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Sentence Reform Acts: S. 2123 and H.R. 3713

Updated October 14, 2015

Congressional Research Service
https://crsreports.congress.gov
R44226

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

As introduced, the Sentencing Reform and Corrections Act of 2015, S. 2123, and the Sentencing Reform Act of 2015, H.R. 3713, use virtually identical language to reduce the impact of the mandatory minimum sentences which federal courts must now impose for certain drug trafficking and firearms offenses.

Key Takeaways

- Existing law requires long minimum sentences for certain drug traffickers who have prior drug convictions. S. 2123 and H.R. 3713 would shorten the mandatory minimums, but apply them for both prior drug and violent felony convictions.
- The safety valve permits judges to ignore mandatory minimums for certain low-level, nonviolent drug traffickers with virtually no criminal record. The bills would make the safety valve available to traffickers with slightly more serious criminal records.
- The bills would establish a mini-safety valve which would permit judges to treat the 10-year drug trafficking mandatory minimums as if they were 5-year mandatory minimums for the benefit of nonviolent defendants with no prior serious drug or violent crime convictions.
- The proposals would permit retroactive application of the 2010 Fair Sentencing Act crack/powder cocaine amendments under some circumstances.
- S. 2123 and H.R. 3713 would reduce the Armed Career Criminal mandatory minimum to 10 years from 15 years.
- The bills would increase to 15 years the maximum penalties for possession of a firearm by a felon and various other firearms offenses.
- H.R. 3713, but not S. 2123, would add a consecutive term of imprisonment for not more than five years to the mandatory minimums in drug trafficking cases which involve heroin or fentanyl (a heroin cutter and counterfeit).
- S. 2123, but not H.R. 3713, would establish new mandatory minimums for certain interstate domestic violence offenses and International Emergency Economic Powers Act (IEEPA) violations.
- S. 2123, but not H.R. 3713, would direct the Attorney General to prepare an inventory of federal statutory crimes and various federal agencies to prepare a comparable inventory of federal regulatory offenses.

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Introduction

Within a week of each other, Senator Grassley and Representative Goodlatte, chairmen of the Senate and House Judiciary Committees, introduced parallel sentencing reform bills with bipartisan cosponsors.[1] By and large in identical language, the two would amend existing mandatory minimum sentence provisions found in federal drug and firearms laws, by and large in identical language. The most obvious difference is that the Senate proposal, S. 2123, the Sentencing Reform and Corrections Act of 2015, features an extensive corrections title, which the House proposal, H.R. 3713, the Sentencing Reform Act of 2015, lacks.[2]

Mandatory Minimums

Controlled Substances

The Controlled Substances Act and the Controlled Substances Import and Export Act establish a series of mandatory minimum sentences for violations of their prohibitions.[3] 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 10 grams of LSD (§841(b)(1)(A)), is punishable by imprisonment for not less than 10 years or more than life.[4] A subsequent conviction carries a sentence of imprisonment for not less than 20 years or more than life.[5] When substantial but lesser amounts are involved, such as 1 gram of LSD (§841(b)(1)(B)), sentences of imprisonment for not less than 5 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.[6]

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[1] In each instance, a summary and a section-by-section analysis accompanied introduction; in the case of S. 2123, it appears at http://www.judiciary.senate.gov/meetings/senators-announce-bipartisan-sentencing-reform-and-corrections-act; in the case of H.R. 3713, at http://judiciary.house.gov/index.cfm/press-releases?id=6043D052-68F1-42D6-B21F-B43449F88615.

[2] Discussion of S. 2123's corrections provisions is beyond the scope of this report.

[3] Portions of what follows have been borrowed from CRS Report R44006, *Mandatory Minimum Sentencing Legislation in the 114th Congress*, by Charles Doyle.

[4] 21 U.S.C. 841(b)(1)(A); 21 U.S.C. 960(b)(1). The threshold amounts covered by the sections are "(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin; (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).

[5] 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 of not less than 20 years and not more than life imprisonment....").

[6] 21 U.S.C. 841(b)(1)(B); 21 U.S.C. 960(b)(2). The threshold amounts for this lower sentencing plateau are "(i) 100

As noted in **Table 1** below, S. 2123 and H.R. 3713 would reduce the mandatory minimum sentences that must be imposed on repeat offenders.

