and analyze presentence reports for the defendants identified in the first step. These reports were read to establish the offense of conviction, to confirm the accuracy of the Administrative Office data as to the sentence, and to determine the existence of mitigating circumstances. For most of the offense categories, presentence reports were requested on all defendants. In the aggravated assault and narcotics

categories, however, because of the large numbers of defendants identified, a systematic sample of defendants was drawn and presentence reports were requested only for the sample. All of the district court probation offices cooperated in the study by sending copies of the relevant presentence reports. For some defendants, however, presentence reports were not available. In each such case, the offense at conviction was confirmed through telephone communications with the appropriate clerk's office or probation office. The telephone was also used to resolve any discrepancies between the Administrative Office data and information on the presentence reports.

It is believed that this procedure allowed us to identify, with a high degree of accuracy, those sentences that were imposed in fiscal 1976 that were inconsistent with the provisions studied. Particularly with respect to the exceptions for mitigating circumstances, some of the determinations are of course judgmental. Moreover, the judgments have been made on the basis of presentence reports, without benefit of the adversary hearings that three of the proposals would require. Even though some decisions might have gone the other way if one of these proposals had been law, however, there is no reason to doubt the general accuracy of the findings with respect to frequency of exceptions.

Faced with data showing that a certain number of sentences was inconsistent with a particular legislative proposal, the

reader will want to put that number within some broader context. Ideally, one would like to know the total number of sentences rendered in circumstances to which the proposal would have applied. Unfortunately, in view of the method by which the study was conducted, it has not been feasible to provide this number. The report is based on an analysis only of the relatively short sentences for certain serious offenses. It would have been an enormous undertaking to collect and analyze the presentence reports for all the sentences within a particular offense category. For example, in fiscal 1976, some 2,138 defendants charged with bank robbery were convicted and sentenced. Only 639 of them met the first-step selection criteria. To make what would probably be the ideal contextual statement about the sentences studied would have required analysis of an additional 1,499 presentence reports for bank robbery alone. Rather than undertake that task, it was decided to settle for second best. An effort is made, for each offense, to place the findings in context by referring to published statistics of the Administrative Office.[1] But the reader should recognize that they provide a somewhat rough basis for comparison.

Similar considerations produced decisions to eliminate from the study a number of provisions contained in the six proposals.

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1. All references to published statistics are based on Table D5 in the 1976 Annual Report of the Director of the Administrative Office of the United States Courts.

Principal among these were provisions in five of the bills that would provide relatively high mandatory minimum sentences for variously defined categories of "repeat offenders."[1] Such offenders could not be identified on the computer tapes. To analyze a four-year minimum for repeat offenders would thus have required that presentence reports be gathered for all offenders receiving sentences of less than four years in the offense category, and screening them to locate those who met the "repeat offender" standard of a particular bill. It was concluded that the additional information that would be produced did not warrant the effort that would have been involved.

In addition to the "repeat offender" provisions, other provisions excluded from the study, and the reasons for their exclusion, were as follows:

* The two-year mandatory minimum sentence provided in the Kennedy bill for burglary of a dwelling at night under the Assimilative Crimes Act.[2] Such burglaries would have had to be identified from a much broader class of burglaries; preliminary inquiry suggested that the overwhelming majority of the burglary offenses were neither residential nor nocturnal.

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1. S. 260, § 7(a); S. 2957, § 6(a); H.R. 2462, numerous sections; S. 1, §§ 1811, 1823; Fong amendments, page 2, line 15, to page 3, line 2, and page 3, line 19, to page 4, line 13.

2. S. 260, § 1.

* The ten-year mandatory minimum sentence provided in the Byrd bill for forcing a person to accompany in connection with robbery, burglary, or larceny of a bank, credit union, or savings and loan association, and the mandatory death sentence for killing a person in connection with such an offense.[1] These offenses are grouped with bank robberies on the data tapes; to search for them would have vastly expanded the number of bank-robbery presentence reports to be studied.

* The provisions of five of the bills with respect to the use or possession of firearms or other dangerous weapons or destructive devices.[2] Each of these provisions would expand the definiton of the substantive offense now defined in 18 U.S.C. § 924(c), as well as attaching a mandatory minimum sentence to it. The study technique was not adaptable to a situation in which it was proposed to change the substantive law under which offenses are prosecuted.

* The additional three years required by the McClory bill for distribution of an opiate to a minor.[3] Since presentence reports do not generally identify the age of the recipient of narcotics, the extra work required was not likely to produce reliable data.

* The provisions of S. 1 and the Fong amendments that prescribe mandatory minimum sentences for possession of an opiate weighing four ounces or more.[4] Analysis of these provisions would have required a search of cases coded as simple possession in addition to the cases coded as narcotics distribution cases.

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1. S. 2957, § 5(e).

2. S. 260, § 3; S. 2957, § 1; S. 1, § 1823; Fong amendments, page 2, line 15, to page 3, line 2, and page 3, line 19, to page 4, line 13; S. 1437, § 1823.

3. H.R. 2462, § 101(b).

4. S. 1, § 1811; Fong amendments, page 2, line 15, to page 3, line 2, and page 3, line 19, to page 4, line 13.

* The provision of the Fong amendments that would prescribe an eighteen-month mandatory minimum sentence for commerce in a Schedule I or II narcotic that is not an opiate.[1] This provision was excluded because of an error in interpretation made during the planning stage of the study, which caused us to overlook the fact that cocaine and related drugs were covered under the Fong amendments.

* The provision of the Fong amendments that would prescribe a three-year mandatory minimum sentence for aircraft hijacking.[2] Aircraft hijacking is coded in a category that includes a variety of other offenses related to the operation of aircraft. It may be noted that a minimum sentence of twenty years is currently provided by 49 U.S.C. § 1472(i) (Supp. V 1975), although it apparently remains permissible to suspend sentence and place the defendant on probation.

Because of these exclusions, the study provides only a partial analysis of the impact that the various proposals would have on existing sentencing practice. For those provisions that were analyzed, however, it is believed that the data generated provide a highly reliable basis for the impact estimates that are offered.

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1. Fong amendments, page 2, line 15, to page 3, line 2, and page 3, line 19, to page 4, line 13.

2. Ibid.

CHAPTER III. OFFENSE-BY-OFFENSE ANALYSIS

Aggravated Assault

Both the Kennedy and Byrd bills have provisions that would amend 18 U.S.C. § 13, the Assimilative Crimes Act, to require a minimum sentence of two years' imprisonment upon conviction of an aggravated assault.[1] The Assimilative Crimes Act is by its terms applicable only to those offenses that are not punishable under an act of Congress. Since 18 U.S.C. § 113 specifies the punishments for assaults committed within the special maritime and territorial jurisdiction of the United States, the references in the two bills to the Assimilative Crimes Act apparently reflect errors of draftsmanship. The analysis here has been performed on the assumption that the intention was to amend 18 U.S.C. § 113 to cover aggravated assaults committed within the maritime and territorial jurisdiction. In addition, the analysis includes aggravated assaults under 18 U.S.C. § 1153, relating to offenses committed within the Indian country, since that section adopts by reference the punishments prescribed in section 113.

