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Sex Trafficking: Proposals in the 114th Congress to Amend Federal Criminal Law

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Summary

Existing federal law outlaws sex trafficking and provides a variety of mechanisms to prevent it and to assist its victims. Members have offered a number of proposals during the 114th Congress to bolster those efforts. Several clarify, expand, or supplement existing federal criminal law.

For instance, Senator Cornyn's S. 178, which was packaged with Representative Poe's H.R. 181 and several proposals and enacted as the Justice for Victims of Trafficking Act of 2015 (P.L. 114-22), confirms that federal commercial sex trafficking prohibitions apply to the customers of such enterprises. P.L. 114-22 also constricts the defense of those who engage in illicit sexual activities with children. In addition, it affords state and federal law enforcement officials greater access to court-supervised electronic surveillance in trafficking cases. It expands victims' statutory rights and removes stringent limits on appellate enforcement of those rights.

As suggested in S. 178, Senator Kirk's S. 572, and Representative Wagner's H.R. 285, P.L. 114-22 brings culpable advertisers within the reach of the federal law which proscribes commercial sex trafficking.

P.L. 114-22 lengthens the permissible term of supervised release for those convicted of plotting to engage in commercial sex trafficking, language reminiscent of Senator Feinstein's S. 140, Representative Poe's H.R. 296, and Representative Granger's H.R. 1201.

S. 178 and Senator Burr's S. 409 proposed requiring Department of Defense (DOD) officials to provide the Attorney General with information relating to military sex offenders required to register under the federal Sex Offender Registration and Notification Act (SORNA). P.L. 114-22 requires them to do so. Representative Speier's H.R. 956 would establish a separate DOD sex offender registry.

Representative Carolyn B. Maloney's H.R. 1311 would increase the penalties for tax evasion by sex traffickers and call for the establishment of a dedicated office within the Internal Revenue Service to investigate and prosecute tax-avoiding sex traffickers.

See also CRS Report R44064, *Justice for Victims of Trafficking Act: A Legal Analysis of the Criminal Provisions of P.L. 114-22*, by (name redacted).

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Introduction

The 114th Congress opened with the introduction of a number of proposals that address human trafficking, particularly sex trafficking.[1] Among them were proposals to amend existing federal criminal law, which would expand the coverage of federal sex trafficking laws; amend bail provisions; raise the limits on supervised release; authorize more extensive wiretapping; and adjust the application of federal forfeiture and restitution laws.[2] The legislation includes the following:

- Justice for Victims of Trafficking Act (H.R. 181) (Representative Poe) (House passed);[3]
- Justice for Victims of Trafficking Act (S. 178) (Senator Cornyn) (P.L. 114-22);[4]
- Justice for Victims of Trafficking Act (H.R. 296) (Representative Poe);
- Stop Advertising Victims of Exploitation Act (SAVE Act) (H.R. 285) (Representative Wagner) (House passed);[5]
- Stop Advertising Victims of Exploitation Act (SAVE Act) (S. 572) (Senator Kirk);
- Combat Human Trafficking Act (H.R. 1201) (Representative Granger);
- Combat Human Trafficking Act (S. 140) (Senator Feinstein);
- Human Trafficking Fraud Enforcement Act (H.R. 1311) (Representative Carolyn B. Maloney);
- Military Sex Offender Reporting Act (S. 409) (Senator Burr); and
- Military Track Register and Alert Communities Act (Military TRAC Act) (H.R. 956) (Representative Speier).

[1] Human trafficking is the coercive or fraudulent exploitation of another in order to secure her labor or services; sexual trafficking is when the victim's sexual services are exploited, Black's Law Dictionary, 1726 (10th ed. 2014)("The illegal recruitment, transportation, harboring, or receipt of a person, esp. one from another country, with the intent to hold the person captive or exploit the person for labor, services or body parts"); see also 22 U.S.C. 7102(9)(b)("The term 'severe forms of trafficking in persons' means- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery").

[2] Other proposals, which focus to a large extent on grant programs for victims' benefits and services, are beyond the scope of this report; see, generally, CRS Report R43917, *Domestic Human Trafficking Legislation in the 114th Congress*, by (name redacted), (name redacted), and (name redacted). For background on federal sex trafficking laws, supervised release, bail, electronic surveillance, forfeiture, and restitution, see CRS Report R43597, *Sex Trafficking: An Overview of Federal Criminal Law*; CRS Report RL31653, *Supervised Release (Parole): An Overview of Federal Law*; CRS Report R41733, *Privacy: An Overview of the Electronic Communications Privacy Act*; CRS Report R40221, *Bail: An Overview of Federal Criminal Law*; CRS Report 97-139, *Crime and Forfeiture*; and CRS Report RL34138, *Restitution in Federal Criminal Cases*, each by (name redacted).

[3] 161 *Cong. Rec.* H600-H602 (daily ed. January 27, 2015); see also H.Rept. 114-7 (2015).

[4] P.L. 114-22, 129 Stat. 227 (2015).

[5] 161 *Cong. Rec.* H596 (daily ed. January 27, 2015); see also H.Rept. 114-8 (2015).

Substantive Offenses

The legislation would amend federal substantive law in three areas: commercial sex trafficking (18 U.S.C. 1591); the Mann Act, which outlaws transportation and travel for unlawful sexual purposes; and federal tax crimes.[6] All but the tax crime proposal appears in P.L. 114-22.[7]

Commercial Sex Trafficking

The proposals would amend §1591 to (1) confirm the coverage of the customers of a commercial sex trafficking enterprise; (2) outlaw advertising of a commercial sex trafficking enterprise; (3) clarify the government's burden of proof with regard to the age of the victim; and (4) enlarge the permissible term of supervised release for commercial sex trafficking conspirators.