Table 1. Terms of Imprisonment: Controlled Substances

Offense	Present Law	S. 502/H.R. 920 (114th Cong.)	S. 2123/H.R. 3713 (114th Cong.)
I. (a)(i) Trafficking: §841(b)(1)(A) substances (e.g., 10 grams + of LSD)	not less than 10 years or more than life	not less than 5 years or more than life	S. 2123: no change [b] H.R. 3713: added term of not more than 5 years if heroin or fentanyl
(a)(ii) if death or serious injury results	not less than 20 years or more than life	no change	no change; [b]
(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 15 years or more than life ([a] also violent prior, but only 10 year drug prior); [b]
(b)(ii) and death or serious injury results	life	no change	no change
(c) two or more prior violations	life	not less than 25 years	not less than 25 years or more than life; ([a]); ([b])
II. (a)(i) Trafficking: §841(b)(1)(B) substance (e.g. 1g + of LSD)	not less than 5 years or more than 40 years	not less than 2 years or more than 40 years	no change; [b]
(a)(ii) if death or serious injury results	not less than 20 years or more than life	no change	no change; [b]
(b)(i) one prior violation	not less than 10 years or more than life	not less than 5 years or more than life	([a]); ([b])
(b)(ii) and death or serious injury results	life	no change	no change
III. (a)(i) Import/export: §960(b)(1) substances (e.g. 10 grams + of LSD)	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	no change; [b]
(a)(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 15 years or more than life; ([a]); ([b])
(b)(i) Import/export; §960(b)(2) substances (e.g., 1g + of LSD)	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	([a]); ([b])

grams or more of a mixture or substance containing a detectable amount of heroin; (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).

Offense	Present Law	S. 502/H.R. 920 (114th Cong.)	S. 2123/H.R. 3713 (114th Cong.)
(b)(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	([a]); ([b])

Source: Congressional Research Service, based on S. 2123 (114th Cong.); S. 502/H.R. 920 (114th Cong.); and 21 U.S.C. 841, 960.

a. S. 2123 and H.R. 3713 would adjust the mandatory minimum sentences required to be imposed on repeat offenders by both expanding and contracting the range of prior convictions which would trigger the recidivist mandatory minimums. Existing law requires a prior conviction for a federal or state drug offense punishable by imprisonment for more than a year.[7] S. 2123 and H.R. 3713 would require conviction for a federal or state drug offense punishable by imprisonment for not more than 10 years and punished by imprisonment for more than a year.[8] The two proposals would also trigger the drug recidivist mandatory minimum provisions on the basis of an assault or other violent crime conviction for which the offender was sentenced to imprisonment for more than a year.[9]
These adjusted mandatory minimum provisions would apply to future cases and cases awaiting sentencing at the time of enactment.[10] They would also permit federal courts to reduce the terms of imprisonment of defendants previously sentenced, after considering the defendant's conduct after his initial sentence, "the nature and seriousness of the danger to any person or the community," and the generally applicable sentencing factors of 18 U.S.C. 3553(a).[11] H.R. 3713, however, would deny retroactive application to defendants previously convicted of a violent crime for which the defendant had received a sentence of imprisonment for more than a year.[12]

b. H.R. 3713 alone would add a consecutive sentence of not more than five years to each of the controlled substance mandatory minimums if the offense involved a detectable amount of either heroin or fentanyl.[13]

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

[7] 21 U.S.C. 802(44).

[8] S. 2123, §§101(a), (b); H.R. 3713, §§2(a), (b)(each adopting by cross reference the definition in 18 U.S.C. 924(e)(2)(A)); proposed 21 U.S.C. 802(57), 841(b)(1); 960(b).

[9] S. 2123, §§101(a), (b); H.R. 3713, §§2(a), (b); proposed 21 U.S.C. 802(58), 841(b)(1); 960(b). The proposals' list of qualifying prior violent felony convictions includes convictions for the crimes described in 18 U.S.C. 3559(c)(2)(F) or the equivalents of convictions under 18 U.S.C. 113 (assault). The §3559(c)(2)(F) offenses consist of any (i) "Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."

[10] S. 2123, §101(c)(1); H.R. 3713, §2(c)(1).

[11] S. 2123, §101(c)(2); H.R. 3713, §2(c)(2).

[12] H.R. 3713, §2(c)(2).

[13] H.R. 3713, §§2(a)(3), (b)(3); proposed 21 U.S.C. 841(b)(8), (9); 960(b)(1), (b)(2).