The Kennedy and Byrd bills define aggravated assault as assault "where a person, by physical force, intentionally causes

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1. S. 260, § 1(b); S. 2957, § 2.

serious bodily injury to another person." Neither bill defines "serious bodily injury," however, and a search of federal court decisions did not reveal a generally accepted federal standard. For purposes of this study, the California standard was used, under which "serious bodily injury" is defined as a serious impairment of physical condition, including any of the following:

1. Prolonged loss of consciousness
2. Severe concussion
3. Protracted loss of any bodily member or organ
4. Protracted impairment of function of any bodily member, organ, or bone
5. A wound or wounds requiring extensive suturing
6. Serious disfigurement
7. Severe physical pain inflicted by torture[1]

This standard is more encompassing than the standards used in some states, and the analysis based upon it produces a relatively high estimate of the number of sentences inconsistent with the two bills. In addition, for purposes of the study, intention to cause serious bodily injury was assumed in cases in which serious bodily injury in fact occurred and the offense of conviction was assault with intent to commit a felony or assault with a dangerous weapon with intent to do bodily harm. Hence, cases have been treated as within the ambit of the Kennedy and Byrd proposals, if

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1. This standard appears in 51A Cal. Penal Code § 12022.7 (West).

serious bodily injury occurred, when the conviction was under 18 U.S.C. §§ 113(a), 113(b), 113(c) or 1153. No cases under section 113(a) were found, however. It should be noted that the present 18 U.S.C. § 113(f), which creates a separate penalty for assault resulting in serious bodily injury, was added to the code toward the end of the 1976 fiscal year, too late to have an impact on the sentences considered in this study.[1]

Subject to the above qualifications, Table 3 shows the impact that both bills would have had on sentences for aggravated assault for all of the district courts in fiscal 1976. The table is based on a sample of assault convictions, and the numbers shown are therefore best estimates, subject to some sampling error. However, the likelihood is small that any of the numbers in the table would vary more than twenty-six.[2]

The published statistics of the Administrative Office of the United States Courts show a total of 624 sentences for assault imposed in fiscal 1976 for all of the federal courts, excluding those of the territories. The 624 sentences were for a variety of assault convictions, many of which would not be covered by either the Kennedy or Byrd bills.

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1. P.L. 94-297, § 3, 90 Stat. 585 (May 29, 1976).

2. Appendix C contains a more detailed analysis of the likely sampling errors.

TABLE 3

AGGRAVATED ASSAULT

Estimated Number of Sentences Inconsistent
With Kennedy and Byrd Bills, Fiscal 1976

(Offenses under 18 U.S.C. §§ 113(a), 113(b), 113(c), 1153))

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	6	6
Adult sentences providing for imprisonment of less than two years	22	30
Sentences that did not include imprisonment	55	86
Estimated totals	83*	122

* Included in this estimate are twelve sentences based on cases in the sample for which presentence reports were not available. No complete determination could be made in these cases as to the applicability of the Kennedy bill's exceptions.

The difference in the impact of the two bills is attributable entirely to the fact that the Byrd bill does not include the exceptions that the Kennedy bill provides based on youth, impaired mental capacity, duress, or relatively minor participation in the offense. Of the estimated thirty-nine defendants whose sentences were inconsistent with the Byrd bill but not the Kennedy bill, thirty-six would have been subject to the Kennedy exception for significantly impaired mental capacity (generally drunkenness) at the time the offense was committed. The other three defendants were under sixteen and would have qualified for the exception based on age.[1]

Current Parole Commission guidelines indicate that aggravated assault is classified as an offense of the "greatest" severity. A defendant sentenced for aggravated assault under the Youth Corrections Act, even if his parole prognosis is favorable, is almost certain to serve more than two years. Hence, although the six Youth Corrections Act sentences in Table 3 would be barred by the Kennedy and Byrd proposals, it should not be assumed that the sentences mandated by these bills would be more severe. The remaining sentences in the table are, of course, less severe

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1. When the Kennedy bill was first introduced in the Ninety-fourth Congress, the age exception would have been applicable to all defendants who were less than eighteen years old. S. 2698, § 3580(b)(1). However, when reintroduced in the Ninety-fifth Congress, the bill lowered the age exception to sixteen years. S. 260, § 7(a) (proposed § 3580(b)(1) of Title 18). An estimated eight additional defendants would have qualified for the age exception had it remained at eighteen. The reader is reminded that these numbers are based on sampling. When very small numbers are estimated from a sample, the possible sampling error is relatively great.

than the bills would require. Analysis of the presentence reports did not reveal any mitigating circumstances other than those covered by the Kennedy bill's exceptions.

The Kennedy and Byrd bills would make the current "good time" provisions of Chapter 309 of Title 18 inapplicable to convictions carrying a mandatory minimum sentence. To take account of these provisions, sentences for aggravated assault were reanalyzed on the assumption that the two-year minimum sentence under either of the two bills would be equivalent to a thirty-month sentence under existing law. On that assumption, an additional eight adult sentences of imprisonment would be added to the "Kennedy" column of Table 3, and fourteen would be added to the "Byrd" column.

Second Degree Murder

A minimum sentence of two years' imprisonment would be required by the Kennedy and Byrd bills upon conviction of second-degree murder in violation of 18 U.S.C. § 1111.[1] Table 4 shows that only one sentence was imposed by federal judges in fiscal 1976 that was inconsistent with the Byrd bill. There were no sentences inconsistent with the Kennedy bill. The analysis included sentences based on convictions under 18 U.S.C. § 1153, relating to offenses committed within the Indian country, since that section adopts by reference the punishment, prescribed in section 1111.

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1. S. 260, § 2; S. 2957, § 3.

TABLE 4

SECOND DEGREE MURDER

Number of Sentences Apparently Inconsistent With Kennedy and Byrd Bills, Fiscal 1976

(Offenses under 18 U.S.C. §§ 1111, 1153))

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	0	1
Adult sentences providing for imprisonment of less than two years	0	0
Sentences that did not include imprisonment	0	0
Totals	0	1

The published statistics of the Administrative Office indicate that seventeen sentences for second-degree murder were imposed in fiscal 1976 in all of the federal courts, excluding the three territorial districts. Not all of these were in fact sentences for second-degree murder. A number of the sentences included in the Administrative Office's statistics for second-degree murder were sentences on pleas to reduced charges such as voluntary or involuntary manslaughter.