Liability of Patrons

Prior to amendment, §1591 outlawed commercial sex trafficking. More precisely, it outlawed:

- 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 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.[8]

It continues to outlaw separately profiting from such a venture.[9]

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).[10] The same penalties apply to anyone who attempts to violate the provisions of §1591.[11]

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[6] Some of the analysis here corresponds to a discussion of similar proposals in CRS Report R44006, *Mandatory Minimum Sentencing Legislation in the 114th Congress*, by (name redacted).

[7] P.L. 114-22, 129 Stat. 227 et seq. (2015), 18 U.S.C. 1591, 2423.

[8] 18 U.S.C. 1591(a)(2012 ed.): "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)."

[9] 18 U.S.C. 1591(a)(2)(quoted above).

[10] 18 U.S.C. 1591(b).

There were suggestions to expand §1591 to cover advertisers and to more explicitly cover the customers of a commercial sex trafficking scheme. At first glance, §1591 did 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.[12] Nevertheless, the U.S. Court of Appeals for the Eighth Circuit found that the language of §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.[13] "The ordinary and natural meaning of 'obtains' and the other terms Congress selected in drafting section 1591 are broad enough to encompass the actions of both suppliers and purchasers of commercial sex acts," the court declared.[14]

S. 178 (Senator Cornyn), H.R. 181 (Representative Poe), and a number of other bills would explicitly confirm this construction by amending §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).[15] P.L. 114-22 adopts the proposal.[16]

Age: Prosecutors' Burden

The same bills often amend the "knowledge of age" element in §1591(c) to reflect the clarifying amendment with respect to the customers of a commercial sex trafficking venture. The law already absolved the government of the obligation to prove that the defendant knew the victim was a child, if it could show that the defendant had an opportunity to "observe" the victim.[17] The proposal, and now P.L. 114-22, makes it clear that the government remains absolved regardless of whether the defendant is a consumer or purveyor of a child's sexual commercial services, provided 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," (language of the proposed amendment in italics).[18]

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[11] 18 U.S.C. 1594(a).

[12] 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 (name redacted).

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

[14] *Id*. at 1071.

[15] S. 178 (Sen. Cornyn), §108(a)(1), (2), proposed 18 U.S.C. 1591(a); H.R. 181, §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); 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.

[16] P.L. 114-22, §108, 129 Stat. 239-40 (2015).

[17] *United States v. Robinson*, 702 F.3d 22, 26 (2d Cir. 2012)("[T]his provision [§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)").

[18] 18 U.S.C. 1591(c), P.L. 114-22, §108(a)(3), 129 Stat. 238-39 (2015); see also S. 178, §108(a)(3), proposed 18 U.S.C.
(continued...)

Advertisers

Section 1591 consists of two offenses: commercial sex trafficking and profiting from commercial sex trafficking. A few bills, S. 178 (Senator Cornyn), H.R. 285 (Representative Wagner), and S. 572 (Senator Kirk), for example, suggested amending §1591(a)(1) to outlaw knowingly advertising a person, knowing the victim would be used for prostitution.[19] Even before amendment, however, there was some evidence that advertising might constitute a crime under either offense. Aiding and abetting would have provided the key to prosecution in both instances. 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.[20] Liability for aiding and abetting requires that a defendant embrace the crime of another and consciously do something to contribute to its success.[21] Anyone who knowingly advertised the availability of child prostitutes might have faced charges of aiding and abetting a commercial sex trafficking offense. An advertiser who profited from such activity might face charges under the profiteering prong of §1591.

Yet §1591 might have presented a technical obstacle. One of §1591's distinctive features was that its action elements—recruiting, harboring, transporting, providing, obtaining—were activities that might be associated with aiding and abetting the operation of a prostitution enterprise. Section 1591, read literally then, did not outlaw operating a prostitution business; it outlawed 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 have qualified as aiding and abetting a violation of §1591, while advertising the availability of a prostitute might not have.

Nevertheless, at least one court suggested that §1591 did outlaw operating a prostitution business, at least for purposes of aiding and abetting liability, and thus by implication advertising might have constituted 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

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1591(c); 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); 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).

[19] E.g., S. 178, §118(b), proposed 18 U.S.C. 1591(a)(1); 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).

[20] 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").

[21] *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").

> Norman and B.L. to "outcall" appointments, and he took photographs of Norman, which he had planned for use in advertisements.[22]

P.L. 114-22 resolves the uncertainty by adding advertising to the prostitution-assisting element of the commercial sex trafficking offense.[23] The offense now reads in pertinent part:

> 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, *advertises,* or maintains by any means a person; ... 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) [language added by the amendment in italics].[24]

After amendment, the knowledge element of §1591's trafficking and profiteering offenses are slight different. Advertising traffickers are liable if they knew of or recklessly disregarded the victim's status. Advertising profiteers are liable only if they knew of the victim's status:

> Whoever knowingly- (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial 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) [language added by the amendment in italics].[25]

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.[26]

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

[23] 18 U.S.C. 1591, P.L. 114-22, §118(b), 129 Stat. 247 (2015).

[24] 18 U.S.C. 1591(a).

[25] *Id.*

[26] *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 (continued...)

Since the element was worded in the alternative—knowing or in reckless disregard of the fact—the courts have rarely distinguished the two. One possible 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."[27] The courts refer to a similar unreasonable indifference standard when speaking of the veracity required for the issuance of a warrant.[28]

Conspirators' Supervised Release

Defendants sentenced to prison for federal crimes are also sentenced to a term of supervised release.[29] Supervised release is comparable to parole. It requires a defendant upon his release from prison to honor certain conditions—such as a curfew, employment requirements and restrictions, limits on computer use, drug testing, travel restrictions, or reporting requirements—all under the watchful eye of a probation officer.[30] As a general rule, the court may impose a term of supervised release of no more than five years.[31] For several crimes involving sexual misconduct—commercial sex trafficking, for example—the term must be at least five years and may run for the lifetime of the defendant.[32]

S. 178 and a number of other bills heralded the provision in P.L. 114-22, with a proposal to add conspiracy to engage in commercial sex trafficking to the list of offenses punishable by this not-less-than-five-years-nor-more-than-life term of supervised release.[33]

Statute of Limitations

Section 1595 establishes a cause of action for victims of human trafficking.[34] The cause of action is subject to a 10-year statute of limitations.[35] S. 178 would extend the statute of limitations in

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was aware of a high probability of the fact in dispute and consciously avoided confirming that fact'").