[14] 18 U.S.C. 3553(f)("Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or

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 an almost 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 60 days incarceration; 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]

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.[21] 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."[22] The Commission 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.[23] In addition, the drug offenses have escalated mandatory minimums for repeat offenders.[24] Moreover, similarly situated drug offenders may be treated differently, because the states punish simple drug possession differently and prosecutors decide when to press recidivism qualifications differently.[25]

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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 ..."). See, generally, CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by Charles Doyle.

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

[22] *Id*. at 352.

[23] *Id.*

[24] *Id.*

[25] *Id*. at 353 ("Interviews of prosecutors and defense attorneys in 13 districts confirm that different districts have

S. 2123 and H.R. 3713 would modify the safety valve in several respects. First, a defendant would be safety valve eligible with 3 or fewer criminal history points and had not been convicted previously of either a drug trafficking offense, a violent offense, or a "3-point offense" (i.e., one for which he was incarcerated for 60 days or more).[26]

Second, the two proposals would permit the court to waive the criminal history disqualification, in cases other than those involving a past serious drug felony or serious violent felony conviction, if it concluded that the defendant's criminal history score overstated the seriousness of his criminal record or the likelihood that he would commit other offenses.[27]

Third, the bills would create additional safety valve. They would allow the sentencing court to treat a statutory 10-year drug trafficking mandatory minimum—the penalty for first-time §841(b)(1)(A) offenses and §960(b)(1) offenses—as though it were a 5-year mandatory minimum.[28] A defendant would be eligible for this mini-safety valve if

- he had no prior convictions for a serious drug felony or serious violent felony;[29]
- he did not use violence in connection with the offense;[30]
- he was not an organizer or supervisor of others in connection with the offense;[31]
- he was not an importer, high-level supplier, or manufacturer of the drugs;[32]
- he did not distribute drugs to or with a child;[33] and

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").

[26] S. 2123, §102(a)(1); H.R. 3713, §3(1); proposed 18 U.S.C. 3553(f)(1). They would define "drug trafficking offense" for these purposes as a state, federal, or foreign drug trafficking offense without reference to the attendant penalties; it would define "violent offense" as a crime punishable by imprisonment which is described in 18 U.S.C. 16 (i.e., a crime one of whose elements is the use or threat of physical force or a felony that by its nature involves a substantial risk of the use of physical force), S. 2123, §102(a)(2); H.R. 3713, §2(a)(2), proposed 18 U.S.C. 3553(h).

[27] S. 2123, §§102(a)(2), 101(a)(1); H.R. 3713, §§3(a)(2), 2(a)(1); proposed 18 U.S.C. 3553(g)(1).

[28] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i).

[29] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i)(1)("(1) the defendant does not have a prior conviction for a serious drug felony or serious violent felony as defined in paragraphs (57) and (58), respectively, of section 102 of the Controlled Substances Act (21 U.S.C. 802) that was made final prior to the commission of the instant offense").

[30] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i)(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, and the offense did not result in death or serious bodily injury to any person").

[31] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i)(3)("the defendant did not play an enhanced role in the offense by acting as an organizer, leader, manager, or supervisor of other participants in the offense, as determined under the sentencing guidelines, or by exercising substantial authority or control over the criminal activity of a criminal organization, regardless of whether the defendant was a member of such organization").

[32] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i)(4), (j)(1), (j)(2), (j)(3)("the defendant did not act as an importer, exporter, high-level distributor or supplier, wholesaler, or manufacturer of the controlled substances involved in the offense or engage in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act (21 U.S.C. 848) ... As used in subsection (i) of this section – (1) the term 'importer, exporter, or high-level distributor or supplier' (A) means a defendant who imported, exported, or otherwise distributed or supplied large quantities of a controlled substance to other drug distributors; and (B) does not include a defendant whose role was limited to transporting drugs or money at the direction of others; (2) the term 'manufacturer' means a defendant who grew, produced, or manufactured a controlled substance and was the principal owner of such controlled substance; and (3) the term 'wholesaler' means a defendant who sold non-retail quantities of a controlled substance to other dealers or distributors").