The single sentence that would conflict with the Byrd bill but not the Kennedy bill was imposed under the Youth Corrections Act. The presentence report indicates that the defendant would have qualified for the Kennedy bill's exception based on impaired mental capacity.

Under present guidelines of the Parole Commission, an offense of "willful homicide" is classified as having the greatest offense severity. Assuming that second-degree murder is treated as "willful," an offender convicted of second-degree murder and sentenced under the Youth Corrections Act will generally serve a period of at least two years' incarceration, even if he has a favorable parole prognosis. Hence, the one Youth Corrections Act sentence that conflicts with the Byrd bill should not be assumed to be a more lenient sentence than the bill would require.

The second-degree-murder sentences were also analyzed to determine the impact of the Kennedy and Byrd proposals to make

current "good time" provisions of Chapter 309 of Title 18 inapplicable to convictions that carry a minimum sentence. Sentences for second-degree murder were reanalyzed on the assumption that a two-year minimum sentence under either of the bills is equivalent to a thirty-month sentence under existing authority. The reanalysis did not produce any additional sentences.

While none of the bills proposes a mandatory minimum sentence for conviction of first-degree murder, sentences for first-degree murder were checked to identify any that provided less than three years' incarceration. There were none.

Rape

The Kennedy and Byrd bills would impose a minimum sentence of two years' imprisonment upon conviction of rape within the special maritime and territorial jurisdiction in violation of 18 U.S.C. § 2031.[1] Table 5 shows the potential impact of the two bills on rape sentences. Included in Table 5 are sentences under 18 U.S.C. § 1153, which makes the sentence for rape committed by Indians in the Indian country the same as the sentence under section 2031. By virtue of this provision, convictions under section 1153 would be subject to the minimum sentences proposed by both of the bills.

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1. S. 260, § 4; S. 2957, § 4.

TABLE 5

RAPE WITHIN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION

Number of Sentences Apparently Inconsistent With Kennedy and Byrd Bills, Fiscal 1976

(Offenses under 18 U.S.C. §§ 1153, 2031))

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	3	3
Adult sentences providing for imprisonment of less than two years	0	2
Sentences that did not include imprisonment	5	5
Totals	8	10

The published statistics of the Administrative Office show only fifty-six sentences for rape in fiscal 1976, excluding the three territorial districts. The fifty-six sentences include convictions for statutory rape and assault with intent to commit rape. Neither of these categories would be covered by the Kennedy or Byrd bills.

The difference in impact of the two bills is attributable entirely to the fact that the Byrd bill does not include the exceptions that the Kennedy bill provides. Presentence reports indicate that the two defendants whose sentences were inconsistent with the Byrd bill but not the Kennedy bill were highly intoxicated at the time the rapes were committed. Both would therefore have qualified for the Kennedy exception relating to impaired mental capacity.

Current Parole Commission guidelines indicate that an offender convicted of forcible rape and sentenced to incarceration under the Youth Corrections Act will normally serve from twenty to forty-eight months, depending on his prior record and other personal characteristics, and assuming satisfactory conduct as a prisoner. Hence, although Youth Corrections Act sentences would be barred by the Kennedy and Byrd proposals, it should not be assumed that the sentences mandated by these bills would be more severe. An adult sentence providing either no imprisonment or imprisonment for less than two years is, of course, less severe than the two

bills would require. Analysis of the presentence reports for defendants receiving such sentences did not reveal any obvious mitigating circumstances other than those covered by the Kennedy bill exceptions.[1]

Sentences for rape have also been analyzed on the assumption that a two-year mandatory minimum sentence under either of the two bills is equivalent to a thirty-month sentence under existing law because the provisions for earning "good time" would be inapplicable to the mandatory minimum sentences. On the thirty-month assumption, two sentences of imprisonment would be added to the "Kennedy" column in Table 5, and three would be added to the "Byrd" column.

In summary, only eight or ten sentences meted out for rape in fiscal 1976 would have been changed by the two-year mandatory minimum sentences in either of the proposed bills. This is partly, of course, a reflection of the fact that rape cases are a very small portion of the criminal caseload in federal courts.

Robbery

The Kennedy and Byrd bills would require a minimum sentence of two years' imprisonment upon conviction of robbery committed

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1. Of the eight defendants whose sentences were inconsistent with the Kennedy proposal, none was sixteen or seventeen years old. Hence, the numbers in the table would be the same even if the cutoff for the age exception were eighteen, as in the Ninety-fourth Congress version of Senator Kennedy's bill, rather than sixteen.

within the maritime or territorial jurisdiction in violation of 18 U.S.C. § 2111, robbery of U.S. property in violation of 18 U.S.C. § 2112, and robbery of a bank, credit union or savings and loan association in violation of 18 U.S.C. § 2113(a) and (d).[1] Under the Kennedy bill, the mandatory minimum sentence would be applicable only to those offenses that resulted in serious bodily injury to an individual.[2] The serious-bodily-injury requirement is not contained in the Byrd bill.

Table 6 shows the potential impact of the two bills on sentences imposed for robbery; tables 6-A through 6-C display the data separately for the three district robbery offenses. Tables 6 and 6A include sentences imposed under 18 U.S.C. § 1153, since that section adopts by reference the punishment provided in section 2111.

The published statistics of the Administrative Office show a total of seventy-three defendants sentenced in the federal courts in fiscal 1976 for robbery committed within the special maritime or territorial jurisdiction and robbery of U.S. property, excluding the three territorial districts. Included among the seventy-three are sentences for offenses, such as assault with intent to commit robbery, that are not covered by either of the bills. The published statistics also show 2,138 sentences for bank robbery.

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1. S. 260, §§ 5(a), (b), (c), and (e); S. 2957 §§ 5(a)-5(d).

2. S. 260, § 7(a) (proposed section 3580(b)(5) of title 18).

TABLE 6

ROBBERY

Number of Sentences Apparently Inconsistent With Kennedy and Byrd Bills, Fiscal 1976

(Offenses under 18 U.S.C. §§ 1153, 2111, 2112, 2113(a), 2113(d))

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	1	216
Adult sentences providing for imprisonment of less than two years	0	38
Sentences that did not include imprisonment	0	114
Totals	1*	368

* In addition to this sentence, there were thirteen sentences for which no presentence reports were available. No determination could be made in these cases as to the presence of serious bodily injury or the applicability of the Kennedy bill's exceptions.

