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Mandatory Minimum Sentencing Legislation in the 114th Congress

Updated April 29, 2015

Congressional Research Service
https://crsreports.congress.gov
R44006

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

A surprising number of federal crimes carry mandatory minimum terms of imprisonment; that is, they are punishably by imprisonment for a term of not less than some number of years. During the 114th Congress, Members have introduced a number of related proposals. Some would expand the scope of existing mandatory minimum sentencing provisions; others would contract their reach.

The most sweeping proposal is that of Representative Scott (VA) (H.R. 706) and Senator Paul (S. 353), which impacts mandatory minimum sentencing across the board, allowing federal courts to disregard statutory mandatory minimum sentencing requirements in order to avoid conflicts with general sentencing standards.

Other proposals are more narrowly drawn, and speak to a particular class of crime. Representative Polis (H.R. 1013), for example, has suggested decriminalizing marijuana, thereby eliminating the mandatory minimum sentencing provisions now associated with marijuana.

Several bills, including those offered by Senators Cornyn (S. 178), Feinstein (S. 140), and Kirk (S. 572), as well as those offered by Representatives Poe (H.R. 181, H.R. 296), Granger (H.R. 1201), and Wagner (H.R. 285), would clarify or expand the coverage of a number of federal sex trafficking offenses, in one way or another, thereby increasing the number of defendants facing mandatory minimum sentences.

While proposals relating to sex trafficking would largely increase the number of mandatory minimum sentences imposed, most of the proposals relating to drug trafficking would have the opposite impact. Senator Lee's S. 502 and Representative Labrador's H.R. 920, for instance, would reduce the mandatory minimum sentences that accompany a number of drug trafficking offenses. The same bills would expand the so-called safety valve which allows a court to sentence certain low-level drug offenders below the otherwise applicable mandatory minimum sentence. Finally, Representative Scott's H.R. 1255 would eliminate the distinction between powder and crack cocaine, and as a consequence potentially reduce the number of defendants subject to the more severe drug trafficking mandatory minimums.

Firearms legislation is more varied. Existing law imposes a series of mandatory minimum sentences when a firearm is associated with the commission of a crime of violence or drug trafficking (18 U.S.C. 924(c)). Representative Scott's H.R. 1254 would convert all of Section 924(c)'s mandatory minimums (not-less-than) to statutory maximums (not-more-than). Senator McCain's S. 847 and Representative McSally's H.R. 1588, on the other hand, would make Section 924(c)'s mandatory minimums available not only in cases involving crimes of violence or drug trafficking, but also those involving the smuggling of aliens.

Many of the proposals in the 114th Congress built upon earlier offerings in the 113th Congress, as described in CRS Report R43296, *Mandatory Minimum Sentencing Legislation in the 113th Congress*, by Charles Doyle.

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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 114th Congress reflect both perspectives.[4]

A General Exception

Federal courts are required to weigh the standards listed in 18 U.S.C. 3553(a) before sentencing a defendant. The standards 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.

S. 353 (Senator Paul) and H.R. 706 (Representative Scott (VA)) would permit federal courts to impose a sentence below an otherwise applicable mandatory minimum when necessary to avoid violating the sentencing standards found in Section 3553(a).[6] When exercising the authority, the court would have 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]

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[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, U.S. 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] Many of the proposals had antecedents in the 113th Congress, as discussed in CRS Report R43296, *Mandatory Minimum Sentencing Legislation in the 113th Congress*, by Charles Doyle, from which this report has borrowed heavily. Portions of the analysis here are also reflected in another CRS report by the same author, CRS Report R44007, *Sex Trafficking: Proposals in the 114th Congress to Amend Federal Criminal Law*.

[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. 706, §2, proposed 18 U.S.C. 3553(g)(1); S. 353, §2, proposed 18 U.S.C. 3553(g)(1). Senator Paul and Representative Scott introduced identical legislation in the 113th Congress, S. 619 (113th Cong.) and H.R. 1695 (113th Cong.