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

[28] *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").

[29] 18 U.S.C. 3583(a).

[30] 18 U.S.C. 3583(d), 3553(a); U.S.S.G. §5D1.3.

[31] 18 U.S.C. 3583(b).

[32] 18 U.S.C. 3583(k).

[33] 18 U.S.C. 3583(k), P.L. 114-22, §114(d), 129 Stat. 242 (2015); S. 178, §114(d), proposed 18 U.S.C. 3583(k); S. 140, §2(c), proposed 18 U.S.C. 3583(k); H.R. 296, §14(d), proposed 18 U.S.C. 3583(k); H.R. 1201, §2(c), proposed 18 U.S.C. 3583(k).

[34] 18 U.S.C. 1595(a).

[35] 18 U.S.C. 1595(c).

cases in which the victim is a child. Under those circumstances, the statute of limitations is 10 years after the child reaches the age of 18 years of age.[36] P.L. 114-22 adopts the same position.[37]

Mann Act

P.L. 114-22 extends the reach of a number of the Mann Act's prohibitions to encompass activities involving child pornography. Section 2423(b) of the Mann Act outlaws travel in U.S. interstate or foreign travel with intent to engage in "illicit sexual conduct."[38] Section 2423(c) prohibits U.S. citizens or U.S. permanent resident aliens from engaging in illicit sexual conduct overseas.[39] Section 2423(d) outlaws commercially facilitating overseas travel in order to engage in illicit sexual conduct.[40] Each of the offenses is punishable by imprisonment for not more than 30 years,[41] and the same punishment attaches to any attempt or conspiracy to commit any of the three.[42]

Prior to the enactment of P.L. 114-22, §2423 defined "illicit sexual conduct" as either (1) conduct that would be sexual abuse of a child if committed in U.S. maritime or territorial jurisdiction or (2) commercial sex trafficking of a child.[43] P.L. 114-22 adds production of child pornography as an alternative third definition.[44] Thus, it is a federal crime (1) under §2423(b) to travel in U.S. interstate or foreign travel with the intent to produce child pornography; or (2) under §2423(c) for a U.S. citizen or permanent resident alien to produce child pornography overseas; or (3) under §2423(d) to commercially facilitate overseas travel in order to produce child pornography.[45]

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[36] S. 178, §120, proposed 18 U.S.C. 1595(c)(2).

[37] 18 U.S.C. 1595(c), P.L. 114-22, §120, 129 Stat. 247 (2015).

[38] 18 U.S.C. 2423(b)("A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both").

[39] 18 U.S.C. 2423(c)("Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both").

[40] 18 U.S.C. 2423(d)("Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both").

[41] 18 U.S.C. 2423(b), (c), (d).

[42] 18 U.S.C. 2423(e).

[43] 18 U.S.C. 2423(f)(2012 ed.).

[44] 18 U.S.C. 2423(f), P.L. 114-22, §111(a), 129 Stat. 240 (2015)("As used in this section, the term 'illicit sexual conduct' means—(1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age; *or (3) production of child pornography (as defined in section 2256(8))*")(language added by the amendment in italics). 18 U.S.C. 2256(8) defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."

[45] 18 U.S.C. 2423(a), (b), (c).

Defendants previously enjoyed an affirmative defense in "illicit sexual activity" cases involving commercial sex trafficking, if they could establish by a preponderance of the evidence that they reasonably believed that the victim was over 18 years of age.[46] P.L. 114-22 limits the defense to cases in which the defendant establishes the reasonableness of his belief by clear and convincing evidence.[47] The difference between preponderance of the evidence and clear and convincing is the difference between more likely than not[48] and highly probable.[49]

The final Mann Act amendment involves prosecutors. Section 2421 outlaws transporting another in interstate or foreign commerce for purposes of prostitution or other unlawful sexual activity.[50] Section 303 of P.L. 114-22 instructs the Attorney General to honor the request of a state attorney general to cross-designate a state prosecutor to handle a §2421 prosecution or to explain in detail why the request has not been honored.[51] The designated state prosecutor—or prosecutors, should the Attorney General receive requests from both the state from which, and the state into which, the victim was transported—presumably operates under the direction of the U.S. Attorney.[52]

P.L. 114-22's Mann Act amendments reflect the position taken in the earlier bills.[53]

Tax Enforcement

The Internal Revenue Code makes taxable income from any source lawful or unlawful.[54] H.R. 1311 (Representative Carolyn B. Maloney) would increase the penalties associated with various tax offenses committed by sex traffickers, and would direct the creation of an office of tax law enforcement to invest tax offenses committed by sex traffickers. The enhanced enforcement would be focused on tax offenses relating to crimes proscribed in:

- 18 U.S.C. 1351 (foreign labor contracting fraud);
- 18 U.S.C. 1589 (forced labor);

[46] 18 U.S.C. 2423(g)(2012 ed.)("In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2) [i.e., any commercial sex act (as defined in Section 1591) with a person under 18 years of age], it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years").

[47] 18 U.S.C. 2423(g), P.L. 114-22, §111(b), 129 Stat. 240 (2015). See also H.R. 296, §11(b), proposed 18 U.S.C. 2423(g); H.Rept. 113-450, at 16 (2014).

[48] *Syblis v. Attorney General of the U.S.*, 763 F.3d 348, 357 (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).

[49] *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).

[50] 18 U.S.C. 2521.

[51] 18 U.S.C. 2421(b), P.L. 114-22, §303, 129 Stat. 256 (2015).