TABLE 6-A

ROBBERY WITHIN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION

Number of Sentences Apparently Inconsistent With Kennedy and Byrd Bills, Fiscal 1976

(Offenses under 18 U.S.C. §§ 1153, 2111)

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	0	12
Adult sentences providing for imprisonment of less than two years	0	1
Sentences that did not include imprisonment	0	4
Totals	0	17

TABLE 6-B

ROBBERY OF U.S. PROPERTY

Number of Sentences Apparently Inconsistent
With Kennedy and Byrd Bills, Fiscal 1976

(Offense under 18 U.S.C. § 2112)

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	0	1
Adult sentences providing for imprisonment of less than two years	0	1
Sentences that did not include imprisonment	0	3
Totals	0	5

TABLE 6-C

ROBBERY OF A BANK, CREDIT UNION, OR SAVINGS AND LOAN ASSOCIATION

Number of Sentences Apparently Inconsistent With Kennedy and Byrd Bills, Fiscal 1976

(Offenses under 18 U.S.C. §§ 2113(a), 2113(d))

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	1	203
Adult sentences providing for imprisonment of less than two years	0	36
Sentences that did not include imprisonment	0	107
Totals	1*	346

* In addition to this sentence, there were thirteen sentences for which no presentence reports were available. No determination could be made in these cases as to the presence of serious bodily injury or the applicability of the Kennedy bill's exceptions.

Table 6 shows that only one robbery sentence in 1976 would have conflicted with the provisions of the Kennedy bill, while 368 sentences would have conflicted with the Byrd bill. This difference is largely attributable to the fact that the Kennedy bill would be applicable to only those offenses in which serious bodily injury was inflicted on an individual. Only two of the 368 robbery sentences in conflict with the Byrd bill involved the infliction of serious bodily injury on an individual. One of them would have qualified for the impaired mental capacity exception of the Kennedy bill.

Of the 368 sentences that conflicted with the Byrd bill, thirty-seven involved mitigating circumstances of the types recognized by the Kennedy bill's exceptions. Nearly all these involved impaired mental capacity at the time the offense was committed. Another forty sentences were in cases with other circumstances that might have been regarded as mitigating. Twelve of these involved defendants who were narcotic addicts; the presentence reports indicated that the offenses were committed as a means of obtaining funds with which to purchase drugs. Eleven other defendants had provided substantial cooperation to the government leading to the prosecution and conviction of other individuals. The remaining seventeen sentences involved a variety of other special circumstances: several were imposed on defendants who were about to be deported from the U.S., and others involved defendants

who were in a poor state of health at the time of sentencing or who had already made complete restitution.

Under the current Parole Commission guidelines, an offender sentenced for robbery under the Youth Corrections Act will normally serve twenty to forty-eight months, depending upon his prior record and other personal characteristics, and assuming satisfactory conduct in prison. While Youth Corrections Act sentences would not be permitted under the Kennedy or Byrd bills, it should not be assumed that they are more lenient than the two-year minimum sentences proposed by the bills.

Sentences for robbery were also analyzed to determine the impact of the "good time" provisions of the Kennedy and Byrd bills. Both bills would make the current "good time" provisions of Chapter 309 of Title 18 inapplicable to convictions that carry mandatory minimum sentences. Sentences for robbery were reanalyzed on the assumption that a two-year sentence under either of the two bills would be equivalent to a thirty-month sentence under existing law. The reanalysis would add fifteen adult sentences to the "Byrd" column in Table 6. The number of sentences that conflict with the Kennedy bill would not be affected.

In summary, only one sentence imposed for robbery in fiscal 1976 would have been changed by the Kennedy bill. A total of 368 sentences for robbery would have been changed by the Byrd bill. About a fifth of the sentences that conflicted with the

Byrd bill were in cases in which the presentence report disclosed circumstances that might have been considered mitigating by the sentencing judge.

Burglary or Larceny of a Bank, Credit Union, or Savings and Loan Association

The Kennedy bill would require a minimum sentence of two years' imprisonment upon conviction of burglary of a bank, credit union, or savings and loan association under 18 U.S.C. § 2113(a) or larceny of money or property having a value exceeding more than $100 from such a financial institution under the first paragraph of 18 U.S.C. § 2113(b).[1] However, the mandatory minimum sentence would be applicable only if serious bodily injury to an individual resulted.[2] Table 7 shows the potential impact of this provision. In both of the cases in which the sentences conflicted with the Kennedy legislation, the convictions were for larceny.

The published statistics of the Administrative Office indicate that there were 193 sentences for bank larceny and forty-two for bank burglary in fiscal 1976. In cases in which serious bodily injury occurs, it might normally be expected that a more serious charge would be brought. Hence, it should not be surprising that only two of these sentences conflicted with the Kennedy bill.

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1. S. 260, § 5(d).

2. S. 260, § 7(a) (proposed section 3580(b)(5) of Title 18).

TABLE 7

BURGLARY OR LARCENY OF A BANK, CREDIT UNION, OR SAVINGS AND LOAN ASSOCIATION

Number of Sentences Apparently Inconsistent With Kennedy Bill, Fiscal 1976

(Offenses under 18 U.S.C. §§ 2113(a), 2113(b))

Sentences of imprisonment under the Youth Corrections Act	1
Adult sentences providing for imprisonment of less than two years	1
Sentences that did not include imprisonment	0
Total	2*

* In addition to these two, there were eleven sentences for which no presentence reports were available. No determination could be made in these cases as to the presence of serious bodily injury or the applicability of the Kennedy bill's exceptions.

Under current Parole Commission guidelines, an offender sentenced for bank larceny under the Youth Corrections Act will normally serve from twelve to thirty-two months, depending on his prior record and other personal characteristics, and assuming satisfactory performance as a prisoner. It might be expected, however, that a longer period would be served in a case in which serious bodily injury was inflicted. It is therefore open to question whether the Kennedy bill would have lengthened the time served by the one defendant who was sentenced under the Youth Corrections Act for a bank larceny in which serious bodily injury was inflicted.

Since the Kennedy bill would make "good time" inapplicable to convictions that carry a mandatory minimum sentence, the sentences for bank larceny and burglary were reanalyzed on the assumption that a two year sentence under the bill would be equivalent to a thirty-month sentence under existing law. The reanalysis produced no change in the numbers in Table 7.

Kidnapping

The proposed Fong amendments to S. 1 would require a minimum sentence of three years' imprisonment upon conviction of a kidnapping in which the offender does not voluntarily release the victim alive and in a safe place prior to trial. They would require a minimum of eighteen months' imprisonment upon conviction of any other kidnapping.[1]

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1. Fong amendments, p. 2, line 15 to p. 3, line 2; p. 3, line 17 to p. 4, line 13. The amendments are reproduced as Appendix A.

Table 8 shows the potential impact of the Fong amendments on fiscal 1976 sentences for kidnapping. In addition to the sentences shown in the table, four sentences were found that would have been inconsistent with the Fong amendment but for the minor participation or duress exceptions.