[7] H.R. 706, §2, proposed 18 U.S.C. 3553(g)(2), (3); S. 353, §2, proposed 18 U.S.C. 3553(g)(2), (3).

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, manufacturing, growing, 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]

As noted in **Table 1** below, S. 502 (Senator Lee) and H.R. 920 (Representative Labrador) would reduce the mandatory minimum sentences for drug traffickers engaged in manufacture, cultivation, or distribution.[11] They would not reduce the mandatory minimum sentences for traffickers engaged in importing or exporting, other than those who were simply acting as couriers (mules).[12] This is a departure from the proposals in the 113th Congress, which would have reduced the mandatory minimum sentences for traffickers generally, without regard to whether they manufacture or import/export.[13]

[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 may not be 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. 502, §4(a); H.R. 920, §4(a).

[12] S. 502, §4(b); H.R. 920, §4(b).

[13] S. 1410 (113th Cong.), §4; H.R. 3382 (113th Cong.), §4.

Table 1. Terms of Imprisonment: Controlled Substances

Offense	Present Law	S. 502/H.R. 920 (114th Cong.)	S. 1410/H.R. 3382 (113th Cong.)
I. (a)(i) Trafficking: §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	not less than 5 years or more than life
(ii) if death or serious injury results	not less than 20 years or more than life	no change	no change
(b)(i) one prior violation	not less than 20 years or more than life	not less than 10 years or more than life	not less than 10 years or more than life
(ii) and death or serious injury results	life	no change	no change
(c) two or more prior violations	life	not less than 25 years	no change
II. (a)(i) Trafficking: §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 less than 2 years or more than 40 years
(ii) if death or serious injury results	not less than 20 years or more than life	no change	no change
(b)(i) one prior violation	not less than 10 years or more than life	not less than 5 years or more than life	not less than 5 years or more than life
(ii) and death or serious injury results	life	no change	no change
III. (a)(i) Import/export: §960(b)(1) substances (e.g., 1 kilo + of heroin)	not less than 10 years or more than life	no change except for a courier; for a courier, not less than 5 years or more than life	not less than 5 years or more than life
(ii) second offense	not less than 20 years or more than life	no change, except for a courier; for a courier, not less than 10 years or more than life	not less than 10 years or more than life
(b)(i) Import/export; §960(b)(2) substances (e.g., 100g + of heroin)	not less than 5 years or more than 40 years	no change, except for couriers; for couriers, not less than 2 years or more than 40 years	not less than 2 years or more than 40 years
(ii) second offense	not less than10 years or more than life	no change, except for couriers; for couriers, not less than 5 years or more than life	not less than 5 years or more than life

Source: Congressional Research Service, based on S. 502/H.R. 920 (114th Cong.); S. 1410/H.R. 3382 (113th Cong.); and 21 U.S.C. 841, 960.

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.[14] To qualify, a defendant may not have used violence in the course of the offense.[15] He must not have played a managerial role in the offense if it involved group participation.[16] The offense must not have resulted in a death or serious bodily injury.[17] The defendant must make full disclosure of his involvement in the offense, providing the government with all the information and evidence at his disposal.[18] Finally, the defendant must have a virtually spotless criminal record, that is, not more than 1 criminal history point.[19]

Criminal history points and categories 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.[20] Criminal History Category I consists of zero or 1 point, Criminal History Category II of 2 or 3 points.[21]

The Sentencing Commission's report on mandatory minimum sentences suggested that Congress consider expanding safety valve eligibility to defendants with 2 or possibly 3 criminal history points.[22] 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."[23] 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.[24] In addition, the drug offenses have escalated mandatory minimums for repeat offenders.[25] Moreover, similarly situated drug offenders may be treated differently, because

[14] 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 ...").

[15] 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").

[16] 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").

[17] 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").

[18] 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").

[19] 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").