[52] 28 U.S.C. 516, 547; see also U.S. Const. Art. II, §3; *Morrison v. Olson*, 487 U.S. 654 (1988).

[53] S. 178, §111(b), proposed 18 U.S.C. 2423(g); H.R. 181, §8, proposed 18 U.S.C. 2423(g); H.R. 296, §11(b), proposed 18 U.S.C. 2423(g); see also H.Rept. 113-450, at 16 (2014); S. 178, §303, proposed 18 U.S.C.2421(b).

[54] I.R.C. §§61, 63; 26 U.S.C. 61, 63.

- 18 U.S.C. 1590 (peonage, slavery, involuntary servitude, or forced labor trafficking);
- 18 U.S.C. 1591(a) (commercial sex trafficking);
- 18 U.S.C. 1952 (Travel Act);
- 18 U.S.C. 2421 (transporting an individual for unlawful sexual purposes);
- 18 U.S.C. 2422 (coercing or enticing travel for unlawful sexual purposes);
- 18 U.S.C. 2423(a) (transporting a child for unlawful sexual purposes);
- 18 U.S.C. 2423(d) (trafficking in travel to engage in unlawful sex with a child);
- 18 U.S.C. 2423(e) (attempting or conspiring to transport a child or to travel and engage in unlawful sex with a child);
- 8 U.S.C. 1328 (importing aliens for immoral purposes); and
- state or territorial laws prohibiting promotion of prostitution or commercial sex acts.[55]

Tax Offenses

Among other offenses, the Internal Revenue Code outlaws (1) attempting to evade or defeat a federal tax;[56] (2) willfully failing to file a return;[57] and (3) making false statements in a tax matter.[58] H.R. 1311 would increase the maximum terms of imprisonment and the maximum fines for each of these offenses when one or more of the designated sex trafficking offenses generated the income involved:[59]

[55] H.R. 1311, §2(b).

[56] I.R.C. §7201; 26 U.S.C. 7201.

[57] I.R.C. §7203; 26 U.S.C. 7203.

[58] I.R.C. §7206; 26 U.S.C. 7206.

[59] H.R. 1311, §3(a), (b), (c), proposed I.R.C. §§7201, 7203, 7206; proposed 26 U.S.C. 7201, 7203, and 7206, respectively. H.R. 1311 would also increase from not more than $25,000 to not more than $50,000 the fines for individuals, other than sex traffickers, who fail to file in violation of §7203, H.R. 1311, §3(b)(1). The 1984 Sentencing Reform Act silently amended the maximum fines for violations of §7201 and §7206, 18 U.S.C. 3551, 3571. Amendments to §7203 enacted after 1984 reestablished the fine levels noted in that section.

Tax Offense	Imprisonment: Current Law	Imprisonment: H.R. 1311	Fine: Current Law	Fine: H.R. 1311
Attempt/Conspiracy (26 U.S.C. 7201)	5 years (max.)	10 years (max.)	$250,000 (max.) / $500,000 (max.) (organizations)	$500,000 (max.) / $1 million (max.) (organizations)
Failure to file (26 U.S.C. 7203)	1 year (max.)	10 years (max.)	$25,000 (max.) / $100,000 (max.) (organizations)	$500,000 (max.) / $1 million (max.) (organizations)
False statement (26 U.S.C. 7206)	3 years (max.)	5 years (max.)	$250,000 (max.) / $500,000 (max.) (organizations)	$500,000 (max.) / $1 million (max.) (organizations)

Source: Congressional Research Service based on H.R. 1311 (114th Cong.), and 26 U.S.C. 7201, 7203, and 7206.

H.R. 1311 would also expand liability for those who provide their employees with false W2 forms and other required forms. Existing law limits employer liability for furnishing employees with a false statement to the misdemeanor provisions of §7204 and §6674.[60] H.R. 1311 would add §7201 and §7203,[61] which would increase potential liability for providing false statements to employees to imprisonment for not more than 10 years, where the misconduct involved income generated by one or more of the sex trafficking offenses.[62]

Enforcement Office

H.R. 1311 would direct the Secretary of the Treasury to create an Internal Revenue Service office specifically for the investigation and prosecution of designated sex trafficking-related tax offenses.[63] The bill anticipates that the office would work cooperatively with the Justice Department's Child Exploitation and Obscenity Section and the Federal Bureau of Investigation's Innocence Lost National Initiative.[64] The bill would authorize an appropriation of $4 million for FY2016 supplemented with an appropriation equal to the amounts collected as a consequence of its activities.[65] It would also make sex trafficking victims eligible for the whistleblower/informant rewards, which can top out at 30% of the amounts collected as a consequence of their disclosures.[66]

Victims

Crime Victims' Rights

Section 3771 provides victims of federal crimes and victims of crime under the District of Columbia Code with certain rights, including the right to confer with the prosecutor and to be

[60] I.R.C. §7204; 26 U.S.C. 7204.

[61] H.R. 1311, §3(d), proposed I.R.C. §7204; proposed 26 U.S.C. 7204.

[62] See H.R. 1311, §3(a), (b), proposed I.R.C. §§7201, 7203; proposed 26 U.S.C. 7201 and 7203.

[63] H.R. 1311, §2(a).

[64] H.R. 1311, §2(c).

[65] H.R. 1311, §2(f).

[66] H.R. 1311, §2(e); I.R.C. §7623; 26 U.S.C. 7623.

heard at public proceedings concerning pleas and sentencing in the case.[67] The rights are reinforced by a right to notice from federal officials of available services.[68] Victims may appeal a failure to honor their rights by seeking a writ of mandamus, and the appellate court must decide the matter within three days (72 hours), or in the case of a stay or continuance within five days.[69]

Most often, mandamus is an extraordinary remedy awarded only on rare occasions and only if at least three prerequisites can be satisfied. "First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires.... Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the

[67] The full litany of rights consists of "(1) The right to be reasonably protected from the accused. (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. (5) The reasonable right to confer with the attorney for the Government in the case. (6) The right to full and timely restitution as provided in law. (7) The right to proceedings free from unreasonable delay. (8) The right to be treated with fairness and with respect for the victim's dignity and privacy," 18 U.S.C. 3771(a).

