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Mandatory Minimum Sentencing Legislation in the 113th Congress

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Summary

Defendants convicted of violating certain federal criminal laws face the prospect of mandatory minimum terms of imprisonment. Bills offered during the 113th Congress would have supplemented, enhanced, or eliminated some of these. The most all-encompassing, H.R. 1695 (Representative Scott (VA)) and S. 619 (Senator Paul) would have permitted federal courts to impose a sentence below an otherwise applicable mandatory minimum when necessary to avoid violating certain statutory directives.

Federal drug statutes feature a series of mandatory minimums. S. 1410 (Senator Durbin)/H.R. 3382 (Representative Labrador) and S. 1410 (Judiciary), as voted by the Judiciary Committee, would have reduced several of the most severe of these. H.R. 3088 (Representative Waters) would have eliminated virtually all of them. The Durbin bill would also have enlarged the safety valve exception. The safety valve provision allows a federal court to sentence qualified defendants below the statutory mandatory minimum in drug cases, if the defendant has a virtually spotless criminal record, that is, has not more than one criminal history point. S. 1410 would have expanded safety valve eligibility to defendants with a slightly more extensive criminal record. Elsewhere, H.R. 2372 (Representative Scott (VA)) would have dropped the sentencing distinction between powder and crack cocaine by striking the cocaine base specific references. Two proposals would have addressed the Fair Sentencing Act's retroactive application. One, H.R. 2369 (Representative Scott (VA)) would have permitted a court to reduce, consistent with the act, a previously imposed sentence for crack cocaine possession or trafficking. The second, S. 1410 (Senator Durbin), would also have permitted a court to reduce such sentences, but would have limited the authority to instances in which the defendant had not been previously granted or denied a similar reduction.

The firearms bills were mixed. H.R. 2405 (Representative Scott (VA)) would have stripped the mandatory minimums from Section 924(c) that outlaws possession of a firearm in furtherance of a crime of violence or serious drug offense. On the other hand, H.R. 722 (Representative King (NY)) would have added two years to each of Section 924(c)'s mandatory minimums, if the firearm were stolen or had had its serial number defaced. H.R. 404 (Representative Schiff) would have established a two-year mandatory minimum term of imprisonment for violation of either of the two firearm acquisition false statement (straw purchaser) proscriptions, if the offense involved two or more firearms and an intent to subsequently transfer them to an ineligible person. H.R. 117 (Representative Holt) would have required the Attorney General to establish a system of handgun registration and licensing. Possession without a federal license or of an unregistered handgun would have been punishable by imprisonment for not less than 15 years.

Several proposals would have added or enhanced the mandatory minimums associated with individual offenses. For instance, S. 1410 (Judiciary) would have set new mandatory minimums for various weapons and sex offenses. H.R. 1468 (Representative Blackburn) would have created a separate crime for anyone who, during and in relation to a computer fraud or abuse violation, substantially impaired or attempted to impair the operation of a critical infrastructure computer system or an associated critical infrastructure. H.R. 457 (Representative Issa) would have established mandatory minimum penalties for an alien previously removed from the U.S. for his criminal activities. H.R. 1577 (Representative Poe) and S. 698 (Senator Cornyn) would have expanded the class of protected public servants; increased the penalties associated with homicides committed against them; established mandatory minimum terms of imprisonment for killing or assaulting them; and created a new flight-to-avoid-prosecution offense for fugitives accused of such crimes, punishable by a mandatory minimum term of imprisonment. The 113th Congress adjourned without enacting any of the proposals relating to mandatory minimum sentencing.

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Introduction

Federal crimes are usually punishable by a statutory maximum term of imprisonment, for example, "imprisoned for not more than 5 years."[1] A surprising number also have statutory minimum terms of imprisonment, for example, "imprisonment which may not be less than 10 years or for life."[2] Under some circumstances, mandatory minimums have proven controversial.[3] Opponents contend that in some instances they can be arbitrary and unduly severe. Proponents contend that they ensure the offenders of the most serious offenses will receive at least some minimum punishment. Legislative proposals in the 113th Congress reflected both perspectives.[4] Congress adjourned, however, without enacting any of them.

Some would have established or enhanced mandatory minimums for a variety of offenses including violent attacks on law enforcement officers, firearms offenses, reentry into the United States by dangerous aliens, and computer attacks on the nation's critical infrastructure. Others would have repealed or mitigated the impact of existing mandatory minimums, particularly with regard to controlled substance offenses.

A General Exception

Federal courts are required to weigh the factors listed in 18 U.S.C. 3553(a) before sentencing a defendant. The factors include things like "the need for the sentence imposed ... to provide just punishment for the offense" and "the need to avoid unwarranted sentence disparities ..."[5] In doing so, however, the courts may not disregard any applicable statutory mandatory minimums.

H.R. 1695 (Representative Scott (VA)) and S. 619 (Senator Paul) would have permitted federal courts to impose a sentence below an otherwise applicable mandatory minimum when necessary to avoid violating the requirements of Section 3553(a).[6] When exercising the authority, the court

[1] 18 U.S.C. 1001(a)(relating to false statements); see also 18 U.S.C. 1955(a)(relating to operating an illegal gambling business); 18 U.S.C. 2339B("imprisoned not more than 15 years")(relating to providing material support to designated terrorist organizations); 18 U.S.C. 1341("imprison not more than 20 years")(relating to mail fraud).

[2] See, generally, CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*.

[3] See, generally, United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Policy Views About Mandatory Minimum Penalties*, 85-103 (October 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum-Penalties/20111031_Rtc_Mandatory_Minimum.cfm.

[4] Although the National Defense Authorization Act for Fiscal Year 2014 contains provisions characterized as mandatory minimum sentencing amendments to the Uniform Code of Military Justice (UCMJ), P.L. 113-66 (H.R. 3304), those provisions and proposals relating to the UCMJ, the District of Columbia Code, or criminal codes of the territories of the United States are beyond the scope of this report.

[5] 18 U.S.C. 3553(a)("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider- (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established ... issued by the Sentencing Commission ... (5) any pertinent policy statement ... issued by the Sentencing Commission ... (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense").

[6] H.R. 1695, §2, proposed 18 U.S.C. 3553(g)(1); S. 619, §2, proposed 18 U.S.C. 3553(g)(1).

would have had to provide the government and the defendant a chance to be heard and to provide a written statement of the Section 3553(a) factors that justify the decision to sentence below the mandatory minimum.[7]

Drug Offenses

The Controlled Substances Act and the Controlled Substances Import and Export Act establish a series of mandatory minimum sentences for violation of their prohibitions. Trafficking—that is, importing, exporting, or possessing with the intent to distribute—a very substantial amount of various highly addictive substances such as more than a kilogram of heroin is punishable by imprisonment for not less than 10 years or more than life.[8] A subsequent conviction carries a sentence of imprisonment for not less than 20 years or more than life.[9] When substantial but lesser amounts are involved, such as 100 grams of heroin, sentences of imprisonment for not less than five years or more than life are called for, and imprisonment for not less than 10 years or more than life in the case of a subsequent conviction.[10]

S. 1410 (Senator Durbin)/H.R. 3382 (Representative Labrador) would have reduced those mandatory minimum sentences by half.[11] The 20-year mandatory minimums would have become 10-year mandatory minimums; the 10-year mandatory minimums would have become five-year mandatory minimums; and the five-year mandatory minimum would have become a two-year mandatory minimum.[12]

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[7] H.R. 1695, §2, proposed 18 U.S.C. 3553(g)(2), (3); S. 619, §2, proposed 18 U.S.C. 3553(g)(2), (3).