[20] U.S.S.G. §4A1.1.

[21] U.S.S.G. Sentencing Table.

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

[23] *Id*. at 352.

[24] *Id.*

[25] *Id.*

states punish simple drug possession differently and prosecutors decide when to press recidivism qualifications differently.[26]

The Lee and Labrador bills (S. 502/H.R. 920) would expand safety valve eligibility from defendants with no more than 1 criminal history point to those with no more than 3 points.[27] S. 1410, as voted out of the Senate Judiciary Committee during the last Congress, 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.[28] A defendant would have been ineligible for the expanded 2-point criminal history safety valve threshold if he had a prior conviction for a federal firearms offense,[29] sex offense,[30] crime of terrorism,[31] RICO predicate offense,[32] or conspiracy to use or invest drug profits.[33] The current proposals have no such limitation.

Cocaine Sentencing

Originally, the Controlled Substances Act made no distinction between powder cocaine and crack cocaine (cocaine base).[34] 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 as trafficking in 5,000 grams of powder cocaine.[35] 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.[36] It also abolished the mandatory minimum for simple crack cocaine possession that the 1988 Anti-Drug Abuse Act had established.[37] 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.[38]

H.R. 1255 (Representative Scott (VA)) would eliminate the sentencing distinction between powder and crack cocaine by eliminating the cocaine base specific references.[39] Trafficking in

[26] *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").

[27] S. 502//H.R. 920, §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.

[28] S. 1410 (113th Cong.), §2, proposed 18 U.S.C. 3553(f)(1)(B).

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

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

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

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

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

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

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

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

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

[38] 18 U.S.C. 3582(c); U.S.S.G. 1B1.10; U.S.S.G. App. C, Amends. 750, 759.

[39] H.R. 1255, §2, proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2). Representative Scott introduced a comparable bill in the last Congress, H.R. 2372 (113th Cong.).

cocaine would carry the same penalties regardless of whether the substance was powder or crack cocaine.[40]

Fair Sentencing Retroactivity

The Fair Sentencing Act reductions apply to cocaine offenses committed thereafter. They also apply to offenses committed beforehand when sentencing occurs after the time of enactment.[41] Federal courts have discretion to reduce a sentence imposed under a Sentencing Guideline that was subsequently substantially reduced.[42] The Fair Sentencing Act (FSA), however, does not apply to sentences imposed prior to its enactment,[43] and it does not apply in sentence reduction hearings triggered by new Sentencing Guidelines.[44] In such proceedings, the courts remain bound by the mandatory minimums in effect prior to enactment of the FSA.[45]

S. 502 (Senator Lee) and H.R. 920 (Representative Labrador) would allow a court to reduce a previously imposed sentence for crack cocaine possession or trafficking, consistent with the FSA, on its own or at the behest of the defendant, prosecutor, or Bureau of Prisons.[46] They would also permit 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.[47] The Judiciary Committee's version of S. 1410 (113th Cong.) contained identical provisions.[48]

Sentencing Guideline Reconciliation

S. 502 and H.R. 920 would direct the U.S. Sentencing Commission to review and propose amendments to the federal Sentencing Guidelines in order to reflect the changes the bills call for and the changes the FSA introduced.[49]

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[40] *Id*.

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

[42] 18 U.S.C. 3582(c)(2).

[43] *United States v. Santos-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).

[44] *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").

[45] *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 FSA's enactment were entitled to its reductions as a matter of equal protection, *United States v. Blewett*, 719 F.3d at 494.

[46] S. 502 (Sen. Lee), §3; H.R. 920 (Rep. Labrador), §3.

[47] S. 502, §3(c); H.R. 920, §3(c).

[48] S. 1410 (113th Cong.), §3.

[49] S. 502, §5(a); H.R. 920, §5(a). S. 1410, as reported out of the Judiciary Committee in the 113th Congress, had an identical provision, S. 1410 (113th Cong.), §5.