[33] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i)(5)("the defendant did not distribute a controlled substance

- he told authorities everything he knew of the offense.[34]

The mini-safety valve would only apply to future convictions.[35]

Firearms

There are two firearms-related offenses that call for the imposition of a mandatory minimum sentence of imprisonment. One, the so-called three strikes provision, also known as the Armed Career Criminal Act (ACCA), imposes a 15-year mandatory minimum sentence on an offender convicted of unlawful possession of a firearm who has three prior convictions for a drug offense or a violent felony.[36] The other, 18 U.S.C. 924(c), imposes one of a series of mandatory terms of imprisonment upon a defendant convicted of the use of a firearm during the course of a drug offense or a crime of violence.[37]

The ACCA limits qualifying state and federal drug offenses to those punishable by imprisonment for more than 10 years.[38] The qualifying federal and state violent felonies are burglary, arson, extortion, the use of explosives, or any other felony which either has the use or threat of physical force as an element.[39] S. 2123 and H.R. 3713 would reduce the mandatory minimum penalty from 15 years to 10 years.[40] They would also make the modification retroactively applicable in the same manner as the proposed mandatory minimum reductions in the case of controlled substances. That is, they would also permit federal courts to reduce the terms of imprisonment of defendants previously sentenced, after considering the defendant's conduct after his initial sentence, "the nature and seriousness of the danger to any person or the community," and the generally applicable sentencing factors of 18 U.S.C. 3553(a).[41] Again, however, H.R. 3713's retroactivity would only apply to defendants without a prior serious violent felony conviction.[42]

Section 924(c) brings firearm mandatory minimum tack-on status to any federal drug felony and to any other federal felony, which either has the use of physical force or threat of physical force as an element or which by its nature involves a substantial risk of the use of physical force.[43]

While the ACCA calls for a single 15-year mandatory minimum, §924(c) imposes one of several different minimum sentences when a firearm is used or possessed in furtherance of another

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to or with a person under 18 years of age").

[34] S. 2123, §103; H.R. 3713, §4; proposed 18 U.S.C. 3553(i)(6)("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").

[35] S. 2123, §103(b); H.R. 3713, §4(b).

[36] 18 U.S.C. 924(e). See, generally, CRS Report R41449, *Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview*, by Charles Doyle.

[37] See, generally, CRS Report R41412, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence*, by Charles Doyle.

[38] 18 U.S.C. 924(e)(2)(A).

[39] 18 U.S.C. 924(e)(2)(B). The statute includes a third category of violent felonies: that is, crimes like the enumerated crimes (burglary, arson, etc.) which presents a serious potential risk of physical injury, 18 U.S.C. 924(e)(2)(B)(ii). The Supreme Court recently held this third category unconstitutionally vague and an impermissible bases for imposition of an enhanced sentence under §924(e), *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

[40] S. 2123, §105(a)(2); H.R. 3713, §6(a)(2); proposed 18 U.S.C. 924(e)(1).

[41] S. 2123, §105(c)(2); H.R. 3713, §6(b)(2).

[42] H.R. 3713, §§6(b)(2), 2(a)(1).

[43] 18 U.S.C. 924(c)(2), (3).

federal crime of violence or of drug trafficking. 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 5 years, unless one of the higher mandatory minimums below applies;
- imprisonment for not less than 7 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 §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 §924(c) and if the firearm is a machine gun or destructive device or is equipped with a silencer.[44]

One of §924(c)'s distinctive features is that its repeat offender provision has been construed to include conviction of an earlier count within the same prosecution.[45] Under this stacking of counts, a defendant convicted of several counts arising out of a single crime spree involving the robbery of several convenience stores, for example, may face a mandatory term of imprisonment of well over 100 years.[46]

The two sentencing reform bills would make clear that a conviction must have become final before it could be counted or purposes of enhancing the mandatory minimum.[47] They would also reduce the repeat offender mandatory minimum from imprisonment for not less than 25 years to not less than 15 years.[48] The proposals, however, would expand the repeat offender mandatory minimum to include recidivists with prior violent state crime convictions. And with one exception, they would both permit courts to apply the changes retroactively to cases that had become final, provided they took to account the defendant's post-conviction conduct, the nature and seriousness of threats to individual or community safety, and the generally applicable

[44] 18 U.S.C. 924(c)(1), (5).

[45] E.g., *United States v. Penny*, 576 F.3d 297, 316 (6th Cir. 2009)("[W]hen two separate predicate offenses for triggering §924(c)(1) are charged and proved, a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course of the same event"); *United States v. Sandstrom*, 594 F.3d 634, 658 (8th Cir. 2010)("[M]ultiple underlying offenses support multiple §924(c) convictions").

[46] E.g., *United States v. Richardson*, 793 F.3d 612, 633 (6th Cir. 2015)("We have regularly upheld sentences exceeding 1, 494 months for §924(c) violations related to armed robberies").