The published statistics of the Administrative Office show a total of ninety-three defendants convicted and sentenced for kidnapping in fiscal 1976 in all of the federal courts, excluding the territories.

Current Parole Commission guidelines for offenders sentenced under the Youth Corrections Act treat kidnapping as an offense of the "greatest" severity. It is questionable whether the Fong amendments would have operated to extend the period of incarceration of either of the two defendants committed under that act.[1]

Presentence reports for the three in Table 8 sentences did not contain evidence of any mitigating circumstances. When the provisions of S. 1 for elimination of "good time" were considered, it was found that no additional sentences would be added to Table 8.

Narcotics Violations

All the proposals included in this study except the Byrd bill have provisions that would require minimum sentences upon

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1. Unlike the Kennedy and Byrd bills, the Fong amendments to S. 1 would not explicitly make the Youth Corrections Act inapplicable to sentences carrying a minimum sentence. However, Youth Corrections Act sentences are not proposed in S. 1 and would, therefore, be inapplicable to sentences imposed under the Fong amendments.

TABLE 8

KIDNAPPING

Number of Sentences Apparently Inconsistent With Fong Amendments to S. 1, Fiscal 1976

(Offenses under 18 U.S.C. §§ 1153, 1201)

Victim Not Voluntarily Released	
Sentences of imprisonment under the Youth Corrections Act	1
Adult sentences providing for imprisonment of less than three years	0
Sentences that did not include imprisonment	0
Total	1
Victim Voluntarily Released	
Sentences of imprisonment under the Youth Corrections Act	1
Adult sentences providing for imprisonment of less than 18 months	0
Sentences that did not include imprisonment	1
Total	2

conviction of certain narcotics violations. Generally speaking, the violations involve dealing in narcotics, but there are some differences among the bills in the precise transactions covered. In addition, there are differences among the bills in the narcotic substances covered. The Kennedy proposal covers only heroin.[1] The other four proposals cover "opiates," defined to include any Schedule I or II narcotic drug other than coca leaves or their derivatives.[2] The Fong amendments to S. 1, in addition, would impose an eighteen-month mandatory minimum sentence for commerce in a Schedule I or Schedule II narcotic that is not an opiate; that provision was not examined in the present study, so the discussion that follows is restricted to opiates.[3]

Table 9 shows the impact that the five proposals would have had on sentences imposed in fiscal 1976. The table is based on samples of narcotics sentences, and the numbers shown are therefore best estimates, subject to some sampling error. The figure of 775 adult sentences of incarceration for periods shorter than would be permitted by S. 1 is based on a small sample of sentences to less than ten years; the most that can be said of that estimate

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1. S. 260, §§ 6(a) and 6(b).

2. H.R. 2462, § 101(a)(2); S. 1, § 1815(a)(5); Fong amendments, p. 4, line 1 to line 4 (referring to the S. 1 provision); S. 1437, § 1815(a)(5).

3. Fong amendments, p. 4, lines 2 and 3.

TABLE 9

OPIATES

Estimated Number of Sentences Inconsistent With Various Proposals, Fiscal 1976

	Kennedy	McClory	S. 1	Fong	S. 1437
Sentences of imprisonment under the Youth Corrections Act	67	89	97	67	67
Adult sentences providing for imprisonment shorter than the proposal would require	133	183	775	130	144
Sentences that did not include imprisonment	180	205	219	199	199
Estimated totals*	380	477	1,091	396	410

* Included in the estimates are some sentences based on cases in the sample for which no presentence reports were available. The number of such sentences does not exceed seventeen for any of these bills. No complete determination could be made in these cases as to the applicability of exceptions in four of the bills.

is that the chances are only about one in twenty that the true number is smaller than 631 or larger than 941. The other numbers in Table 9 are based on a larger sample of sentences under the Youth Corrections Act, adult sentences to imprisonment of less than three years, and sentences involving no imprisonment; the chance is less than one in twenty that any of these numbers would be in error by more than thirty-nine. Table C-2, in Appendix C, presents additional detail of the likely sampling error in each of the estimates presented in this table.

The published statistics of the administrative office show a total of 4,363 narcotics defendants sentenced in the federal district courts in fiscal 1976, excluding the three territorial districts. These figures include sentences for a number of offenses not included in the analysis in Table 9, most of them regarded as less serious, notably cocaine offenses and simple possession of narcotics. 2,101 of the sentences were to imprisonment under the Youth Corrections Act or to adult terms of three years or more.

In considering the data in Table 9, it is important to bear in mind that sentences of incarceration under the Youth Corrections Act and sentences that do not include incarceration at all are inconsistent with all of the five proposals, regardless of the differences among the proposals in the lengths of the mandatory minimum sentences proposed. The differences in impact shown in

the first and third rows of Table 9, therefore, cannot be explained by differences in the lengths of the proposed minimums. Instead, they reflect differences in the scope of the offenses covered by the various proposals and in the applicability of the standard exceptions based on age, duress, impaired capacity, and minor participation. It will be noted that the numbers in these two rows are identical for S. 1437 and the Fong amendments to S. 1; both bills cover what have been referred to in Table 1 as the "commerce" offenses -- that is, manufacture, distribution, possession with intent to manufacture or distribute, and importation and exportation of opiates.[1] (Although S.1 and Fong also cover simple possession in excess of four ounces, that offense was not included in the present study.) Both bills also recognize the standard exceptions, using eighteen years as the age cutoff.

The numbers of sentences inconsistent with S. 1 in the first and third rows in Table 9 are considerably larger than those for S. 1437 and the Fong amendments. Although S. 1 covers the same offenses,[2] it does not recognize the mitigating exceptions. The Kennedy and McClory bills do recognize the exceptions, but the offenses covered by these bills are somewhat different. As already noted, the Kennedy bill is restricted to commerce in heroin.

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1. S. 1437, § 1811; S. 1, § 1811, as amended by Fong amendments, p. 4 lines 1 to 4.

2. S. 1, § 1811.

The McClory bill covers all the opiates, and it covers conspiracies and attempts as well as the "commerce" offenses.[1]

The second row in Table 9 shows the number of adult sentences of imprisonment in fiscal 1976 that were inconsistent with the five proposals. In addition to the differences among the proposals that have already been observed with respect to scope of coverage and applicability of exceptions, this row of course reflects differences in the minimum sentences proposed. S. 1 proposes minimum sentences of five years in some cases and ten years in others; the Fong amendments propose sentences of eighteen months and three years in the same circumstances; the McClory bill proposes three years; and the Kennedy bill and S. 1437 propose two years.[2]

Current Parole Commission guidelines indicate that "hard drug" offenses are considered to be of very high severity, and that defendants sentenced for them under the Youth Corrections Act will normally serve between twenty and forty-eight months before release, depending on prior record and other personal characteristics, and assuming satisfactory behavior in the institution. Hence, except in the case of S. 1, it cannot be assumed that the Youth Corrections Act sentences in Table 9 are less severe than the mandatory minimum sentences of the proposals. It should be

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1. H.R. 2462, § 102(c).