The Sentencing Reform Act created the Sentencing Commission and authorizes it to propose Sentencing Guidelines.[50] It also authorizes the commission to periodically review and propose amendments to the Guidelines.[51] Once considered binding, the Guidelines still substantially limit the sentences a federal court may impose.[52] A court must correctly calculate the Guidelines' recommended sentencing range, and it must justify any deviation.[53]

The bills would instruct the commission to conduct this reexamination with six factors in mind:

- the need to minimize the risk that the federal prison population would exceed the system's capacity;
- the findings and recommendations of the Commission's report on mandatory minimum sentences;
- the fiscal implications of any changes to the Guidelines;
- relevant public safety concerns;
- congressional intent to maintain appropriately severe penalties for violent, repeat, and serious drug traffickers; and
- the need to reduce and prevent racial sentencing disparities.[54]

Marijuana Sentencing

The Controlled Substances Act prohibits cultivation, distribution, possession with intent to distribute, and simple possession of marijuana.[55] Those prohibitions carry with them mandatory minimum sentences when substantial amounts of marijuana are involved. Thus, cultivation, distribution, or possession with intent to distribute "1,000 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 sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.[56]

[50] 28 U.S.C. 991, 994.

[51] 28 U.S.C. 994(p).

[52] 18 U.S.C. 3553(b)(1)(purporting to make the Guidelines binding), found unconstitutional but severable in *United States v. Booker*, 543 U.S. 220 (2005).

[53] *United States v. Gall*, 552 U.S. 38, 49-50(2007)("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.... If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance").

[54] S. 502, §5(b); H.R. 920, §5(b).

[55] 21 U.S.C. 841(a), 844.

[56] 21 U.S.C. 841(b)(1)(A).

If the offense instead involves a lesser amount, that is, less than 1,000 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.... [57]

H.R. 1013 (Representative Polis) would eliminate mandatory minimum sentences for trafficking in marijuana by removing marijuana from the coverage of the Controlled Substances Act.[58]

Attorney General Reports

S. 502 (Senator Lee) and H.R. 920 (Representative Labrador) would also direct the Attorney General to prepare two reports covering federal criminal statutes, generally both those that feature mandatory sentencing provisions and those that do not. The first would address the impact of the bill's provisions, including an indication of how the savings realized from the reduction in mandatory minimum sentences would be used to reduce prison overcrowding and to contribute to crime prevention.[59]

The second would provide an inventory of federal criminal statutory and regulatory offenses.[60] The report would be required to indicate the range of penalties that accompany each offense, the mens rea element for each offense, and the regularity with which each offense has been prosecuted.[61] For the regulatory offenses, inventory and related information would have to be broken down on an agency-by-agency basis.[62]

The same provisions appeared in S. 1410 as it was taken to the floor during the 113th Congress.[63]

Firearms

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 drug trafficking.[64] 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 the higher mandatory minimums below applies;

[57] 21 U.S.C. 841(b)(1)(B).

[58] H.R. 1255, §101.

[59] S. 502, §6; H.R. 920, §6.

[60] S. 502, §7; H.R. 920, §7.

[61] S. 502, §7(b), (c); H.R. 920, §7(b), (c).

[62] S. 502, §7(c); H.R. 920, §7(c).

[63] S. 1410 (113th Cong.), §6 (savings), §7 (inventory).

[64] 18 U.S.C. 924(c).

- 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 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;[65] 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.[66]

H.R. 1254 (Representative Scott (VA)) would convert all of Section 924(c)'s mandatory minimum penalties to maximum penalties. Each of its not-less-than penalties would become not-more-than penalties.[67] So, for example, possession of a shotgun in furtherance of a crime of violence or of drug trafficking would be punishable by imprisonment for not more than 10 years. Possession of a machine gun in furtherance of such an offense would be punishable by imprisonment for not more than 30 years.