[8] 21 U.S.C. 841(b)(1)(A); 21 U.S.C. 960(b)(1). The threshold amounts covered by the sections in addition to a kilogram of heroin are "(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of- (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP); (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; (vii) 1,000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." 21 U.S.C. 841(b)(1)(ii)-(vii).

[9] 21 U.S.C. 841(b)(1)(A); 21 U.S.C. 960(b)(1)("... If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which of not less than 20 years and not more than life imprisonment.... ").

[10] 21 U.S.C. 841(b)(1)(B); 21 U.S.C. 960(b)(2). Beyond 100 grams of heroin, the threshold amounts for this lower sentencing plateau are "(ii) 500 grams or more of a mixture or substance containing a detectable amount of ... cocaine ... (iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; (iv) 10 grams or more of phencyclidine (PCP) ... (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); (vi) 40 grams or more of a mixture or substance containing a detectable amount of ... propanamide ... (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana ... or (viii) 5 grams or more of methamphetamine.... " 21 U.S.C. 841(b)(1)(B)(ii)-(vii).

[11] S. 1410, §4, proposed 21 U.S.C 841(b)(1) and proposed 21 U.S.C. 960(b). S. 1410 (Durbin)/H.R. 3382 (Labrador) refers to the bill as introduced; S. 1410 (Judiciary), which here would have carried forward the same amendments, refers to the bill as voted out of the Judiciary Committee.

[12] *Id.*

H.R. 3088 (Representative Waters) would have eliminated the mandatory minimum sentences so that each of those offenses would have been punishable by imprisonment for any term of years or for life.[13] Unlike the Durbin bill (S. 1410), the Waters proposal (H.R. 3088) would have eliminated virtually every other controlled substance mandatory minimum as well.[14]

Under present law, when a death or serious bodily injury results from the trafficking in a very substantial amount of a controlled substance like heroin, the mandatory minimum term of imprisonment is 20 years rather than 10 years.[15] When death or serious bodily injury results from trafficking in a substantial but somewhat lower amount of a controlled substance like heroin, the mandatory minimum term of imprisonment is 20 years rather than five years.[16] When an offender has two or more prior controlled substance convictions, trafficking a very substantial amount of a controlled substance like heroin carries a mandatory sentence of life imprisonment.[17] Without regard for the type or amount of the controlled substance, simple possession by an offender with a prior controlled substance conviction is punishable by imprisonment for not less than 15 days and not more than two years.[18] The penalty is imprisonment for not less than 90 days and not more than three years when the offender has two or more prior convictions.[19] H.R. 3088 would have repealed each of these mandatory minimums, but would have left the existing maximum penalties unchanged.[20]

Finally, penalties double when the commission of a controlled substance offense involves distribution to or using a child, or when it involves distribution near a school or other protected location.[21] These offenses often come with a one-year mandatory minimum term of imprisonment, when the underlying distribution crime would not have otherwise carried a mandatory minimum because of the type or amount of the drugs involved.[22] The Waters bill (H.R. 3088) would have disposed of these mandatory minimums as well.[23] It would have left in place, however, a fairly unique provision found in the school distribution, repeat offender provision of 21 U.S.C. 860(b):

> Any person who violates section 841(a)(1) of this title ... by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of ... a ... school ... or housing facility owned by a public housing authority,

[13] H.R. 3088, §4(b), (c), proposed 21 U.S.C 841(b)(1) and proposed 21 U.S.C. 960(b).

[14] H.R. 3088, §4, proposed 21 U.S.C. 841(b); proposed 21 U.S.C. 844; proposed 21 U.S.C. 859; proposed 21 U.S.C. 860; proposed 21 U.S.C. 861; and proposed 21 U.S.C. 960(b).

[15] 21 U.S.C. 841(b)(1)(A), 21 U.S.C. 960(b)(1).

[16] 21 U.S.C. 841(b)(1)(B), 21 U.S.C. 960(b)(2).

[17] 21 U.S.C. 841(b)(1)(A), 21 U.S.C. 960(b)(1).

[18] 21 U.S.C. 844.

[19] *Id.*

[20] H.R. 3088, §4, proposed 21 U.S.C. 841(b); proposed 21 U.S.C. 844; and proposed 21 U.S.C. 960(b).

[21] 21 U.S.C. 859 (distribution to a child under 21 years of age)(penalties for repeat offenders are tripled); 21 U.S.C. 860 (trafficking "within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility")(penalties for repeat offenders are tripled); 21 U.S.C. 861(use of a child for controlled substance violations or distribution to a pregnant individual)(penalties for repeat offenders are tripled).

[22] E.g., 21 U.S.C. 859(a) ("... Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year ..."); similar provisions apply with respect to 21 U.S.C. 859 (b); 21 U.S.C. 860(a); 21 U.S.C. 861(b), (c), (f). Repeat offenders under 21 U.S.C. 860 face a mandatory minimum of imprisonment of not less than three years in the absence of a higher otherwise applicable mandatory minimum, 21 U.S.C. 860(b).

[23] H.R. 3088, §4, proposed 21 U.S.C. 859(a), (b); 21 U.S.C. 860(a), (b); proposed 21 U.S.C. 861(b), (c).

> or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, after a prior conviction under subsection (a) of this section has become final is punishable (1) by the greater of (A) a term of imprisonment of not less than three years and not more than life imprisonment or (B) three times the maximum punishment authorized by section 841(b) of this title....

A summary of the changes in the existing controlled substance mandatory minimum terms of imprisonment, proposed in the Durbin (S. 1410)/Labrador (H.R. 3382) (which the Judiciary Committee left unchanged) and Waters (H.R. 3088) proposals, appears in **Table 1**.

Table 1. Terms of Imprisonment: Controlled Substances

Offense	Present Law	S. 1410/H.R. 3382	H.R. 3088
I. (a)(i) Trafficking: Sec. 841(b)(1)(A) substances (e.g. 1 kilo. + of heroin)	not less than 10 years or more than life	not less than 5 years or more than life	any term of years or life (no mandatory minimum)
(ii) if death or serious injury results	not less than 20 years or more than life	no change	any term of years or life (no mandatory minimum)
(b)(i) one prior violation	not less than 20 years or more than life	not less than 10 years or more than life	any term of years or life (no mandatory minimum)
(ii) and death or serious injury results	life	no change	any term of years or life (no mandatory minimum)
(c) two or more prior violations	life	no change	any term of years or life (no mandatory minimum)
II. (a)(i) Trafficking: Sec. 841(b)(1)(B) substances (e.g. 100g + of heroin)	not less than 5 years or more than 40 years	not less than 2 years or more than 40 years	not more than 40 years (no mandatory minimum)
(ii) if death or serious injury results	not less than 20 years or more than life	no change	any term of years or life (no mandatory minimum)
(b)(i)one prior violation	not less than 10 years or more than life	not less than 5 years or more than life	any term of years or life (no mandatory minimum)
(ii) and death or serious injury results	life	life	any term of years or life (no mandatory minimum)
III. (a) Trafficking to a child where no mandatory minimum otherwise applies	not less than 1 year	no change	no mandatory minimum
(b) Using a child to traffic or trafficking to a pregnant person where no mandatory minimum otherwise applies	not less than 1 year	no change	no mandatory minimum
(c)(i) Trafficking near a school or protected location where no mandatory minimum otherwise applies	not less than 1 year	no change	no mandatory minimum
(ii) with a prior conviction	not less than 3 years	no change	no mandatory minimum

Offense	Present Law	S. 1410/H.R. 3382	H.R. 3088
(iii) with a prior conviction	the greater of (A) imprisonment for not less than 3 years or more than life or (B) three times the otherwise applicable penalty	no change	no change
IV. (a) Simple possession and prior conviction	not less than 15 days or more than 2 years	no change	no mandatory minimum
(b) Simple possession and 2 or more prior convictions	not more than 90 days or more than 3 years	no change	no mandatory minimum

Source: Congressional Research Service, based on S. 1410/H.R. 3382; H.R. 3088; and 21 U.S.C. 841, 844, 859, 860, 861, 960.