2. S. 1, § 1811; Fong amendments, p. 2, lines 15, to p. 3, line 2; H.R. 2462, §§ 101(a) and (c), 102(a) and (c); S. 260, § 6; S. 1437, § 1811.

noted in that connection that S. 1 and S. 1437 propose to eliminate the Youth Corrections Act from the criminal code entirely, for reasons unrelated to mandatory minimum sentences. The Fong amendments to S. 1 would leave that outcome unchanged. The Kennedy and McClory bills, on the other hand, would merely make the Youth Corrections Act inapplicable to those cases in which minimum sentences were mandated.

S. 1 and S. 1437 also eliminate allowances for "good time" as a general proposition. The Kennedy bill would make "good time" inapplicable to mandated minimum sentences; the McClory bill would not affect it. In addition, all the bills except S. 1 would make parole inapplicable to the mandated minimum sentences. The result is that defendants receiving mandated minimum sentences under the Kennedy and Fong proposals and S. 1437 would be required to serve the full term of the sentence without possibility of early release except through executive clemency. For the Kennedy bill and S. 1437, the data were reanalyzed on the assumption that a thirty-month sentence under existing law is the equivalent of the two-year mandatory minimum that each of these bills would require. That assumption would add an additional nineteen sentences to the number shown in Table 9 for the Kennedy bill, and an additional twenty-eight to the number shown for S. 1437. A similar reanalysis was not done for the Fong proposal, since the sample of presentence reports on which the figures in Table 9 are based did not include reports on sentences in excess of three years.

Table 10 shows the estimated frequency with which the exceptions recognized in four of the proposals would have applied to defendants whose sentence would otherwise conflict with the proposals. Although S. 1 does not recognize these exceptions for mitigating circumstances, it is included in the table to indicate what the effect would be if the exceptions applied. The number of fiscal 1976 sentences shown in Table 9 as being inconsistent with the provisions of S. 1 was determined, of course, without taking the exceptions into account.

Since some defendants qualified under more than one of the exceptions, the total number of exceptions is slightly higher than the total number of defendants.

In the Kennedy bill, the cutoff for the age exception is established at 16 years, while in the other bills the age cutoff is 18. As noted previously, Senator Kennedy used the 18-year-old cutoff in the version introduced in the 94th Congress. No defendants were found in the sample for whom this change would have made a difference.

Table 11 shows the estimated frequency of certain other mitigating circumstances for defendants who did not qualify for any of the exceptions shown in Table 10. It will be observed that the most frequent of these is cooperation with the prosecution. Even when the defendant has cooperated with the prosecution, that fact is sometimes

TABLE 10

OPIATES

Estimated Frequency of Exceptions for Mitigating Circumstances

	Kennedy	McClory	S. 1	Fong	S. 1437
Age	0	0	0	0	0
Duress	6	20	(25)	16	8
Impaired mental capacity	3	6	(6)	3	3
Minor participation	66	69	(62)	50	69
Estimated total exceptions*	75	95	(93)	69	80
Estimated total defendants	66	75	(78)	53	69

* In addition to these, there was a small number of sentences for which no presentence reports were available. No complete determination could be made as to the applicability of the exceptions in these cases.

communicated to the sentencing judge without appearing in the presentence report. Hence, the estimated frequency of cooperation in Table 11 is almost certainly on the low side.

Both S. 1 and the Fong amendments to S. 1 propose mandatory minimum sentences of different lengths, depending upon the classification of a narcotics transaction. Section 1811(b) of S. 1 defines commerce in an opiate as a Class B felony if the opiate weighs four ounces or more; if the offense consists of distributing the opiate to a person who is at least eighteen years old and at least five years younger than the offender; or if the offense is a repeat offense committed after the defendant has been convicted of an opiate-related felony under federal, state, or local law, or while he is on release pending trial for an opiate-related offense. All other commerce in opiates is defined as a Class C felony. S. 1 prescribes minimum sentences of ten years and five years for Class B and Class C felonies, respectively; the Fong amendments prescribe minimums of three years and eighteen months. Table 12 indicates, for these two proposals, the breakdown of the overall figures that were presented in Table 9.

It should be observed that the data available with respect to the Class B felonies was somewhat limited, and that the estimates both here and in Table 9 may therefore be somewhat on the low side. Information about prior convictions is not always complete in the presentence reports. Moreover, presentence reports do

TABLE 11

OPIATES

Estimated Frequency of Other Mitigating Circumstances

	Kennedy	McClory	S. 1	Fong	S. 1437
Cooperation with government	39	64	50	44	50
Offense committed by offender in order to support narcotic habit	22	36	28	33	36
Estimated totals*	61	100	78	77	86
Estimated total defendants	55	92	75	69	78

* In addition to these, there was a small number of sentences for which no presentence reports were available. No complete determination could be made as to the presence of mitigating circumstances.

TABLE 12

OPIATES

Detailed Analysis of S. 1 and Fong Amendments

	S. 1	Fong Amendments
Class B Felonies		
Sentences of imprisonment under the Youth Corrections Act	42	28
Adult sentences for imprisonment shorter than the proposal would require	354	64
Sentences that did not include imprisonment	50	41
Estimated totals	446	133
Class C Felonies		
Sentences of imprisonment under the Youth Corrections Act	55	38
Adult sentences for imprisonment shorter than the proposal would require	421	66
Sentences that did not include imprisonment	169	158
Estimated totals	645	262

not generally show the age of the person to whom an opiate was sold or otherwise distributed, so some cases of sales to people under eighteen may not have been identified. It is believed that any such understatement is relatively small, however. The gaps in the data with respect to prior record appear to be relatively infrequent. The characteristic transaction upon which a conviction is based appears to be a sale to a law enforcement official or an informant working for law enforcement officials; it seems probable that few people in either category are under eighteen.

This last point suggests, of course, that little impact can be expected for provisions that impose extra penalties for narcotics transactions in which the purchaser is under eighteen.

The study of the narcotics cases also raises another issue that is frequently raised when mandatory minimum sentences are discussed. That is the question of the extent to which the prosecutor has the discretion to negate the mandatory minimum sentence by accepting a plea to a reduced charge. In the study of narcotics offenses, a substantial number of cases were found in which the indictment originally included charges of both distribution and simple possession, and in which the case was terminated on the basis of a plea only to the possession charge. While some of these may be cases in which the charge of distribution could not be established, it would be naive to ignore the role that plea bargaining plays in this process, and the increased importance

that would be conferred on the plea bargaining process if mandatory minimum sentences were enacted.