The Scott bill would append 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.[68] It would, however, drop 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.[69] It would also abandon the provision that bars questioning the validity of remote convictions.[70] H.R. 1254 is a twin of a proposal offered by Representative Scott in the 113th Congress.[71]

S. 847 (Senator McCain) and H.R. 1588 (Representative McSally), in contrast, would enlarge the coverage of Section 924(c) by adding alien smuggling, 8 U.S.C. 1324(a), 1327, or 1328, to violent crimes and drug trafficking as predicate offenses which trigger Section 924(c)'s

[65] 18 U.S.C. 921(4)("The term 'destructive device' means- (A) any explosive, incendiary, or poison gas- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; ...").

[66] 18 U.S.C. 924(c)(1), (5).

[67] H.R. 1254, §2(1), (2), proposed 18 U.S.C. 924(c)(1)(A), (B), (C), (5)(A).

[68] H.R. 1254, §2(3), proposed 18 U.S.C. 924(c)(6).

[69] *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 "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."

[70] *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 "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."

[71] H.R. 2405 (113th Cong.).

mandatory minimum sentences.[72] Thus, for example, a defendant, in possession of a firearm in furtherance of alien smuggling, would be subject to imprisonment for not less than five years. The proposal has a number of antecedents in the 113th Congress.[73]

Sex Offenses

The Mann Act (travel or transportation for unlawful sexual purposes) and 18 U.S.C. 1591 (commercial sex trafficking) contain several provisions which outlaw sexual misconduct punishable by mandatory minimum sentences. A number of proposals would either clarify or expand the reach of those provisions.

Commercial Sex Trafficking

Liability of Patrons

Section 1591 outlaws commercial sex trafficking. More precisely, it outlaws

- knowingly
- recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining another individual
- knowing or with reckless disregard of the fact that
- the individual will be used to engage commercial sexual activity
- either as a child or by virtue of the use of fraud or coercion
- when the activity occurs in or affects interstate or foreign commerce, or occurs within the special maritime or territorial jurisdiction of the United States.[74]

It outlaws separately profiting from such a venture.[75]

Offenders face the prospect of life imprisonment with a mandatory minimum term of not less than 15 years (not less than 10 years if the victim is between the ages of 14 and 18).[76] The same penalties apply to anyone who attempts to violate the provisions of Section 1591.[77]

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[72] S. 847, §2(b), proposed 18 U.S.C. 924(c)(1), (2); H.R. 1588, §2(b), proposed 18 U.S.C. 924(c)(1), (2).

[73] H.R. 4961 (113th Cong.)(Rep. McCaul), §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 (113th Cong.)(Sen. McCain), §4(d), proposed 18 U.S.C. 924(c); S. 2619(113th Cong.)(Sen. McCain), §5(a)(2), proposed 18 U.S.C. 924(c); S. 2743, §1204(a)(2), proposed 18 U.S.C. 924(c); S. 2773 (113th Cong.)(Sen. Cornyn), §1204(a)(2), proposed 18 U.S.C. 924(c).

[74] 18 U.S.C. 1591(a): "Whoever knowingly - (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

"knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b)."

[75] 18 U.S.C. 1951(a)(2)(quoted above).

[76] 18 U.S.C. 1591(b).

[77] 18 U.S.C. 1594(a).

There have been suggestions to expand Section 1591 to cover advertisers and to more explicitly cover the customers of a commercial sex trafficking scheme. At first glance, Section 1591 does not appear to cover the customers of a sex trafficking enterprise. Moreover, in the absence of a specific provision, mere customers ordinarily are not considered either co-conspirators or accessories before the fact in a prostitution ring.[78] Nevertheless, the U.S. Court of Appeals found that the language of Section 1591(a) applied to the case of two customers caught in a law enforcement "sting" who attempted to purchase the services of what they believed were child prostitutes.[79] "The ordinary and natural meaning of 'obtains' and the other terms Congress selected in drafting §1591 are broad enough to encompass the actions of both suppliers and purchasers of commercial sex acts," the court declared.[80]