[68] 42 U.S.C. 10607(c)("(1) A responsible official shall- (A) inform a victim of the place where the victim may receive emergency medical and social services; (B) inform a victim of any restitution or other relief to which the victim may be entitled under this or any other law and manner in which such relief may be obtained; (C) inform a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim; and (D) assist a victim in contacting the persons who are responsible for providing the services and relief described in subparagraphs (A), (B), and (C).

"(2) A responsible official shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender.

"(3) During the investigation and prosecution of a crime, a responsible official shall provide a victim the earliest possible notice of- (A) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation; (B) the arrest of a suspected offender; (C) the filing of charges against a suspected offender; (D) the scheduling of each court proceeding that the witness is either required to attend or, under section 10606(b)(4) of this title, is entitled to attend; (E) the release or detention status of an offender or suspected offender; (F) the acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial; and (G) the sentence imposed on an offender, including the date on which the offender will be eligible for parole.

"(4) During court proceedings, a responsible official shall ensure that a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defense witnesses.

"(5) After trial, a responsible official shall provide a victim the earliest possible notice of- (A) the scheduling of a parole hearing for the offender; (B) the escape, work release, furlough, or any other form of release from custody of the offender; and (C) the death of the offender, if the offender dies while in custody.

"(6) At all times, a responsible official shall ensure that any property of a victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes.

"(7) The Attorney General or the head of another department or agency that conducts an investigation of a sexual assault shall pay, either directly or by reimbursement of payment by the victim, the cost of a physical examination of the victim which an investigating officer determines was necessary or useful for evidentiary purposes. The Attorney General shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. A victim may waive anonymity and confidentiality of any tests paid for under this section.
"(8) A responsible official shall provide the victim with general information regarding the corrections process, including information about work release, furlough, probation, and eligibility for each").

[69] 18 U.S.C. 3771(d)(3).

first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[70]

The federal appellate courts, however, cannot agree on whether this stringent traditional mandamus standard or the usual appellate standard (abuse of discretion or legal error) should apply in Crime Victims' Rights Act appeals.[71]

P.L. 114-22 resolves the dispute in favor of the less demanding abuse of discretion or legal error standard used for most appeals.[72] It allows the parties to extend the three-day deadline for the appellate court to take up the petition for a writ of mandamus, but not the five-day limitation on stays or continuances in appellate mandamus cases concerning victims' rights.[73] Finally, P.L. 114-22 creates two new additional rights—the right to timely notice of a plea bargain or deferred prosecution agreement and the right to be informed of the rights under the Crime Victims' Rights Act and the benefits under the Victims' Rights and Restitution Act.[74] The House committee report indicates that the amendment was designed to "clarif[y] Congress' intent that crime victims be notified of plea agreements or deferred prosecution agreements, including those that may take place prior to a formal charge."[75]

Here, too, in its victims' rights treatment, P.L. 114-22 follows the path laid out in earlier bills.[76]

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[70] *Cheney v. U.S. District Court*, 542 U.S. 367, 380-81 (2004)(internal citations and quotation marks omitted); *In re Rolls Royce Corp.*, 775 F.3d 671, 675 (5th Cir. 2014); *Linder v. Union Pacific Railroad Co.*, 762 F.3d 568, 572 (7th Cir. 2014); see also *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1082 (9th Cir. 2014)("This court considers the following five factors in determining whether mandamus relief is appropriate: (1) whether the petition has no other means to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression").

[71] *In re Wellcare Health Plans, Inc.,* 754 F.3d 1234, 1238 (11th Cir. 2014)("[T]he tradition mandamus standard of review applies to petitions for writs of mandamus filed pursuant to the CVRA "), citing in accord, *United States v. Monzel*, 641 F.3d 528, 533 (D.C.Cir. 2011); *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010); *In re Antrobus*, 519 F.3d 1123, 1127-130 (10th Cir. 2008); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); contra, *In re Stake Center Locating, Inc.,* 731 F.3d 949, 951 (9th Cir. 2013)("In reviewing a CVRA mandamus petition, we ... must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error"); *In re Huff Asset Management Co.*, 409 F.3d 555, 563-64 (2d Cir. 2005)(abuse of discretion standard).

[72] 18 U.S.C. 3771(d)(3), P.L. 114-22, §113(c), 129 Stat. 241 (2015). Several other bills featured a comparable proposal; see, e.g., S. 140, §6(b), proposed 18 U.S.C. 3771(d)(3); S. 140, §6(b), proposed 18 U.S.C. 3771(d)(3); H.R. 296, §13(c)(1), proposed 18 U.S.C. 3771(d)(3).

[73] 18 U.S.C. 3771(d)(3), P.L. 114-22, §113(a)(2), 129 Stat. 240 (2015).

[74] 18 U.S.C. 3771(a)(9), (10), P.L. 114-22, §113(a)(1), 129 Stat. 240 (2015)("(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement. (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice").

[75] H.Rept. 114-7, at 7 (2015).

[76] S. 178, §113(c), proposed 18 U.S.C. 3771(d)(3); H.R. 181, §10(b), proposed 18 U.S.C. 3771(d)(3); S. 140, §6(b), proposed 18 U.S.C. 3771(d)(3); S. 140, §6(b), proposed 18 U.S.C. 3771(d)(3); H.R. 296, §13(c)(1), proposed 18 U.S.C. 3771(d)(3); S. 178, §113(a)(2), proposed 18 U.S.C. 3771(d)(3); H.R. 181, §10(a)(2), proposed 18 U.S.C. 3771(d)(3); H.R. 296, §13(a)(2), proposed 18 U.S.C. 3771(d)(3); S. 178, §113(a)(1), proposed 18 U.S.C. 3771(a)(9), (10); H.R. 181, §10(a)(1), proposed 18 U.S.C. 3771(a)(9), (10); H.R. 296, §13(a)(1), proposed 18 U.S.C. 3771(a)(9), (10).