Attorney General's Approval

The Waters bill (H.R. 3088) also contained a proposal apparently designed to reserve federal prosecutions for the most serious cases. Less serious cases—prosecution for possession or trafficking in amounts less than those necessary to trigger the most severe mandatory minimums (e.g., less than a kilogram of heroin), or in the case of cocaine, less than 500 grams—would have required the Attorney General's written approval.[24]

Safety Valve

The so-called safety valve provision of 18 U.S.C. 3553(f) allows a court to sentence qualified defendants below the statutory mandatory minimum in controlled substance trafficking and possession cases.[25] To qualify, a defendant may not have used violence in the course of the offense.[26] He must not have played a managerial role in the offense if it involved group participation.[27] The offense must not have resulted in a death or serious bodily injury.[28] The defendant must make full disclosure of his involvement in the offense, providing the government

[24] H.R. 3088, §3. The limitation would have applied to prosecution of any offense or conspiracy to commit any offense under the Controlled Substances Act or the Controlled Substances Import and Export Act.

[25] 18 U.S.C. 3553(f)(" Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation ...").

[26] 18 U.S.C. 3553(f)(2)("... if the court finds at sentencing ... that ... (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense").

[27] 18 U.S.C. 3553(f)(4)("... if the court finds at sentencing ... that ... (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act").

[28] 18 U.S.C. 3553(f)(3)("... if the court finds at sentencing ... that ... (3) the offense did not result in death or serious bodily injury to any person").

with all the information and evidence at his disposal.[29] Finally, the defendant must have a virtually spotless criminal record, that is, not more than 1 criminal history point.[30]

Criminal history points are a feature of the U.S. Sentencing Commission's Sentencing Guidelines. The Guidelines assign points based on the sentences imposed for prior state and federal convictions. For example, the Guidelines assign 1 point for any past conviction that resulted in a sentence of less than incarceration for 60 days; 2 points for any conviction resulting in a sentence of incarceration for at least 60 days; and 3 points for any conviction resulting in a sentence of incarceration of more than a year and a month.[31]

The Sentencing Commission's report on mandatory minimum sentences suggested that Congress consider expanding safety valve eligibility to defendants with 2 or possible 3 criminal history points.[32] The report indicated that under the Guidelines a defendant's criminal record "can have a disproportionate and excessively severe cumulative sentencing impact on certain drug offenders."[33] It explained that the Guidelines are construed to ensure that the sentence they recommend in a given case calls for a term of imprisonment that is not less than an applicable mandatory minimum.[34] In addition, the drug offenses have escalated mandatory minimums for repeat offenders.[35] Moreover, similarly situated drug offenders may be treated differently, because states punish simple drug possession differently and prosecutors decide when to press recidivism qualifications differently.[36]

The Durbin/Labrador bill (S. 1410/H.R. 3382) would have expanded safety valve eligibility from defendants with no more than 1 criminal history point to those with no more than 3 points.[37] S. 1410 (Judiciary), as voted out of the Senate Judiciary Committee, would have expanded safety valve eligibility from defendants with no more than 1 criminal history point to those with no more than 2 points, if they avoided certain disqualifications.[38] A defendant would have been ineligible for the expanded 2-point criminal history safety valve threshold if he had a prior conviction for a

[29] 18 U.S.C. 3553(f)(5)("... if the court finds at sentencing ... that ... (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement").

[30] 18 U.S.C. 3553(f)(1)("... if the court finds at sentencing ... that - (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines").

[31] U.S.S.G. §4A1.1.

[32] United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 355 (October 2011).

[33] *Id*. at 352.

[34] *Id.*

[35] *Id.*

[36] *Id*. at 353 ("Interviews of prosecutors and defense attorneys in 13 districts confirm that different districts have adopted different practices with respect to filing the necessary information required to seek an enhanced penalty under 21 U.S.C. §851[relating to proof of a prior conviction] in part because of its severity. The structure of the recidivist provisions in 21 U.S.C. §§841 and 960 fosters inconsistent application, in part, because their applicability turns on the varying statutory maximum penalties for state drug offenses").

[37] S. 1410 (Durbin)/H.R. 3382 (Labrador), §2, proposed 18 U.S.C. 3553(f)(1). The bill sets the ceiling at criminal history category II, that is, not more than 3 criminal history points, U.S.S.G. ch.5, pt. A.

[38] S. 1410, §2, proposed 18 U.S.C. 3553(f)(1)(B).

federal firearms offense,[39] sex offense,[40] crime of terrorism,[41] RICO predicate offense,[42] or conspiracy to use or invest drug profits.[43]

Cocaine Sentencing

Originally, the Controlled Substances Act made no distinction between powder cocaine and crack cocaine (cocaine base).[44] The 1986 Anti-Drug Abuse Act introduced a 100-1 sentencing ratio between the two, so that trafficking in 50 grams of crack cocaine carried the same penalties trafficking in 5,000 grams of powder cocaine.[45] The 2010 Fair Sentencing Act replaced it with the present 500-28 ratio, so that trafficking in 280 grams of crack cocaine carries the same penalties as 5,000 grams of powder cocaine.[46] It also abolished the mandatory minimum for simple crack cocaine possession that the 1988 Anti-Drug Abuse Act had established.[47] The Sentencing Commission subsequently revised the Sentencing Guidelines to reflect the change and made the modification retroactively applicable at the discretion of the sentencing court.[48]

H.R. 2372 (Representative Scott (VA)) would have eliminated the sentencing distinction between powder and crack cocaine by eliminating the cocaine base specific references.[49] Trafficking in cocaine would have carried the same penalties regardless whether the substance was powder or crack cocaine.[50]

Fair Sentencing Retroactivity

The Fair Sentencing Act reductions apply to offenses committed thereafter. They also apply to offenses committed beforehand when sentencing occurs after the time of enactment.[51] Federal courts have discretion to reduce a sentence imposed under a Sentencing Guideline that was subsequently substantially reduced.[52] The Fair Sentencing Act, however, does not apply to sentences imposed prior to its enactment,[53] and it does not apply in sentence reduction hearings

[39] As proscribed under 18 U.S.C. 922, 924.

[40] As defined under §111 of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16911).

[41] As defined in 18 U.S.C. 2332b(g)(5).

[42] As identified in 18 U.S.C. 1961(1).

[43] As proscribed under 18 U.S.C 371 and 21 U.S.C. 854.

[44] P.L. 91-513, §§401, 1010; 84 Stat. 1260, 1290 (1970); 21 U.S.C. 841, 960 (1970 ed.).

[45] P.L. 99-570, §§1002, 1004; 100 Stat. 3207-2, 3207-6; 21 U.S.C. 841, 960 (1988 ed.)