APPENDIX A - FONG AMENDMENTS TO S. 1

94TH CONGRESS
1ST SESSION

S. 1

IN THE SENATE OF THE UNITED STATES

JULY 26 (legislative day, JULY 21), 1975

Referred to the Committee on the Judiciary and ordered to be printed

AMENDMENTS

Intended to be proposed by Mr. FONG (by request) to S. 1, a bill to codify, revise, and reform title 18 of the United States Code; to make appropriate amendments to the Federal Rules of Criminal Procedure; to make conforming amendments to criminal provisions of other titles of the United States Code; and for other purposes, viz:

On page 26, add the following after the material following line 1:

"2307. Mandatory Sentence of Imprisonment.".

On page 166, strike lines 34 and 35.

On page 167, strike lines 1 through 3.

On page 172, strike the language beginning with the word "Notwithstanding" on line 15 through the end of line 23.

Amdt. No. 820

On page 190, add at the end of line 13 the following: "Except as provided in section 2307 (b), a defendant who has been found guilty of an offense described in section 2307 (a) shall be sentenced to a term of imprisonment as set forth in subsection (e).".

On page 191, add at the end of line 2 the following: "Except as provided in section 2307 (b), the minimum term of parole ineligibility of a defendant who has been found guilty of an offense described in section 2307 (a) shall be not less than six months or one-tenth of the maximum term authorized for the offense, whichever is greater, and the minimum term of parole ineligibility of a defendant who has been found guilty of a Class A felony described in section 2307 (a) shall be three years.".

On page 191, add the following after line 2:

"(e) MANDATORY TERM OF IMPRISONMENT.—Except as provided in section 2307 (b), a defendant who has been found guilty of an offense described in section 2307 (a) may not be sentenced to probation but shall be sentenced by the court to a term of imprisonment of not less than six months or one-tenth of the maximum term authorized for the offense, whichever is greater, and the minimum term of imprisonment for a defendant found guilty of a Class A felony described in section 2307 (a) shall be three years. Such term

of imprisonment shall run consecutively to any other term of imprisonment imposed on the defendant.".

On page 191, delete "The court," at the end of line 4 and insert in lieu thereof the following: "Except as provided in section 2307 (b), the court shall impose a minimum term of imprisonment on a defendant convicted of an offense described in section 2307 of at least the term prescribed in section 2301 (e). In any other case, the court,".

On page 192, lines 26 and 27, delete the words "The court," and insert in lieu thereof "Except as provided in section 2307 (b), the court shall impose a term of parole ineligibility on a defendant convicted of an offense described in section 2307 (a) for the term prescribed in section 2301 (d). In any other case, the court,".

On page 193, line 19, delete "If" and insert in lieu thereof "Except as provided in section 2301 (e), if".

On page 194, add the following new section after line 29:

"§ 2307. Mandatory Sentence of Imprisonment

"(a) IN GENERAL.—Except as otherwise provided in subsection (b), a defendant who has been found guilty of:

"(1) an offense under section 1823 (Using a Weapon in the Course of a Crime):

"(2) an offense described in section 1621 (Kid-

napping), 1631 (Aircraft Hijacking), or 1811 (Trafficking in an Opiate), or 1812 (Trafficking in drugs) if the controlled substance is a narcotic drug listed in Schedule I or II; or

"(3) a violent offense committed after conviction for the commission of a previous violent offense, or conviction for the commission of a previous state or local offense which would be a violent offense if the offense was a federal offense, if the offenses were committed on separate occasions;

shall be sentenced to a mandatory term of imprisonment and parole ineligibility in accordance with the provisions of sections 2301 (d) and (e).

"(b) IMPOSITION NOT REQUIRED.—Notwithstanding the provisions of subsection (a), the court may sentence the defendant to a shorter term of parole ineligibility than required under section 2301 (d), to a term of imprisonment with no term of parole ineligibility, or to probation, if the court finds that, at the time of the offense:

"(1) the defendant was less than eighteen years old;

"(2) the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution;

"(3) the defendant was under unusual and sub-

stantial duress, although not such duress as would constitute a defense to prosecution; or

"(4) the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor.

"(c) DEFINITION.—As used in this section, a "violent offense" is an offense described in section 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1641 (Rape), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), or 1805 (Facilitating a Racketeering Activity by Violence).".

On page 276, line 21, strike "1811(b) or 1823(b)" and insert in lieu thereof "2301(e)".

On page 353, add the following after line 32:

"Rule 32.2—Sentence to a Mandatory Sentence of Imprisonment

"If a defendant is convicted of an offense described in 18 U.S.C. 2307(a), the court, prior to imposition of sentence shall hold a hearing to determine whether a term of imprisonment and parole ineligibility is mandatory under 18 U.S.C. 2307. The hearing shall be held before the court sitting without a jury, and the defendant and the government shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the

hearing. If it appears by a preponderance of the information, including information submitted during the trial, during the sentencing hearing, and in so much of the presentence report as the court relies on, that the defendant is subject to a mandatory term of imprisonment and parole ineligibility, the court shall sentence the defendant in accordance with the provisions of 18 U.S.C. 2301(e) and 2307(a). The court shall place in the record its findings, including an identification of the information relied upon in making its findings.".

APPENDIX B - PROCEDURES USED IN THE STUDY

For each offense studied, this appendix presents in detail the procedure employed to generate the data presented in the body of the report.

The references to offense codes are to the four-digit offense classification codes used by the Administrative Office to identify offense at filing and offense at conviction. In fiscal 1976, the offense classification procedures used by the Administrative Office were:

1. in cases involving multiple offenses, the most serious offense was coded as the offense at filing, and

2. for all offenses except murder, the offense at conviction was assumed to be the same as the offense at filing.

The four-digit codes are generally assigned to groups of offenses, so several related offenses may share the same four-digit offense code. A complete listing of the offense codes along with the procedures used by the Administrative Office to classify offenses appears in the Administrative Office's manual entitled, "Codes and Procedures Used In the Federal Offender (Criminal) Statistical Reporting System" (January 1977).

Aggravated Assault

1. Administrative Office data tapes were searched for all defendants with an offense coded as "1500" and a sentence including no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. Code 1500 includes a variety of assaults not covered by the bills under study, such as assaults on certain Federal officials. The search produced 414 defendants.

2. A systematic sample of 150 defendants was drawn from a listing of the 414 defendants. Presentence reports were received for 138 of the defendants. Included in the analysis are sentences for assault under sections 113(a), 113(b), 113(c), and 1153 of Title 18, in which

serious bodily injury resulted. All other sentences were eliminated from the analysis.