Special Assessments

Federal criminal convictions come with a special assessment ranging from $5 to $100 for individuals and from $25 to $400 for organizations, depending on the seriousness of the offense.[77] Receipts are deposited in the Crime Victims Fund and used for victims' assistance and compensation.[78]

P.L. 114-22 establishes a second Fund, the Domestic Trafficking Victims Fund, and second special assessment, this one for $5,000 directed to the Fund for the assistance and compensation of victims of trafficking and sexual abuse.[79] The assessment is imposed on those convicted offenses under:

- 18 U.S.C. ch. 77 (peonage, slavery, and human trafficking);
- 18 U.S.C. ch. 109A (sexual abuse in U.S. special maritime and territorial jurisdiction);
- 18 U.S.C. ch. 110 (child pornography);
- 18 U.S.C. ch. 177 (interstate or foreign transportation for unlawful sexual purposes); or
- 8 U.S.C. 1324 (smuggling aliens other than immediate family members).[80]

The Fund is to receive two types of transfers. The first is to be a transfer from the general fund of the Treasury in amounts equal to those collected from these assessments.[81] These transferred amounts are to be appropriate and made available to the Attorney General, in coordination with the Secretary of Health and Human Services, through FY2019 for the services and benefits (other than health care services and benefits) under:

- 42 U.S.C. 14044c (grants for enhanced state and local anti-trafficking enforcement);
- 42 U.S.C. 13002(b)(grants for child advocacy centers);
- 22 U.S.C. 7105(b)(2)(grants to state, tribes, and local governments to enhance trafficking;
- victims' services); and
- 22 U.S.C. 7105(f)(assistance for U.S. victims of severe forms of trafficking).[82]

The second transfer is to be from appropriations under the Patient Protection and Affordable Care Act, as amended, in amounts equal to those generated by the special assessments, but not less than $5 million or more than $30 million per fiscal year.[83] The amounts are also to be available to

[77] 18 U.S.C. 3013.

[78] 42 U.S.C. 10601(b)(2), (d).

[79] 18 U.S.C. 3014, P.L. 114-22, §101, 129 Stat. 228-29 (2015).

[80] 18 U.S.C. 3014(a), P.L. 114-22, §101(a), 129 Stat. 228-29 (2015).

[81] S. 178, §101(a), proposed 18 U.S.C. 3014(d).

[82] 18 U.S.C. 3014(e), P.L. 114-22, §101(a), 129 Stat. 229 (2015).

[83] 18 U.S.C. 3014(h), P.L. 1145-22, §101(a), 129 Stat. 230 (2015).

the Attorney General, in coordination with the Secretary of Health and Human Services, for health care services under:

- 42 U.S.C. 14044a (grants for trafficking victims' assistance programs);
- 42 U.S.C. 14044b (residential treatment for victims of child trafficking);
- 42 U.S.C. 14044c (grants for enhanced state and local anti-trafficking enforcement);
- 42 U.S.C. 13002(b)(grants for child advocacy centers);
- 22 U.S.C. 7105(b)(2)(grants to state, tribes, and local governments to enhance trafficking;
- victims' services); and
- 22 U.S.C. 7105(f)(assistance for U.S. victims of severe forms of trafficking).[84]

Forfeiture

Forfeiture is the confiscation of property based on its proximity to a criminal offense.[85] Confiscation may be accomplished either as a consequence of the property owner's conviction (criminal forfeiture) or in a civil proceeding conducted against the property in rem (civil forfeiture).[86] In either case, the proceeds from most federal forfeitures are deposited either in the Justice Department's Asset Forfeiture Fund or the Department of the Treasury's Forfeiture Fund, and are available for law enforcement purposes.[87]

The forfeiture-triggering relationship between property and confiscation varies from one crime to another. Forfeitures relating to financial crimes sometimes apply to property "involved in" the offense. For example, property "involved in" a money laundering transaction is subject to confiscation.[88] In the case of human trafficking, property that constitutes the proceeds from, that was used, or that was intended for use, to commit or facilitate, a trafficking offense is subject to criminal and civil forfeiture.[89] As S. 178 and H.R. 296 suggested,[90] P.L. 114-22 makes property "involved in" or proceeds "traceable to" a trafficking offense subject to criminal and civil forfeiture as well.[91]

Defendants convicted of human trafficking offenses must be ordered to pay victim restitution.[92] As a general rule, the Attorney General may transfer forfeited property to pay victim restitution.[93]

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[84] *Id.*

[85] See, generally, CRS Report 97-139, *Crime and Forfeiture*, by (name redacted).

[86] E.g., 18 U.S.C. 981, 982, 983.

[87] 28 U.S.C. 524(c) and 31 U.S.C. 9703, respectively.

[88] 18 U.S.C. 981(a)(1)(A), 982(a)(1).

[89] 18 U.S.C. 1594(d), (e).

[90] S. 178, §105(a)(1), (2), proposed 18 U.S.C. 1594(d), (e); H.R. 296, §6(a)(1), (2), proposed 18 U.S.C. 1594(d), (e).

[91] 18 U.S.C. 1594(d), (e), P.L. 114-22, §105(a), 129 Stat. 236 (2015).

[92] 18 U.S.C. 1593(a).

[93] 18 U.S.C. 981(e)(6), 982(b)(1); 21 U.S.C. 853(*i*)(i).