[46] P.L. 111-220, §2, 124 Stat. 2372, 21 U.S.C. 841, 960.

[47] P.L. 111-220, §3, 124 Stat. 2372, 21 U.S.C. 844.

[48] 18 U.S.C. 3582(c); U.S.S.G. 1B1.10; U.S.S.G. App. C, Amends. 750, 759.

[49] H.R. 2372, §2, proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2).

[50] *Id*.

[51] *Dorsey v. United States*, 132 S.Ct. 2321, 2326 (2012).

[52] 18 U.S.C. 3582(c)(2).

[53] *United States v. Rivera*, 726 F3.d 17, *28 (1st Cir. 2013)(internal citations omitted)("[I]n *United States v. Goncalves*, we joined ten of our fellow Circuit Courts of Appeal in concluding that the FSA is not retroactive for the benefit of a defendant like Carrasquillo-Ocasio, whose criminal conduct and sentencing occurred before the FSA became law"); see also *United States v. Hodge*, 721 F.3d 1279, 1281 (10th Cir. 2013).

triggered by new Sentencing Guidelines.[54] In such proceedings, the courts remain bound by the mandatory minimums in effect prior to enactment of the Fair Sentencing Act.[55]

Three proposals would have addressed the Fair Sentencing Act's retroactive application. One, H.R. 2369 (Representative Scott (VA)), would have begun with an expression of concern that some district courts may not be applying the act to pending cases.[56] It would have then made it clear that the act's amendments applied to cases in which sentencing had yet to occur and to cases in which an appellate court remanded for sentencing consistent with the act.[57] It would also have allowed a court to reduce, consistent with the act, a previously imposed sentence for crack cocaine possession or trafficking.[58]

The others, S. 1410 (Judiciary) and S. 1410 (Senator Durbin)/H.R. 3382 (Representative Labrador), would also have permitted a court to reduce such sentences, but would have limited the authority to instances in which the defendant had not been previously granted or denied a similar reduction.[59]

Marijuana

The Controlled Substances Act prohibits cultivation, distribution, possession with intent to distribute, and simple possession of marijuana.[60] Those prohibitions carry with them mandatory minimum sentences when substantial amounts of marijuana are involved. Thus, cultivation, distribution, or possession with intent to distribute "1000 kilograms (2,204.6 lbs.) or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight" is punishable by "a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, ... If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment. ... If any person commits a violation of this subparagraph ... after two or more prior convictions for a felony drug offense have become final, such person shall be

[54] *United States v. Swangin*, 726 F.3d 205, 208 (D.C.Cir. 2013)("Finally, we note that every circuit that has addressed the question post-*Dorsey* has likewise concluded that courts cannot retroactively apply the Fair Sentencing Act's new mandatory minimums in §3582(c)(2) proceedings to defendants who were sentenced before the Act's effective date"); *United States v. Hodge*, 721 F.3d at 1281 ("As an initial matter, the FSA does not provide an independent basis for a sentence reduction; only the statutory exceptions in 18 U.S.C.§3582 provide such grounds. In a §3582 proceeding, the court applies the statutory penalties in effect at the time of the original sentencing").

[55] *United States v. Reeves*, 717 F.3d 647, 650 (8th Cir. 2013)("[E]ight of the nine federal circuits to address the issue have held that the statutory provisions applicable when the defendant was originally sentenced—not the statutory provisions in the Fair Sentencing Act—apply in section 3582(c)(2) proceedings"). The single contrary opinion was later vacated for en banc rehearing, *United States v. Blewett*, 719 F.3d 482 (6th Cir. 2013). The divided *Blewett* panel held that defendants sentenced prior to the Fair Sentence Act's enactment were entitled to its reductions are a matter of equal protection, *United States v. Blewett*, 719 F.3d at 494.

[56] H.R. 2369, §2.

[57] H.R. 2369, §3.

[58] H.R. 2369, §4.

[59] S. 1410 (Judiciary), §3; S. 1410 (Durbin)/H.R. 3382 (Labrador), §3.

[60] 21 U.S.C. 841(a), 844.

sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence."[61]

If the offense instead involves a less amount, that is, less than 1000 kilograms, but "100 kilograms (220.46 lbs.) or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight," the offense is punishable by "a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life ... If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment.... "[62]

H.R. 499 (Representative Polis), the Ending Federal Marijuana Prohibition Act of 2013, would have eliminated the federal prohibitions on marijuana generally and would have specifically repealed the mandatory minimum sentences that attend offenses involving substantial amounts of marijuana.[63]

The impact of other marijuana-related proposals would have turned on the laws of a given state. Thus, H.R. 1523 (Representative Rohrabacher), the Respect State Marijuana Laws Act of 2013, would have reached the federal marijuana mandatory minimums thresholds, only if state law (recreational or medicinal) permitted cultivation, distribution, or possession with intent to distribute marijuana in the amounts (more than 220.46 lbs./2,204.6 lbs.) necessary to trigger the mandatory minimum penalties.[64] If for no other reason than market size, proposals such as the States' Medical Marijuana Patient Protection Act, H.R. 689 (Representative Blumenauer)—which would have shielded medical marijuana production, distribution, and use—may seem less likely to have legalized the amounts of marijuana necessary to have washed away the federal mandatory minimums.[65]

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[61] 21 U.S.C. 841(b)(1)(A).

[62] 21 U.S.C. 841(b)(1)(B).

[63] H.R. 499, §102(b)(1)(A), (b)(1)(B), proposed 21 U.S.C. 841(b).

[64] H.R. 1523, §2, proposed 21 U.S.C. 910 ("Notwithstanding any other provision of law, the provisions of this subchapter related to marijuana shall not apply to any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marijuana").

[65] H.R. 689, §2(b)(1)(B), (b)(2)("No provision of the Controlled Substances Act shall prohibit or otherwise restrict in a State in which the medical use of marijuana is legal under State law ... (B) an individual from obtaining, manufacturing, possessing, or transporting within their State marijuana for medical purposes, provided the activities.... No provision of the Controlled Substances Act shall prohibit or otherwise restrict an entity authorized by a State or local government, in a State in which the possession and use of marijuana for medical purposes is legal from producing, possessing, or distributing marijuana for such purposes"). Whether a grower or distributor in a medical marijuana state would have been likely to cross the mandatory minimum thresholds (220.46 lbs./2,204.6 lbs.) might have depended upon whether state law anticipates distribution through the use of dispensaries or cooperative ventures or more strictly limits growth and distribution to patients and their caregivers, compare MICH. COMP. LAWS §§333.26421 and *People v. Johnson*, 302 Mich. App. 450, 463, 838 N.W.2d 889, 896 (2013)("[T]he MMMA [Michigan Medical Marihuana Act] does not authorize marijuana dispensaries"),with CAL. HEALTH & SAFETY CODE §§11362.7 et seq. and *People v. London*, 228 Cal. App. 4th 544, 564, 175 Cal. Rptr. 3d 392, 410 (2014)("[T]he MMPA [Medical Marijuana Program Act] allows qualified patients, valid identification cardholders, and their respective primary caregivers, if any, to form nonprofit groups, and through those groups, pay each other and receive compensation and reimbursement from each other in amounts necessary to cover the overhead costs and operating expenses of cultivating and providing medical marijuana to the qualified patient and valid cardholder members of the group.... MMPA does not limit [the] number of qualified patient members a medical marijuana cooperative or collective may have"); see generally CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey and Charles Doyle.