[47] S. 2123, §104(a)(1); H.R. 3713, §5(a)(1); proposed 18 U.S.C. 924(c)(1)(C). The provision would read: "(C) in the case of a violation of this subsection that occurs after a prior conviction under this subsection or under State law for a crime of violence that contains as an element of the offense the carrying, brandishing, or use of a firearm has become final."

[48] S. 2123, §104(a)(2); H.R. 3713, §5(a)(2); proposed 18 U.S.C. 924(c)(1)(C)(i).

sentencing factors.[49] H.R. 3713 differs from S. 2123 in one respect. It would not afford retroactive application to a defendant who has a prior conviction for a serious violent felony.[50]

S. 2123 and H.R. 3713 each have a third firearms amendment that, although not a strict mandatory minimum amendment, would increase the likelihood of imprisonment by operation of implementing sentencing guidelines by simply increasing the maximum sentence authorized for the offense or offenses.[51] The two bills would increase from imprisonment for not more than 10 years to not more than 15 years the sentences for the following firearms offenses:[52]

- false statements in connection with the purchase of a firearm or ammunition;[53]
- sale of a firearm or ammunition to, or possession by, a convicted felon or other disqualified individual;[54]
- while in the employ of a disqualified individual, receipt or possession of a firearm or ammunition;[55]
- knowing transportation of stolen firearms or ammunition;[56]
- knowing sale, possession, or pledge as security of stolen firearms or ammunition;[57] or
- transfer or possession of a machine gun under certain circumstances.[58]

Fair Sentencing Act

Originally, the Controlled Substances Act made no distinction between powder cocaine and crack cocaine (cocaine base).[59] 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.[60] The 2010 Fair Sentencing Act (FSA) 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.[61] The Sentencing Commission subsequently revised

[49] S. 2123, §104(b)(2); H.R. 3713, §5(b)(2).

[50] H.R. 3713, §5(b)(2).

[51] The maximum penalty which Congress assigns to a crime is one mark of how serious Congress considers the offense. The Sentencing Guidelines are designed to ensure that comparable offenders receive comparable punishment, U.S.S.G. ch.1, pt. A, 3. When Congress increases the maximum penalty assigned to a crime, the Sentencing Commission would ordinarily adjust the pertinent sentencing guideline to reflect the appropriate increased level of severity, and thereby increase the likelihood of sentencing range that would require imprisonment.

[52] S. 2123, §105(a)(1); H.R. 3713, §6(a)(1); proposed 18 U.S.C. 924(a)(2).

[53] 18 U.S.C. 922(a)(6).

[54] 18 U.S.C. 922(d), (g). A disqualified individual is one who (1) has been convicted of a felony; (2) is a fugitive from justice; (3) is an unlawful user or addicted to a controlled substance; (4) has been adjudicated a mental defective; (5) is an illegal alien; (6) was dishonorably discharged from the Armed Forces; (7) has renounced his U.S. citizenship; (8) is the subject of certain domestic violence restraining orders; or (9) has been convicted of a domestic violence misdemeanor, *id.*

[55] 18 U.S.C. 922(h).

[56] 18 U.S.C. 922(i).

[57] 18 U.S.C. 922(j).

[58] 18 U.S.C. 922(o).

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

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

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

the Sentencing Guidelines to reflect the change and made the modification retroactively applicable at the discretion of the sentencing court.[62]

The FSA reductions apply to cocaine offenses committed thereafter. They also apply to offenses committed beforehand when sentencing occurred after the time of enactment.[63] Federal courts have discretion to reduce a sentence imposed under a Sentencing Guideline that was subsequently substantially reduced.[64] The FSA, however, does not apply to sentences imposed prior to its enactment,[65] and it does not apply in sentence reduction hearings triggered by new Sentencing Guidelines.[66] In such proceedings, the courts remain bound by the mandatory minimums in effect prior to enactment of the FSA.[67]

S. 2123 and H.R. 3713, in roughly the same terms, would change that and would allow a court to reduce a sentence, imposed for an offense committed prior to the FSA, to reflect its provisions, unless the court had already done so or unless the original sentence was imposed consistent with the FSA amendments.[68]

New Mandatory Minimums

H.R. 3713 would create no new mandatory minimum sentencing provisions. S. 2123, on the other hand, would establish two: one for interstate domestic violence offenses and another for certain violations of the International Emergency Economic Powers Act (IEEPA).

Existing federal law criminalizes interstate domestic violence and interstate stalking, and penalizes them equally. S. 2123 would establish a mandatory minimum sentence of imprisonment

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[62] 18 U.S.C. 3582(c); U.S.S.G. 1B1.10; U.S.S.G. App. C, Amends. 750, 759.