S. 178 and H.R. 296 proposed, and P.L. 114-22 requires, such a transfer, without reducing or mitigating the defendant's restitution obligations.[94]

Subject to annual appropriations, the Attorney General may use the Justice Department Asset Forfeiture Fund for informants' fees in drug and money laundering cases.[95] The Secretary of the Treasury enjoys comparable authority with respect to the Treasury Fund, although apparently without the need for annual appropriations.[96] P.L. 114-22, as S. 178 and H.R. 296 proposed, expands the authority to include access to the Justice Department Fund for informants' fees in human trafficking cases,[97] and to the Department of the Treasury Fund for informants' fees paid by Immigration and Customs Enforcement in human trafficking cases.[98]

Bail

Existing federal law states that an individual charged with a federal offense should be released on his own recognizance, unless the magistrate is convinced that certain conditions must be imposed to insure individual or community safety or to insure the appearance of the accused at subsequent judicial proceedings.[99] The government may seek pretrial detention of an accused charged with a crime of violence, a federal crime of terrorism, or with commercial sex trafficking.[100] H.R. 296, S. 178, and ultimately P.L. 114-22 amended the definition of "a crime of violence" for these purposes to include any of the human trafficking offenses.[101]

Wiretapping Authority

In the investigation of certain serious federal and state crimes, the Electronic Communications Privacy Act, sometimes referred to in part as Title III, authorizes federal and state law enforcement officials to engage in court-supervised surreptitious interception of telephone, face-to-face, or electronic communications.[102] The list of these federal crimes includes commercial sex trafficking (18 U.S.C. 1591), but not the other offenses outlawed in the slavery, peonage, and forced labor chapter of the federal criminal code.[103] The list of state crimes includes murder, robbery, kidnaping, etc., but not prostitution or human trafficking.[104]

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[94] 18 U.S.C. 1954(f), P.L. 114-22, §105(a)(4), 129 Stat. 236 (2015); S. 178, §105(a)(4), proposed 18 U.S.C. 1594(f); H.R. 296, §6(a)(4), proposed 18 U.S.C. 1594(f).

[95] 28 U.S.C. 524(c)(1).

[96] 31 U.S.C. 9703(a)(2)(B).

[97] 28 U.S.C. 524(c)(1), P.L. 114-22, §105(b), 129 Stat. 237 (2015); S. 178, §105(b), proposed 28 U.S.C. 524(c)(1); H.R. 296, §6(b), proposed 28 U.S.C. 524(c)(1).

[98] 31 U.S.C. 9705(a)(2)(B)(v), P.L. 114-22, §105(c), 129 Stat. 237 (2015); S. 178, §105(c), proposed 31 U.S.C. 9705(a)(2)(B)(v); H.R. 296, §6(c), proposed 31 U.S.C. 9705(a)(2)(B)(v).

[99] 18 U.S.C. 3142(a), (b), (c).

[100] 18 U.S.C. 3142(e), (f).

[101] 18 U.S.C. 3156(a)(4)(C), P.L. 114-22, §112, 129 Stat. 240 (2015); S. 178, §112, proposed 18 U.S.C. 3156(a)(4)(C); H.R. 296, §12, proposed 18 U.S.C. 3156(a)(4)(C).

[102] 18 U.S.C. 2510 et seq.

[103] 18 U.S.C. 2516(1).

[104] 18 U.S.C. 2516(2).

P.L. 114-22, as proposed in S. 178 and H.R. 181, permits federal court-ordered interceptions in connection with investigations involving peonage (18 U.S.C. 1581 (peonage), 1584 (involuntary servitude), 1589 (forced labor), and 1592 (trafficking-related document misconduct)).[105] It also permits state prosecutors to engage in state court-supervised interceptions in cases of human trafficking, child pornography production, and child sexual exploitation to the extent that state law permits.[106]

Sex Offender Registration

The federal Sex Offender Registration and Notification Act (SORNA), as the name implies, requires individuals convicted of a federal, state, tribal, foreign, or military sex offense to register with, and continue to provide current information to, state or tribal authorities (jurisdictions) in any location in which they live, work, or attend school.[107] The reporting obligations apply to those convicted of qualifying sex offenses either before or after the enactment of SORNA.[108] SORNA accomplishes its notification goal through the creation of a system which affords public online access to state and tribal registration information.[109] The system allows the public to determine either where a particular sex offender lives, works, and attends school, or the names and location of sex offenders who live, work, or attend school within a particular area.[110] SORNA requires jurisdictions to satisfy minimum standards for the information they collect and maintain.[111]

Section 114 of SORNA requires registrants to provide (1) their name and any alias; their Social Security number; (2) their place of residence; (3) the name and address of their employer; (4) the name and address of any school they are attending; (5) the description and license plate number of any vehicle they own or operate; and (6) any other information the Attorney General requires.[112]

Section 114 requires jurisdictions to include within their registries (1) a physical description of the offender; (2) the text of the statute defining the crime which requires the offender to register; (3) the offender's criminal history; (4) a current photograph of the offender; (5) a set of the

[105] 18 U.S.C. 2516, P.L. 114-22 §106, 129 Stat. 238 (2015).

[106] *Id.* See also H.Rept. 114-7, at 6 (2015)("State courts have struggled with whether human trafficking and prostitution investigations provide evidence of one of the listed classes of offenses, which in some cases has precluded state human trafficking task forces from obtaining wiretaps in these critical cases"). The proposal appeared in various other proposals; see, e.g., S. 178, §106(2), proposed 18 U.S.C. 2516(2); S. 140, §5(2), proposed 18 U.S.C. 2516(2); H.R. 181, §4(2), proposed 18 U.S.C. 2516(2); H.R. 296, §4(2), proposed 18 U.S.C. 2516(2); H.R. 1201, §5(2), proposed 18 U.S.C. 2516(2).