Firearms

Human Trafficking, Stolen Firearms, Crimes of Violence, and Drug Trafficking

Section 924(c), in its current form, imposes one of several different minimum sentences when a firearm is used or possessed in furtherance of another federal crime of violence or of drug trafficking.[66] The mandatory minimums, imposed in addition to the sentence imposed for the underlying crime of violence or drug trafficking, vary, depending upon the circumstances:

- imprisonment for not less than five years, unless one of higher mandatory minimums below applies;
- imprisonment for not less than seven years, if a firearm is brandished;
- imprisonment for not less than 10 years, if a firearm is discharged;
- imprisonment for not less than 10 years, if a firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon;
- imprisonment for not less than 15 years, if the offense involves the armor piercing ammunition;
- imprisonment for not less than 25 years, if the offender has a prior conviction for violation of Section 924(c);
- imprisonment for not less than 30 years, if the firearm is a machine gun or destructive device or is equipped with a silencer; and
- imprisonment for life, if the offender has a prior conviction for violation of Section 924(c) and if the firearm is a machine gun or destructive device or is equipped with a silencer.[67]

Some of the proposals in the 113th Congress would have enlarged the coverage of 924(c); others would have curtailed it. The most common proposal would have added alien smuggling to violent crimes and drug trafficking as predicate offenses under the section: H.R. 4961 (Representative McCaul); S. 2561 (Senator McCain); S. 2619 (Senator McCain); S. 2743 (Senator Cornyn); S. 2773 (Senator Cornyn).[68]

H.R. 2405 (Representative Scott (VA)) would have stripped Section 924(c) of its mandatory minimum penalties. Each of its not-less-than penalties would have become not-more-than penalties.[69] So, for example, possession of a shotgun in furtherance of a crime of violence or of drug trafficking would have been punishable by imprisonment for not more than 10 years. Possession of a machine gun in furtherance of such an offense would have been punishable by imprisonment for not more than 25 years, and so forth.

[66] 18 U.S.C. 924(c).

[67] 18 U.S.C. 924(c)(1), (5).

[68] H.R. 4961, §4(d), proposed 18 U.S.C. 924(c)("prohibiting carrying or use of a firearm during and in relation to an alien smuggling crime[, i.e., felonies punishable under 8 U.S.C. 1324(a), 1327, 1328]"); S. 2561, §4(d), proposed 18 U.S.C. 924(c); S. 2619, §5(a)(2), proposed 18 U.S.C. 924(c); S. 2743, §1204(a)(2), proposed 18 U.S.C. 924(c); S. 2773, §1204(a)(2), proposed 18 U.S.C. 924(c).

[69] H.R. 2405, §2(1), (2), proposed 18 U.S.C. 924(c)(1)(A), (B), (C), (5)(A).

The Scott bill would also have appended in large measure the procedure used in Controlled Substance Act cases to establish the existence of a qualifying prior conviction, 21 U.S.C. 851.[70] It would, however, have dropped the provision in Section 851 that affords the defendant the right to have the question presented to the grand jury in the case of serious enhancements.[71] It would also have abandoned the provision that bars questioning the validity of remote convictions.[72]

H.R. 722 (Representative King (NY)) would have added two years to each of these base mandatory minimums of Section 924(c)(1)(A), if the firearm were stolen or had had its serial number defaced. Thus, use of a stolen firearm or one with a defaced serial number during or in relation to a federal crime of violence or drug trafficking would have been punishable by imprisonment for not less than seven years.[73] If a stolen or defaced firearm were brandished under such circumstances, the mandatory minimum would have been nine years.[74] If a stolen or defaced firearm were discharged, the mandatory minimum would have been 12 years.[75]

Straw Purchasers

Federal law now punishes false statements in conjunction with a firearm's purchase under two sections. Section 924(a)(1) imposes a term of imprisonment of not more than five years for false statements relating to information required for licensing or record-keeping purposes.[76] Section 922(a)(6) outlaws false statements in the acquisition of a firearm.[77] Section 924(a)(2) makes the offense punishable by imprisonment for not more than 10 years.[78]

H.R. 404 (Representative Schiff) would have established a two-year mandatory minimum term of imprisonment for violation of either false statement proscription if the offense involved two or more firearms and an intent to subsequently transfer them to an ineligible person.[79]

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[70] H.R. 2405, §2(3), proposed 18 U.S.C. 924(c)(6).

[71] *Id*. ("The provisions of ... 21 U.S.C. 851, other than subsections (a)(2) and (e) ... shall apply to sentencing for convictions under this subsection.... "). 21 U.S.C. 851(a)(2) provides the following: "An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed."

[72] *Id*. ("The provisions of ... 21 U.S.C. 851, other than subsections (a)(2) and (e) ... shall apply to sentencing for convictions under this subsection.... "). 21 U.S.C. 851(e) provides the following: "No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction."

[73] H.R. 722, §8, proposed 18 U.S.C. 924(c)(1)(A)(i).

[74] H.R. 722, §8, proposed 18 U.S.C. 924(c)(1)(A)(ii).

[75] H.R. 722, §8, proposed 18 U.S.C. 924(c)(1)(A)(iii).

[76] 18 U.S.C. 924(a)(1)(A)("[W]hoever - (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter; ... shall be ... imprisoned not more than five years").

[77] 18 U.S.C. 922(a)(6)("It shall be unlawful ... (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter").

[78] 18 U.S.C. 924(a)(2).

[79] H.R. 404, §2, proposed 18 U.S.C. 924(q)(1).

Handguns

H.R. 117 (Representative Holt) would have required the Attorney General to establish a system of handgun registration and licensing.[80] The system would have been inapplicable in states that already had a comparable system as long as the state outlawed possession of unlicensed or unregistered handguns or the failure to complete required firearms safety training.[81] Elsewhere, possession without a federal license or of an unregistered handgun would have been punishable by imprisonment for not less than 15 years.[82]

International Weapons Trafficking

Several federal laws outlaw international weapons trafficking, among them the International Emergency Economic Powers Act; Trading With the Enemy Act; Arms Export Control Act; and the federal smuggling statute. S. 1410 (Judiciary) would have established mandatory minimum penalties for violation of provisions under certain circumstances.

The International Emergency Economic Powers Act (IEEPA) authorizes the President to impose economic boycotts on foreign nations, entities, and individuals who pose an unusual and extraordinary threat to the national security, foreign policy, or the economy of the United States.[83] Presidents have exercised the authority to proscribe transactions with nations that have sponsored terrorism, with terrorist organizations, and in the interest of stemming the proliferation of weapons of mass destruction.[84] Willful violations, attempted violations, or conspiracies to violate any license, order, regulation, or proscription under IEEPA are punishable by imprisonment for not more than 20 years and a fine of not more than $1 million.[85]

S. 1410 (Judiciary) would have amended IEEPA to establish a five-year mandatory minimum term of imprisonment for such offense when the crime involved either exporting goods or services for the foreign development of weapons of mass destruction or providing defense articles or services to foreign terrorist organizations, states sponsoring terrorism, or to individuals or entities subject to economic sanctions on the basis of concerns over international terrorism or the proliferation of the weapons of mass destruction.[86]

Trading With the Enemy Act (TWEA) prohibits commerce with the enemies of the United States or those affiliated with them, without executive branch approval.[87] As in the case of IEEPA,

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[80] H.R. 117, §2, proposed 18 U.S.C. 932(a)(1).

[81] H.R. 117, §2, proposed 18 U.S.C. 932(b).