S. 178, H.R. 181, and a number of other bills would explicitly confirm this construction by amending Section 1591(a) to read in part "Whoever knowingly ... recruits, entices, harbors, transports, provides, obtains, maintains, or *patronizes, or solicits* by any means any person ..." (language of the proposed amendment in italics).[81]

Age: Prosecutors' Burden

The same bills often amend the "knowledge of age" element in Section 1591(c) to reflect its clarifying amendment with respect to the customers of a commercial sex trafficking venture. The law now absolves the government of the obligation to prove that the defendant knew the victim was a child, if it can show that the defendant had an opportunity to "observe" the victim.[82] The proposal would make it clear that the government would be equally absolved regardless of whether the defendant were a consumer or purveyor of a child's sexual commercial services, as long as it establishes that the defendant had an opportunity to observe the child: "In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, *patronized, or solicited* the Government need not prove that the defendant knew, *or recklessly disregarded the fact*, that the person had not attained the age of 18 years," 18 U.S.C. 1591(c) (language of the proposed amendment in italics).[83]

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[78] See, e.g., *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983)("[O]ne having intercourse with a prostitute is not liable for aiding and abetting prostitution"); see, generally, CRS Report R43769, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, by Charles Doyle.

[79] *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013).

[80] *Id*. at 1071.

[81] H.R. 181 (Rep. Poe), §6(1), (2), proposed 18 U.S.C. 1591(a); H.R. 296 (Rep. Poe), §9(a)(1), (2), proposed 18 U.S.C. 1591(a); H.R. 1201 (Rep. Granger), §2(a)(1), (2), proposed 18 U.S.C. 1591(a); S. 140 (Sen. Feinstein), §2(a)(1), (2), proposed 18 U.S.C. 1591(a); S. 178 (Sen. Cornyn), §9(a)(1), (2), proposed 18 U.S.C. 1591(a); see also H.Rept. 113-450, at 15-6 (2014)(discussing a similar proposal in the 113th Congress). Here and hereinafter references to H.R. 181 and later references to H.R. 285 allude to those measures as passed by the House.

[82] *United States v. Robinson*, 702 F.3d 22, 26 (2d Cir. 2012)("[T]his provision [Section 1591(c)], when applicable, imposes strict liability with regard to the defendant's awareness of the victim's age, thus relieving the government's usual burden to prove knowledge or reckless disregard of the victim's underage status under §1591(a)").

[83] H.R. 181, §6(3), proposed 18 U.S.C. 1591(c); H.R. 296, §9(a)(3), proposed 18 U.S.C. 1591(c); S. 140, §2(a)(3), proposed 18 U.S.C. 1591(c); S. 178, §9(a)(3), proposed 18 U.S.C. 1591(c); the House report with respect to comparable language in an earlier proposal observed that "[t]his clarification is intended to direct law enforcement's investigative and prosecutorial focus on the purchasers of these illegal services, who create the market for the traffickers," H.Rept. 113-450, at 16 (2014).

Advertisers

Proposals to explicitly cover advertisers might also be seen as a matter of simply sharpening existing law. Anyone who aids and abets the commission of a federal crime by another merits the same punishment as the individual who actually commits the crime.[84] Liability for aiding and abetting requires that a defendant embrace the crime of another and consciously do something to contribute to its success.[85]

One of Section 1591's distinctive features is that its action elements—recruiting, harboring, transporting, providing, obtaining—are activities that might be associated with aiding and abetting the operation of a prostitution enterprise. Section 1591, read literally, does not outlaw operating a prostitution business; it outlaws the steps leading up to or associated with operating a prostitution business—recruiting, harboring, transporting, etc. Strictly construed, advertising in aid of recruitment, harboring, transporting, or one of the other action elements might qualify as aiding and abetting a violation of Section 1591; advertising the availability of a prostitute might not.