[107] 42 U.S.C. 16913(a). SORNA defines the term jurisdiction "to mean any of the following: (A) A State. (B) The District of Columbia. C) The Commonwealth of Puerto Rico. (D) Guam. (E) American Samoa. (F) The Northern Mariana Islands. (G) The United States Virgin Islands. (H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe," 42 U.S.C. 16911(10). For a general discussion of SORNA, see CRS Report R43954, *Federal Involvement in Sex Offender Registration and Notification: Overview and Issues for Congress, In Brief*, by (name redacted), and CRS Report R42692, *Failure to Register as a Sex Offender: A Legal Analysis of 18 U.S.C. 2250*, by (name redacted).

[108] 42 U.S.C. 16913(d); 73 *Federal Register* 81849 (December 28, 2010).

[109] 42 U.S.C. 16918, 16920(b).

[110] *Id.*

[111] 42 U.S.C. 16912.

[112] 42 U.S.C. 16914(a).

offender's fingerprints; (6) a sample of the offender's DNA; (7) a copy of the offender's driver's license or other identification card; and (8) any other information the Attorney General requires.[113]

As previously proposed in S. 178 (Senator Cornyn), S. 409 (Senator Burr), and H.R. 956 (Representative Speier), P.L. 114-22 directs the Secretary of Defense to provide the Attorney General with information described in §114 relating to military sex offenders whom SORNA requires to register with state or tribal authorities.[114] The requirement would presumably apply to those convicted of registration-requiring offenses both before and after the enactment of SORNA.[115]

H.R. 956 (Representative Speier) would further amend SORNA to increase the role of the Department of Defense (DOD) by establishing a separate sex offender registry. Military sex offenders, who are obligated to maintain current registration information with state or tribal authorities any place where they live, work, or attend school, would also be required to register with the Secretary of Defense upon their release from custody or entry into the United States. The proposal makes no explicit provision for military sex offenders convicted prior to the enactment of SORNA.

SORNA requires states and certain tribes to maintain a jurisdiction-wide sex offender registry that meets SORNA requirements.[116] H.R. 956 would impose the same obligation on the Secretary of Defense,[117] but without the fiscal sanctions which attend a state's failure to comply.[118] In addition to the demand to register where they live, work, or attend school, sex offenders being released from custody must also register with the jurisdiction in which they were convicted.[119] H.R. 956 would require military sex offenders to register upon release in addition with the Secretary of Defense.[120]

H.R. 956, like S. 178 and S. 409, would require the Secretary of Defense to include the same information within his registry regarding a recently released sex offender that states and tribes are required to capture: physical description of the sex offender; text of the law proscribing the conduct for which the sex offender was convicted; the sex offender's criminal history; fingerprints, a DNA sample, and a photograph of the sex offender; a copy of the offender's driver's license or other official identification of the sex offender; and any additional information required by the Attorney General.[121]

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[113] 42 U.S.C. 16914(b).

[114] 42 U.S.C. 16928A, P.L. 114-22, §502, 129 Stat. 258 (2015); see also S. 178, §502(a), proposed 42 U.S.C. 16928A; S. 409, §2, proposed 42 U.S.C. 16928A.

[115] Cf., 42 U.S.C. 16913(d); 73 *Federal Register* 81849 (December 28, 2010).

[116] 42 U.S.C. 16912.

[117] H.R. 956, §3, proposed 42 U.S.C. 16912(a), which after amendment would read "Each jurisdiction*, and, for military offenders, the Secretary of Defense (including any military offender serving in the Coast Guard, without regard to the department in which the Coast Guard is operating)*, shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter." (Language that H.R. 956 would add in italics.)

[118] Jurisdictions that fail to comply with SORNA's requirements are subject to a 10% reduction of federal law enforcement assistance funds, 42 U.S.C. 16925(a).

[119] 42 U.S.C. 16913(a).

[120] H.R. 956, §4(a), proposed 42 U.S.C. 16913(a).

[121] H.R. 956, §4(b), proposed 42 U.S.C. 16914(b); S. 409, §2, proposed 42 U.S.C. 16928A.

The Secretary would have to make this information publicly available online,[122] and would be required to report the information to the Attorney General, appropriate law enforcement, and educational, public housing, social service officials, as well as assorted related public and private entities.[123] The Attorney General would be required to include the information in the national registry and to forward updated information received from various jurisdictions relating to a military sex offender to the Secretary of Defense.[124] The national registry would be required to include military sex offender information available on the Secretary's website.[125]

SORNA mandates that "appropriate officials" and "appropriate law enforcement agencies" take action when a sex offender fails to comply with the requirements of a state or tribal registry.[126] H.R. 956 would establish a comparable command for action when a military sex offender fails to comply with the requirements of the DOD registry.[127] It is unclear whether the amendment is intended to expand the terms "appropriate official" and "appropriate law enforcement agencies" to encompass DOD officials and law enforcement agencies, giving them authority over discharged military sex offenders over whom they would otherwise have no jurisdiction.

SORNA obligates the Attorney General to develop and support the computer software necessary for jurisdictions to comply with SORNA's standards.[128] H.R. 956 would enlarge the obligation to enable establishment and maintenance of a DOD registry.[129]

Finally, H.R. 956 would require military sex offenders entering the United States to register with the Secretary of Defense.[130]

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[122] H.R. 956, §4(c), proposed 42 U.S.C. 16918.

[123] H.R. 956, §4(f), proposed 42 U.S.C. 16921(b).

[124] H.R. 956, §4(d), proposed 42 U.S.C. 16919(a), (b).

[125] H.R. 956, §4(e), proposed 42 U.S.C. 16920(b).

[126] 42 U.S.C. 16922.

[127] H.R. 956, §4(g), proposed 42 U.S.C. 16922, which after amendment would read "An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry *(and, in the case of military offenders, the registry of the Secretary of Defense)* to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance." (Language that H.R. 956 would add in italics.)

[128] 42 U.S.C. 16923.

[129] H.R. 956, §4(h), proposed 42 U.S.C. 16923.

[130] H.R. 956, §4(*i*), proposed 42 U.S.C. 16928.