[82] H.R. 117, §2, proposed 18 U.S.C. 924(a)(7). In what may have been a scrivener's error, the bill attaches the penalty not to a violation of its provisions (proposed 18 U.S.C. 932), but to a violation of 18 U.S.C. 931(relating to possession of body armor by convicted violent felons). That construction is complicated by the fact that although the drafters of H.R. 117 believed that no 18 U.S.C. 924(a)(7) now exists ("Section 924(a) of such title is amended by adding at the end the following: (7) ..."), the section not only exists but applies to violations of 18 U.S.C. 931.

[83] 50 U.S.C. 1701 to 1707.

[84] 50 U.S.C. 1701 note; 31 C.F.R. pt. 594 to pt. 597.

[85] 50 U.S.C. 1705.

[86] S. 1410, Grassley Amendment 14048, proposed 50 U.S.C. 1705(d). In markup, the committee adopted four amendments to S. 1410 before voting to report it favorably: ALB14075, a Manager's Amendment in the nature of substitute, and three amendments offered by Senator Grassley, ALB14048, ALB14061, and ALB14062, available on the committee's website, for example, at http://www.judiciary.senteate.gov/legislation/upload/AB14048-Grassley.pdf.

[87] 50 U.S.C. App. 1 to 44.

anyone who willfully violates TWEA or any license, regulation, or order issued under it is punishable by imprisonment for not more than 20 years and a fine of not more than $1 million.[88]

S. 1410 (Judiciary) would have created a five-year mandatory minimum term of imprisonment for anyone convicted of willfully violating TWEA or attempting or conspiring to do so.[89] The mandatory minimum would have been limited to cases involving trade in defense articles or services with nations that sponsor terrorism, foreign terrorist organizations, or individuals or entities subject to economic sanctions on the basis of concerns over international terrorism or the proliferation of the weapons of mass destruction.[90] The minimums would also have applied to exporting goods and services for the foreign development of weapons of mass destruction.[91]

The Arms Export Control Act regulates weapons exports.[92] Regulatory violations are punishable by imprisonment for not more than 20 years and a fine of not more than $1 million.[93] Moreover, as a general matter, smuggling goods out of the United States is punishable by imprisonment for not more than 10 years and a fine of not more than $250,000 (not more than $500,000 for organizations).[94]

S. 1410 (Judiciary) would have set a five-year mandatory minimum term of imprisonment for violations of either the general smuggling statute or the Arms Export Control Act under much the same circumstances as would have pertained in the case of IEEPA and TWEA violations: shipments to terrorist organizations; to state sponsors of terrorism; to individuals and entities associated with terrorism; or to those assisting in the foreign development of weapons of mass destruction.[95]

Sex Offenses and Domestic Violence

S. 1410 (Judiciary) would have added new mandatory minimum terms of imprisonment for various federal sex offenses and for interstate domestic violence.

Sex Offenses

When committed within the special maritime or territorial jurisdiction of the United States or within federal prisons, federal law proscribes sexual abuse and aggravated sexual abuse. Offenders are punishable by imprisonment for any term of years or for life.[96] Engaging in sexual activity with a ward or with a child between 12 and 16 years of age within the special maritime and territorial jurisdiction of the United States or in a federal prison is a federal crime as well, and is punishable by imprisonment for not more than 15 years.[97]

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[88] 50 U.S.C. App. 16.

[89] S. 1410 (Judiciary), Grassley Amendment 14048, proposed 50 U.S.C. App. 5(c).

[90] *Id*.

[91] *Id*.

[92] 22 U.S.C. 2751 to 2799a-2.

[93] 22 U.S.C. 2778(c).

[94] 18 U.S.C. 554(a).

[95] S. 1410 (Judiciary), Grassley Amendment 14048, proposed 22 U.S.C. 2778(c)(2); and S. 1410 (Judiciary), Grassley Amendment 14048, proposed 18 U.S.C. 554(a)(2).

[96] 18 U.S.C. 2241, 2242.

[97] 18 U.S.C. 2243.

S. 1410 (Judiciary) would have amended each of these provisions by adding a five-year mandatory minimum sentence of imprisonment for violation of any of the three, but leaving the maximum permissible sentences in place.[98] It would have left in place the 30-year mandatory minimum term of imprisonment that applies to sexual abuse of a child under 12 years of age.[99]

Federal law also punishes by death, or imprisonment for any term of years or for life, murder committed in the course of one of these offenses or during the course of a violation of 18 U.S.C. 1591 (sex trafficking of children or by force), 2251 (sexual exploitation of children), 2251A (buying or selling children for sexual purposes), or 2260 (overseas production of child pornography to be imported into the United States).[100] S. 1410 (Judiciary) would have added a five-year mandatory minimum term of imprisonment in the case of such murders.[101]

Interstate Domestic Violence

Interstate travel for the purposes of visiting violence upon a spouse, intimate partner, or dating partner is punishable according to the extent of the injuries inflicted.[102] Where death results, the penalty is imprisonment for life or any term of years.[103] Where maiming results, the penalty is imprisonment for not more than 20 years.[104] Where serious bodily injury results, the penalty is imprisonment for not more than 10 years.[105]

S. 1410 (Judiciary) would have established a 10-year mandatory minimum term of imprisonment in cases where death results.[106] Rather than create a mandatory minimum in maiming and serious bodily injury cases, the bill would have increased the maximum penalties for those offenses to 25 years and 15 years, respectively.[107]

Aggravated Computer Abuse

Federal law prohibits various forms of computer abuse in 18 U.S.C. 1030, ranging from espionage to hacking to computer fraud to damaging computer systems.[108]

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[98] S. 1410 (Judiciary), Grassley Amendment 14061, proposed 18 U.S.C. 2241(a), (b); proposed 18 U.S.C. 2242; and proposed 18 U.S.C. 2243(a), (b).

[99] 18 U.S.C. 2241(c). Subsection 2241(c) also outlaws interstate travel with the intent to sexually abuse a child under 12 years of age.

[100] 18 U.S.C. 2245.

[101] S. 1410 (Judiciary), Grassley Amendment 14061, proposed 18 U.S.C. 2245(1). Section 2245 also punishes with death, or imprisonment of any term of years or for life, murders committed in the course of the Mann Act sex offenses involving interstate or foreign travel that appear in 18 U.S.C. 2421, 2422, 2423, and 2425. S. 1410 (Judiciary) would have created no new mandatory minimum punishments in the cases of murders committed during the course of these offenses.

[102] 18 U.S.C. 2261(a), (b).

[103] 18 U.S.C. 2261(b)(1).

[104] 18 U.S.C. 2261(b)(2).

[105] 18 U.S.C. 2261(b)(3).

[106] S. 1410 (Judiciary), Grassley Amendment 14062, proposed 18 U.S.C. 2261(b)(1)(A).

[107] S. 1410 (Judiciary), Grassley Amendment 14062, proposed 18 U.S.C. 2261(b)(2)(A), (b)(3)(A). Section 2261 also sets the penalties for violations of the interstate stalking prohibitions of 18 U.S.C. 2261A, 18 U.S.C. 2261(B). S. 1410 would have left those penalties unchanged.