Second Degree Murder

1. Administrative Office data tapes were search for all defendants with an offense coded as "0200" and a sentence including no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. This produced 6 defendants.

2. Reports were received for 5 of the defendants. Included in the analysis are sentences for second degree murder under sections 1111 and 1153 of Title 18.

Rape

1. Administrative Office data tapes were searched for all defendants with an offense coded as "6100" and a sentence including no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. Code 6100 includes both forcible and statutory rape. The search produced 36 defendants.

2. Presentence reports were received for 32 defendants. Sentences for offenses other than forcible rape under sections 1153 and 2031 of Title 18 were eliminated from the analysis.

Robbery of U.S. Property and Robbery Within the Special Maritime and Territorial Jurisdiction

1. Administrative Office data tapes were searched for all defendants with an offense coded as "1400" and a sentence of no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. The search produced 56 defendants.

2. Presentence reports were received for 41 of the defendants. Included in the analysis are sentences for robbery under sections 2111 and 2112 of Title 18. All other sentences were eliminated from the analysis.

Robbery of a Bank, Credit Union, or Savings and Loan Association

1. Administrative Office data tapes were searched for all defendants with an offense coded as "1100" and a sentence including no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. Code 1100 includes sentences for attempt or conspiracy to commit robbery of a bank, credit union or savings and loan association, as well as for robbery itself. The search produced 639 defendants.

2. Presentence reports were received for 597 defendants. Included in the analysis are sentences for robbery of a bank, credit union, or savings and loan association under sections 2113(a) and (d) of Title 18. Sentences for offenses other than robbery of a bank, credit union, or savings and loan association were eliminated from the analysis.

Burglary of a Bank, Credit Union, or Savings and Loan Association

1. Administrative Office data tapes were searched for all defendants with an offense coded as "2100" and a sentence including no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. Code 2100 includes sentences for attempt or conspiracy to commit burglary of a bank, credit union, or savings and loan association, as well as for burglary itself. The search produced 29 defendants.

2. Reports were received for 24 of the defendants. Sentences for offenses other than burglary under section 2113(a) of Title 18 were eliminated from the analysis.

Larceny of a Bank, Credit Union, or Savings and Loan Association

1. Administrative Office data tapes were searched for all defendants with an offense coded as "3100" and a sentence including no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. In addition to the larceny sentences, code 3100 includes sentences under Section 2113(c) of Title 18 for receiving, possessing, or disposing of

money or proerty that has been taken from a bank, credit union, or savings and loan association in violation of section 2113(b) of Title 18. The search produced 143 defendants.

2. Presentence reports were received for 126 defendants. All sentences other than those for larceny of a bank, credit union, or savings and loan association under Section 2113(b) of Title 18 were eliminated from the analysis.

Kidnapping

1. Administrative Office data tapes were searched for all defendants with an offense coded as "7600" or "7610" and with a sentence of no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. In addition to kidnapping, code 7600 includes sentences for receiving, possessing, or disposing of money or property that has been delivered as ransom. The search produced 20 defendants.

2. Presentence reports were received for 12 of the defendants. Sentences for offenses other than kidnapping under section 1153 and 1201 of Title 18 were eliminated from the analysis.

Narcotics

1. Administrative Office data tapes were searched for all defendants with an offense coded as "6701," "6702," "6703," "6711," "6712," "6713," "6721," "6722," or "6723" and a sentence of no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. The search produced 2,240 defendants.

2. A second search of the Administrative Office data tapes was made for all defendants with an offense at conviction coded as "6701," "6702," "6703," "6711," "6712," "6713," "6721," "6722," or "6723" and a sentence of three to less than ten years (36 to 119 months). The search produced 1,326 defendants.

3. A systematic sample of 807 defendants was drawn from the list of 2,240 defendants with sentences of no imprisonment, imprisonment for less than three years, or imprisonment under the Youth Corrections Act. A second systematic sample, based on the universe of 3,566 defendants that included those sentenced to at least three years but less than ten years, was constructed by further sampling the 807 defendants in the "under three year" sample to yield 196 defendants and by proportionately sampling the list of 1,326 defendants sentenced to three years but under ten years to yield 117 defendants. Therefore, the "under ten year" sample contained a total of 313 defendants, of which 196 were also included in the "under three year" sample.

4. Original JS-2 and JS-3 reports submitted to the Administrative Office by the district courts, and containing some data not reduced to machine-readable form, were used to identify some of the defendants in both samples who had been convicted of non-opiate offenses. Reference to these reports permitted us to identify a total of 179 offenders as having been sentenced on offenses which were not included in this study.

5. Presentence reports were requested for 745 narcotics offenders. Reports were received for 709 offenders. Sentences for offenses other than those covered by the five bills were eliminated from the analysis.

APPENDIX C - EXPLANATION OF ESTIMATES BASED ON SAMPLES

As indicated in the text and in Appendix B, the data for aggravated assault and opiate offenses is based on sampling of the relevant sentences identified from the Administrative Office data tapes. The following tables show the confidence intervals for the data presented in Tables 3 and 9, calculated at a ninety-five percent level using the method set forth in R. Burford, Statistics: A Computer Approach 210-213 (1968).

For aggravated assault, the sample consisted of 150 defendants drawn from a universe of 414. For opiate-related offenses, the principal sample consisted of 807 defendants drawn from a sample of 2,240. The sample that included all sentences of less than ten years, used in the analysis of S.1, consisted of 313 defendants drawn from a universe of 3,566.

APPENDIX C

TABLE 13

AGGRAVATED ASSAULTS

Likely Sampling Errors for Estimates Presented in Table 3

	Kennedy	Byrd
Sentences of imprisonment under the Youth Corrections Act	(-4) (+10)	(-4) (+10)
Adult sentences providing for imprisonment of less than two years	(-9) (+15)	(-11) (+17)
Sentences that did not include imprisonment	(-15) (+21)	(-20) (+23)
Estimated Totals	(-26) (+26)	(-23) (+18)

APPENDIX C

TABLE 14

OPIATES

Likely Sampling Errors for Estimates Presented in Table 9

	Kennedy	McClory	S. 1	Fong	S. 1437
Sentences of imprisonment under the Youth Corrections Act	(-18) (+24)	(-21) (+27)	(-22) (+29)	(-18) (+24)	(-18) (+24)
Adult sentences providing for imprisonment shorter than the proposal would require	(-26) (+33)	(-31) (+37)	(-144) (+166)	(-26_ (+33)	(-27) (+34)
Sentences that did not include imprisonment	(-30) (+37)	(-32) (+39)	(-34) (+40)	(-27) (+39)	(-32) (+39)
Estimated Totals	(-62) (+62)	(-61) (+60)	*	(-59) (+65)	(-60) (+66)

* Not computed. Totals for S.1 were based on combined data from two samples.