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

[64] 18 U.S.C. 3582(c)(2).

[65] *United States v. Santos-Rivera*, 726 F.3d 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).

[66] *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").

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

[68] S. 2123, §106(c); H.R. 3713, §7(c). The section, with changes found only in H.R. 3713 in italics and changes found only in S. 2123 underlined, would read: "No court shall entertain a motion made under this section to reduce a sentence if the sentence was <u>previously</u> imposed or <u>previously</u> reduced *to a sentence greater than the applicable mandatory minimum* in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220;124 Stat. 2372), or if a motion made *pursuant to sections 2 or 3 of the sentencing Act or* under this section was <u>previously</u> denied *by a court because a reduction in the defendant's term of imprisonment would pose a danger to any person or the community or was denied by a court because of the defendant's post-sentencing conduct*. Nothing in this section shall require a court to reduce any sentence pursuant to this section."

for not less than 10 years when death resulted from interstate domestic violence.[69] In addition, it would increase the maximum penalties for interstate domestic violence from imprisonment for not more than 20 years to not more than 25 years when life-threatening or permanent disfigurement resulted and from imprisonment for not more than 10 years to not more than 15 years when a dangerous weapon was used or serious bodily injury resulted.[70] Otherwise, the Senate proposal would leave the penalties for interstate domestic violence and interstate stalking unchanged.

IEEPA authorizes the President to exercise various authorities to "deal with any unusual and extraordinary [overseas threat] ... to the national security, foreign policy or economy of the United States." Presidents have used this authority to issue executive orders banning various unlicensed transactions with various countries, entities, and individuals. IEEPA violations are punishable by imprisonment for not more than 20 years.[71]

S. 2123 would create a separate mandatory minimum sentence of imprisonment for not less than five years for three types of IEEPA violations. One prohibits IEEPA violations that involve providing defense articles or services as defined by the Arms Export Control Act to countries under an arms embargo.[72] Another prohibits IEEPA violations that involve supplying goods or services for the foreign development of weapons of mass destruction.[73] The third prohibits IEEPA violations that furnish certain foreign entities with goods and services that are subject to export restrictions.[74]

Inventory of Federal Crimes

S. 2123 alone would call for an inventory of federal crimes. Section 109 of the bill would direct the Attorney General to prepare and provide the House and Senate Committees on the Judiciary an inventory of federal statutory crimes and of federal regulatory offenses. The compilation of federal statutory crimes would have to identify the penalties, mens rea, and frequency of prosecution of each offense.[75] The compilation of federal regulatory offenses would be organized by enforcing agency and note the penalties and frequency of prosecution for each.[76] The Attorney General and pertinent agency head would also be responsible for the creation of a publicly available online index of such offenses.[77]

[69] S. 2123, §107, proposed 18 U.S.C. 2261(b)(1).

[70] S. 2123, §107, proposed 18 U.S.C. 2261(b)(2), (3).

[71] 50 U.S.C. 1705.

[72] S. 2123, §108(2), proposed 50 U.S.C. 1705(d)(1), (2)(C), (3)(B), (3)(C). Section 47 of the Arms Export Control Act, 22 U.S.C. 2794(3), (4), defines the term "defense article" to include things like weapons and materials and facilities used to produce and market weapons. The countries subject to embargo are Iraq, North Korea, and the other countries listed in 22 C.F.R. §126.1.

[73] S. 2123, §108(2), proposed 50 U.S.C. 1705(d)(1), (2)(B), (3)(E). "Weapons of mass destruction" includes biological, chemical, and nuclear weapons, as well as explosives, 18 U.S.C. 2332a(c)(2).

[74] S. 2123, §108(2), proposed 50 U.S.C. 1705(d)(1), (2)(A), (3)(A), (3)(D). The entities covered consist of (1) state sponsors of terrorism, as defined in §6(j)(1)(A) of the Export Administration Act of 1979, 50 U.S.C. App. 2405(j)(1)(A); (2) foreign terrorist organizations as designated under §219(a) of the Immigration and Nationality Act, 8 U.S.C. 1189(a); and (3) persons of Office of Foreign Assets Control's list of designated nationals and blocked persons.

[75] S. 2123, §109(b).

[76] S. 2123, §109(c).

[77] S. 2123, §109(d).

Author Information

Charles Doyle
Senior Specialist in American Public Law

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