[108] More precisely, the seven crimes defined in 18 U.S.C. 1030 are (1) computer trespassing (e.g., hacking) in a government computer; (2) computer trespassing (e.g., hacking) resulting in exposure to certain governmental, credit, financial, or computer-housed information; (3) damaging a government computer, a bank computer, or a computer used

H.R. 1468 (Representative Blackburn) would have created a separate crime for anyone who, during and in relation to a violation of Section 1030 substantially impaired or attempted to impair the operation of a critical infrastructure computer system or an associated critical infrastructure.[109] The bill defined the term "critical infrastructure computer" to mean

> a computer that manages or controls systems or assets vital to national defense, national security, national economic security, public health or safety, or any combination of those matters, whether publicly or privately owned or operated, including - (A) oil and gas production, storage, conversion, and delivery systems; (B) water supply systems; (C) telecommunication networks; (D) electrical power generation and delivery systems; (E) finance and banking systems; (F) emergency services; (G) transportation systems and services; and (H) government operations that provide essential services to the public.[110]

The offense would have been punishable by imprisonment for not less than three years or more than 20 years.[111]

Some of the federal statutes calling for imposition of a minimum term of imprisonment suggest the possibility of a fine as an alternative to imprisonment. For example, the penalty for trafficking in 1,000 grams or more of heroin is "a term of imprisonment which may not be less than 10 years or more than life ... a fine not to exceed ... $10,000,000 ... or both."[112] The bill would have suggested the possibility of a fine as an alternative to imprisonment as well.[113] Experience with other mandatory minimums, coupled with implementing Sentencing Guidelines, suggests that this alternative may have been more hypothetical than real.[114]

Immigration Offenses

Human Smuggling

Several bills in the 113th Congress would have established mandatory minimum sentences of imprisonment for smuggling individuals into the country under certain circumstances.[115] Thus, H.R. 4961 (Representative McCaul), S. 2561 (Senator McCain), and S. 2619 (Senator McCain)

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in, or affecting, interstate or foreign commerce (e.g., a worm, computer virus, Trojan horse, time bomb, a denial of service attack, and other forms of cyberattack, cybercrime, or cyberterrorism); (4) committing fraud an integral part of which involves unauthorized access to a government computer, a bank computer, or a computer used in, or affecting, interstate or foreign commerce; (5) threatening to damage a government computer, a bank computer, or a computer used in, or affecting, interstate or foreign commerce; (6) trafficking in passwords for a government computer, or when the trafficking affects interstate or foreign commerce; and (7) accessing a computer to commit espionage.

[109] H.R. 1468, §305(a), proposed 18 U.S.C. 1030A(b).

[110] H.R. 1468, §305(a), proposed 18 U.S.C. 1030A(a)(2).

[111] H.R. 1468, §305(a), proposed 18 U.S.C. 1030A(c).

[112] 21 U.S.C. 841(b)(1)(A); see also 21 U.S.C. 960(b)(2).

[113] H.R. 1468, §305(a), proposed 18 U.S.C. 1030A(c)("Any person who violates subsection (b) shall be—(1) fined under this title; (2) imprisoned for not less than 3 years but not more than 29 years; or (3) penalized under paragraphs (1) and (2) ").

[114] U.S.S.G. §5G1.1(b)("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence").

[115] As noted earlier a number of the bills would have established alien smuggling as a predicate offense under 18 U.S.C. 924(c), which calls for an escalating series of mandatory minimums when various firearms are possessed, brandished, or discharged in furtherance of a predicate offense.

would have punished such smuggling with imprisonment for not less than 5 years nor more than 10 years, if the offense involved restraint or confinement of the smuggled individual.[116]

S. 2619 would have also punished such smuggling with imprisonment for not less than 5 years nor more than 30 years, if the offense involved an involuntary sexual act;[117] and with imprisonment for not less than 5 years or more than for life, if the offense involved a death.[118]

S. 2743 (Senator Cornyn) and S. 2773 (Senator Cornyn) would have outlawed fraud in connection with the transfer of custody of an unaccompanied alien child. The offense would have been punishable by imprisonment for not less than 15 years, if it involved sexual exploitation of the child; and imprisonment for not less than a year, otherwise.[119]

Illegal Reentry

Foreign nationals who reenter or attempt to reenter the United States after having been deported, excluded, or otherwise removed are punishable by imprisonment for not more than two years.[120] If the alien was removed following conviction for an aggravated felony, the penalty is increased to imprisonment for not more than 20 years.[121] If removed following conviction for a misdemeanor involving drugs or crimes against the person or for a lesser felony, the penalty is imprisonment for not more than 10 years.[122] The same 10-year maximum term of imprisonment attends reentry or attempted reentry following removal prior to completion of service of imprisonment for a non-violent felony.[123]

Those who aid and abet the commission of a federal crime are subject to the same penalties as those who actually commit the underlying offenses.[124] Those who conspire to violate federal law are liable not only for conspiracy but for any crimes committed by one of their conspirators in furtherance of the plot.[125]

H.R. 457 (Representative Issa) would have established mandatory minimum penalties for each of these reentry offenses.[126] The minimums would have been pegged at half the maximum. Thus, simple reentry would have carried a one-year mandatory minimum term.[127] Reentry following an aggravated felony conviction would have been punishable with a mandatory minimum of 10

[116] H.R. 4961, §2(d)(8); S. 2561, §2(e)(8); S. 2619, §5(b), proposed 18 U.S.C. 1598(d)(8).

[117] S. 2619, §5(b), proposed 18 U.S.C. 1598(d)(6).

[118] S. 2619, §5(b), proposed 18 U.S.C. 1598(d)(7).

[119] S. 2743, §1007(a), proposed 18 U.S.C. 1041(d); S. 2773, §1007(a), proposed 18 U.S.C. 1041(d).

[120] 8 U.S.C. 1326(a).

[121] 8 U.S.C. 1326(b)(2).

[122] 8 U.S.C. 1326(b)(1).

[123] 8 U.S.C. 1326(b)(4).

[124] 18 U.S.C. 2.

[125] 18 U.S.C. 371; *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946); *United States v. Grasso*, 724 F.3d 1077, 1089 (9th Cir. 2013); *United States v. Walker*, 721 F.3d 828, 836 (7th Cir. 2013); *United States v. Clark*, 717 F.3d 790, 808-809 (10th Cir. 2013).

[126] H.R. 457, §2(b), proposed 8 U.S.C. 1326.

[127] H.R. 457, §2(b)(1), proposed 8 U.S.C. 1326(a).

years.[128] Finally, the mandatory minimums for the reentry offenses with 10-year maximums would have been set at five years.[129]

The Issa bill would also have made accessory and conspirator liability more specific. Anyone who aided or abetted an alien's unlawful reentry or conspired to accomplish it would have been subject to the same penalties including mandatory minimums as the reentering alien.[130]

Violence Against Public Servants

Federal law protects federal judges and employees against murder, manslaughter, attempted murder or manslaughter, and assault. With the exception of first degree murder, which is punishable by death or imprisonment for life, none of the prohibitions carry a mandatory minimum term of imprisonment. Flight to avoid prosecution is also a federal crime, but it does not come with a mandatory minimum term of imprisonment either.

H.R. 1577 (Representative Poe) and S. 698 (Senator Cornyn) would have expanded the class of protected public servants; increased the penalties associated with homicides committed against them; established mandatory minimum terms of imprisonment for killing or assaulting them; and created a new flight-to-avoid-prosecution offense for fugitives accused of such crimes, punishable by a mandatory minimum term of imprisonment.[131]

Homicide

Federal law outlaws killing any federal officer or employee, including federal judges, during or on account of the performance of their duties.[132] It also protects anyone assisting them.[133] The penalties imposed depend on the nature of the homicide:

- first degree murder: death or life imprisonment;[134]
- second degree murder: imprisonment for any term years or for life;[135]
- voluntary manslaughter: imprisonment for not more than 15 years;[136]
- involuntary manslaughter: imprisonment for not more than eight years;[137]
- attempted murder: imprisonment for not more than 20 years;[138]

[128] H.R. 457, §2(b)(2)(B), proposed 8 U.S.C. 1326(b)(2).