Yet one court suggests that Section 1591 does outlaw operating a prostitution business, at least for purposes of aiding and abetting liability, and that by implication advertising might constitute aiding and abetting a violation of the section:

> Pringler first argues that the evidence is insufficient to support his conviction for aiding and abetting the sex trafficking of a minor [in violation of Section 1591].... We disagree. The record is not devoid of evidence to support the jury's verdict and show Pringler's integral role in the criminal venture. Pringler took the money that Norman and B.L. earned from their prostitution and used some of it to pay for hotel rooms where the women met their patrons. Pringler bought the laptop Norman and B.L. used to advertise their services. He drove Norman and B.L. to "outcall" appointments, and he took photographs of Norman, which he had planned for use in advertisements.[86]

Some bills, H.R. 285 and S. 572, for example, would amend Section 1591(a)(1) to outlaw knowingly advertising a person, knowing the victim would be used for prostitution.[87] Proponents might suggest that "advertising" would seem to fit snugly within the litany of Section 1591's action elements.

Section 1591 now requires the government to prove either that the defendant knew of the victim's underage or coerced status or recklessly disregarded it. The proposal would expose the trafficker and the profiteer to liability based on different levels of knowledge. The liability for advertising traffickers would require that they knew of or recklessly disregarded the victim's status. The liability for advertising profiteers would require that they knew of the victim's status.[88]

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[84] 18 U.S.C. 2(a)("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal").

[85] *Rosemond v. United States*, 134 S.Ct. 1240, 1245 (2014), quoting, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994)("[T]hose who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime"); see also *United States v. Pringler*, 765 F.3d 445, 449 (5th Cir. 2014)("To hold a defendant liable for aiding and abetting an offense, the government must show that elements of the substantive offense occurred and that the defendant associated with the criminal activity, participated in it, and acted to help it succeed").

[86] *Id*. at 449-51.

[87] E.g., H.R. 285, §2(a), proposed 18 U.S.C. 1591(a)(1); S. 572, §2(a), proposed 18 U.S.C. 1591(a)(1).

[88] Should the proposal be enacted 18 U.S.C. 1591(a) would read in pertinent part (proposed language in italics): "Whoever knowingly - (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial

Knowledge is obviously a more demanding standard than reckless disregard, but the dividing line between the two is not always easily discerned, in part because of the doctrine of willful blindness. The doctrine describes the circumstances under which a jury may be instructed by the court that it may infer knowledge on the part of a defendant. Worded variously, the doctrine applies where evidence indicates that the defendant sought to avoid the guilty knowledge.[89]

Since the element is worded in the alternative—knowing or in reckless disregard of the fact—the courts have rarely distinguished the two. One interpretation comes from comparable wording in an immigration offense which outlaws transporting an alien knowing or acting in reckless disregard of the fact that the alien is in this country illegally: "To act with reckless disregard of the fact means to be aware of but consciously and carelessly ignore facts and circumstances clearly indicating that the person transported was an alien who had entered or remained in the United States illegally."[90] The courts refer to a similar unreasonable indifference standard when speaking of the veracity required for the issuance of a warrant.[91]

Mann Act

The Mann Act criminalizes, among other things, (1) interstate or foreign transportation of a child for purposes of prostitution or other unlawful sexual purposes; (2) interstate or foreign travel for purposes of engaging in "illicit sexual activity" with a child; and (3) overseas travel of U.S. nationals followed by illicit sexual activities with a child.[92]

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jurisdiction of the United States, recruits ... *advertises* ...; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, *except where, in an offense under paragraph (2), the act constituting the violation of paragraph (1) is advertising,* in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b)."

[89] *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2070 (2011)("While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate action to avoid learning of that fact"); *United States v. Adorno-Molina*, 774 F.3d 116, 124 (1st Cir. 2014)("A willful blindness instruction is appropriate if (1) a defendant claims a lack of knowledge, (2) the facts suggest a conscious course of deliberate ignorance, and (3) the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge"); *United States v. Salinas*, 763 F.3d 869, 878 (7th Cir. 2014)("A defendant may not escape criminal liability simply by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact information about the nature and extent of those dealings"); *United States v. Mathauda*, 740 F.3d 565, 568-69 (11th Cir. 2014), quoting *United States v. Bisong*, 384 F.3d 400 (D.C. Cir. 2011), ("We agree with the United States Court of Appeals for the District of Columbia Circuit that there are two predominant formulations of willful blindness: 'when a defendant purposely contrived to avoid learning of the facts, or the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact'").

[90] *United States v. Anyanwu*, 775 F.3d 1322, 1325 (11th Cir. 2015).

[91] *United States v. Gifford*, 727 F.3d 92, 98 (1st Cir. 2013)("An allegation is made with reckless disregard for the truth if the affiant in fact entertained serious doubts as to the truth of the allegations or where the circumstances evinced obvious reasons to doubt the veracity of the allegations in the application"); *Betker v. Gomez*, 692 F.3d 854, 860 (7th Cir. 2012)("We have said that a reckless disregard for the truth can be shown by demonstrating that the officer entertained serious doubts as to the truth of the statements, had obvious reasons to doubt their accuracy, or failed to disclose facts that he or she knew would negate probable cause"); *United States v. Brown*, 631 F.3d 638, 645 (3d Cir. 2011)("This definition provides two distinct ways in which conduct can be found reckless: either the affiant actually entertained serious doubts; or obvious reasons existed for him to do so, such that the finder of act can infer a subjectively reckless state of mind").

[92] 18 U.S.C. 2423(a), (b), and (c), respectively; 18 U.S.C. 2423(f).

Defendants enjoy an affirmative defense in "illicit sexual activity" cases, if they can establish by a preponderance of the evidence that they reasonably believed that the victim was over 18 years of age.[93]

S. 178, H.R. 181, and other bills would limit the defense to cases where the defendant establishes the reasonableness of his belief by clear and convincing evidence.[94] The difference between preponderance of the evidence and clear and convincing is the difference between more likely than not[95] and highly probable.[96] Many of these same proposals would amend the "illicit sexual activity" definition to include child pornography cases,[97] with the result that interstate or foreign travel associated with the production of child pornography would be clear violations of the Mann Act's Section 2423(b)(interstate or foreign travel for purposes of such production), Section 2423(c)(foreign travel followed by such production), and Section 2423(d)(commercially facilitating such travel), each of which is punishable by imprisonment for not more than 30 years.[98]

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[93] 18 U.S.C. 2423(g).

[94] H.R. 181, §8, proposed 18 U.S.C. 2423(g); H.R. 296, §11(b), proposed 18 U.S.C. 2423(g); S. 178, §11(b), proposed 18 U.S.C. 2423(g); see also H.Rept. 113-450, at 16 (2014).

[95] *Syblis v. Attorney General of the U.S.*, 763 F.3d 348 (3d Cir. 2014), quoting, *Concrete Pipe & Prods of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993), and *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)("A burden of proof by a preponderance of the evidence 'requires the trier of fact to believe that the existence of a factor is more probable than its nonexistence' ... Accordingly, the burden establishes 'which party loses if the evidence is closely balanced"); see also *Siddiqui v. Holder*, 670 F.3d 736, 742 (7th Cir. 2012); *United States v. Manigan*, 508 F.3d 621, 631 (4th 2010).

[96] *Bishop v. Warden*, 726 F.3d 1243, 1258 (11th Cir. 2013); *United States v. Springe*r, 715 F.3d 535, 538 (4th Cir. 2013); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013).

[97] S. 178, §111(a)(3), proposed 18 U.S.C. 2423(f)(3); H.R. 296, §11(a), proposed 18 U.S.C. 2423(f)(3).

[98] 18 U.S.C. 2423(b), (c), (d).