[129] H.R. 457, §2(b)(2)(A), (C), proposed 8 U.S.C. 1326(b)(1), (b)(4).

[130] H.R. 457, §2(C), proposed 8 U.S.C. 1327(b).

[131] The bills as introduced were identical and consequently will be referred to hereinafter as H.R. 1577/S. 698.

[132] 18 U.S.C. 1114 ("Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished ...").

[133] *Id.*

[134] 18 U.S.C. 1114, 1111.

[135] *Id.*

[136] 18 U.S.C. 1114, 1112.

[137] *Id.*

[138] 18 U.S.C. 1114, 1113.

- attempted manslaughter: imprisonment for not more than seven years;[139] and
- conspiracy to murder: imprisonment for any term of years or for life.[140]

Federal law outlaws the murder of state or local officers or employees assisting in a federal investigation.[141] Offenders are punishable by death or life imprisonment.[142] It also outlaws the murder of a state correctional officer by a federal prisoner or while the officer is transporting a prisoner in interstate commerce.[143] Offenders are punishable by imprisonment for not less than 20 years or for life or by death.[144] Murder of a federal, state, or local law enforcement officer in furtherance of a violation of the Controlled Substances Act or the Controlled Substances Import and Export Act is punishable as well by imprisonment for not less than 20 years or for life or by death.[145]

H.R. 1577/S. 698 would have established 30-year mandatory minimum terms of imprisonment for killing, attempting to kill, or conspiring to kill three classes of public servants: (1) federal judges and federal law enforcement officers, regardless of whether the crime occurred during or on account of the performance of their duties;[146] (2) federally funded public servants (state, local, territorial, and tribal law enforcement officers, firefighters, chaplains, rescue squad and ambulance crew members) during or on account of the performance of their official duties;[147] and (3) former federal judges, former law enforcement officers, and former federally funded public servants, killed on account of performance of their official duties.[148]

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[139] *Id.*

[140] 18 U.S.C. 1117.

[141] 18 U.S.C. 1121(a)("Whoever intentionally kills- (1) a State or local official, law enforcement officer, or other officer or employee while working with Federal law enforcement officials in furtherance of a Federal criminal investigation- (A) while the victim is engaged in the performance of official duties; (B) because of the performance of the victim's official duties; or (C) because of the victim's status as a public servant; or (2) any person assisting a Federal criminal investigation, while that assistance is being rendered and because of it, shall be sentenced according to the terms of section 1111, including by sentence of death or by imprisonment for life").

[142] *Id.* 18 U.S.C. 1111.

[143] 18 U.S.C. 1121(b)("Whoever, in a circumstance described in paragraph (3) of this subsection, while incarcerated, intentionally kills any State correctional officer engaged in, or on account of the performance of such officer's official duties, shall be sentenced to a term of imprisonment which shall not be less than 20 years, and may be sentenced to life imprisonment or death. (2) As used in this section, the term, 'State correctional officer' includes any officer or employee of any prison, jail, or other detention facility, operated by, or under contract to, either a State or local governmental agency, whose job responsibilities include providing for the custody of incarcerated individuals. (3) The circumstance referred to in paragraph (1) is that- (A) the correctional officer is engaged in transporting the incarcerated person interstate; or (B) the incarcerated person is incarcerated pursuant to a conviction for an offense against the United States").

[144] *Id.*

[145] 21 U.S.C. 848(e)(1)(B)("[A]ny person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death. (2) As used in paragraph (1)(B), the term 'law enforcement officer' means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions").

[146] H.R. 1577/S. 698, §3(a), proposed 18 U.S.C.1123(a)(1), (b)(1)(A), (B).

[147] H.R. 1577/S. 698, §3(a), proposed 18 U.S.C.1123(a)(2), (7), (b)(1)(C).

[148] H.R. 1577/S. 698, §3(a), proposed 18 U.S.C.1123 (b)(2). The proposal does not include attempts to kill or conspiracies to kill members of this class of former judges, officers, or public servants.

In addition to the 30-year mandatory minimum, the offense would have carried the prospect of imprisonment for life and, if a killing occurred, of the death penalty.[149]

Flight to Avoid Prosecution

It is a federal crime punishable by imprisonment for not more than five years to travel in interstate or foreign commerce for the purpose of avoiding state or federal prosecution.[150]

H.R. 1577/S. 698 would have created an additional flight statute that would have proscribed flights to avoid prosecution for killing, attempting to kill, or conspiring to kill a federal judge, federal law enforcement officer, or federally funded public servant.[151] The offense would have been punishable by imprisonment for any term of years not less than 10 years.[152]

Assaulting a Federal Officer or Employee

Section 111 prohibits assaulting a federal officer or employee during or on account of his or her official duties.[153] Simple assault is punishable under the provision by imprisonment for not more than one year.[154] If the assault results in physical contact or is committed with the intent to commit another felony, the penalty increases to imprisonment for not more than eight years.[155] If the assault involves the use of a deadly or dangerous weapon or results in bodily injury, the penalty becomes imprisonment for not more than 20 years.[156]

If the assault resulted in substantial bodily injury (temporary but substantial disfigurement or loss of bodily or mental capacity) to a federal judge or federal law enforcement officer, H.R. 1577/S. 698 would have made the offense punishable by imprisonment for not less than five years or more than 30 years.[157] If the assault resulted in serious bodily injury (risk of death, extreme pain, etc.) or involved possession or use of a dangerous weapon, H.R. 1577/S. 698 would have made the offense punishable by imprisonment for any term of years not less than 10 years or for life.[158]

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[149] H.R. 1577/S. 698, §3(a), proposed 18 U.S.C.1123(c).

[150] 18 U.S.C. 1073.

[151] H.R. 1577/S. 698, §3(b), proposed 18 U.S.C.1075(a).

[152] H.R. 1577/S. 698, §3(b), proposed 18 U.S.C.1075(b).

[153] 18 U.S.C. 111.

[154] 18 U.S.C. 111(a).

[155] *Id.* H.R. 1577/S. 698, §3(e), proposed 18 U.S.C. 111(b)(2)(B)(ii) would have increased the maximum penalty to imprisonment for not more than 10 years.

[156] 18 U.S.C. 111(b). H.R. 1577/S. 698, §3(e), proposed 18 U.S.C. 111(b)(2)(B)(iv) would have increased the maximum penalty to imprisonment for not more than 30 years when the assault resulted in substantial bodily injury or involved the use or possession of a dangerous weapon.

[157] H.R. 1577/S. 698, §3(e), proposed 18 U.S.C.111(b)(1)(A). H.R. 1577/S. 698 would have adopted the definition of "substantial bodily injury" found in 18 U.S.C. 113(b)(1): "the term 'substantial bodily injury' means bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty."

[158] H.R. 1577/S. 698, §3(e), proposed 18 U.S.C.111(b)(1)(B). H.R. 1577/S. 698 would have adopted the definition of "serious bodily injury" found in 18 U.S.C. 1365(h)(3): "the term 'serious bodily injury' means bodily injury which involves - (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

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