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# Sentencing Reform: Comparison of Selected Proposals

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# Summary

This is a comparison of selected criminal sentencing reform bills as introduced: H.R. 3713, H.R. 2944, S. 502, and H.R. 920; and S. 2123 as passed by the Senate Judiciary Committee with a manager's amendment. It consists of narrative and charts comparing the bills with respect to adjustments in the mandatory minimum sentencing provisions that apply to controlled substance and firearms offenses, the safety valve, and retroactive application of the Fair Sentencing Act (FSA).

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# Introduction

Within a week of each other, Senator Grassley and Representative Goodlatte, respective 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. The differences between S. 2123 and H.R. 3713, occasioned by the manager's amendment adopted before the Senate Judiciary Committee passed S. 2123, are noted in the prefatory remarks for each chart, and in the remarks relating to the inventory of federal crimes. The subjects of their proposals appear in earlier proposals including (1) H.R. 2944, which Representatives Sensenbrenner and Scott, the chairman and ranking minority Member of the House Judiciary Committee's crime subcommittee, respectively, introduced for themselves and others, and (2) S. 502/H.R. 920, introduced by Senator Lee and Representative Labrador with additional bipartisan cosponsors. Their common components notwithstanding, the bills have some varying features.

# 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.[2] Trafficking—that is, importing, exporting, or manufacturing, growing, 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.[3] 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.[4]

[1] S. 2123, H.R. 3713.

[2] Portions of this report have been borrowed from earlier reports on mandatory minimum sentencing by (name redacted).

[3] 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).

[4] 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2). The threshold amounts for the substances in §841(b)(1)(A) are 10 times the threshold amounts for those in §841(b)(1)(B), e.g., for heroin, 1,000 grams (1 kilogram) v.100 grams. The same ratio applies in the case of exporting or importing these substances, §§960(b)(1), 960(b)(2).

Penalties for both sets of offenses increase if the crime results in a death or if the defendant has a prior conviction for a drug felony.[5]

The proposed amendments are noted and compared in **Table 1**. S. 502/H.R. 920 would reduce the mandatory minimum for the high volume §841(b)(1)(A) and §960(b)(1) offenses to imprisonment for not less than 5 years from not less than 10 years, and the mandatory minimums for the medium volume §841(b)(1)(B) and §960(b)(1) offenses to not less than 2 years from not less than 5 years.[6]

H.R. 2944 would eliminate the mandatory minimum for the high volume §841(b)(1)(A) and §960(b)(1) offenses, except when the defendant was the organizer or leader of a 5 member or more drug enterprise. It would eliminate as well the mandatory minimum for the medium volume §841(b)(1)(B) and §960(b)(2) offenses, except when the defendant was the organizer, leader, manager, or supervisor of a 5 or more member drug enterprise.[7] Moreover, the recidivist enhancement would only come into play when the prior conviction for an offense carrying a maximum penalty of imprisonment for 10 years or more; resulting in a sentence of imprisonment for 13 months or more; and from which the defendant had been released within 10 years of the commission of the subsequent drug offense.[8] H.R. 2944 would allow the court to treat each of its amendments, here and throughout the course of the bill, as grounds for reduced sentencing, on the motion of the court, the defendant, the prosecutor, or the Bureau of Prisons.[9]

S. 2123/H.R. 3713 would create a mini-safety valve to reduce the mandatory minimum for the high volume §841(b)(1)(A) and §960(b)(1) offenses to imprisonment for not less than 5 years, unless the offender had used violence in the commission of the offense; had acted as a supervisor or leader of a drug enterprise; sold to minors; failed to fully reveal all the information or evidence at his disposal relating to the offense or related offenses; and had no prior serious drug or violent felony convictions.[10]

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[5] 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2).

[6] S. 502/H.R. 920, §4(a)(2)(A)(i), 4(b)(1)(C), proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), (960(b)(2).

[7] H.R. 2944, §401(a), 4(c), proposed 21 U.S.C. 841(i), 960(e).

[8] H.R. 2944, §403(a), (b), proposed 21 U.S.C. 802(44), (57).

[9] H.R. 2944, §405, proposed 18 U.S.C. 3582(c)(3)(''[I]n the case of a defendant who was sentenced to a term of imprisonment for an offense for which the minimum or maximum term of imprisonment was subsequently reduced as a result of the amendments made by the Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, upon motion of the defendant, counsel for the defendant, counsel for the Government, or the Director of the Bureau of Prisons, or, on its own motion, the court may reduce the term of imprisonment consistent with that reduction, after considering the factors set forth in subsections (a) and (d) through (g) of section 3553 to the extent applicable. If the court does grant a sentence reduction, the reduced sentence shall not be less than permitted under current statutory law. If the court denies a motion made under this paragraph, the movant may file another motion under this subsection, not earlier than 5 years after each denial, which may be granted if the offender demonstrates the offender's compliance with recidivism-reduction programming or other efforts the offender has undertaken to improve the likelihood of successful re-entry and decrease any risk to public safety posed by the defendant's release'').

[10] S. 2123, §103(a)/H.R. 3713, §4(a), proposed 18 U.S.C. 3553(i). A "serious drug felony" would be a state or federal offense for which the maximum penalty is imprisonment for not more than 10 years and which resulted in a sentence of imprisonment for more than 1 year. A "serious violent felony" is an offense which resulted in a sentence of imprisonment for more than 1 year and is either an assault as described in 18 U.S.C. 113 or an offense described in 18 U.S.C. 3559(c)(2)(F). Under 18 U.S.C. 3559(c)(2)(F), "'serious violent felony' means - (i) a 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); ... 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 (continued...)

S. 2123/H.R. 3713 would both expand and contract drug recidivist mandatory minimums under the high volume and medium §§841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2) offenses. Under existing law, any prior drug felony conviction triggers the enhanced recidivist mandatory minimum.[11] Under S. 2123/H.R. 3713, only drug convictions carrying a maximum penalty of 10 years or more and resulting in a sentence of a year or more would trigger the increased recidivist mandatory minimums.[12] On the other hand, convictions for kidnapping, burglary, arson or other serious violent crimes would also serve as a basis for the recidivist mandatory minimums.[13]

The bills would allow the courts, on their own motion or that of the defendant or the Bureau of Prisons, to resentence defendants, convicted prior to S. 2123/H.R. 3713's enactment, as though the bills' reduced recidivist mandatory minimums were in place at the time of prior sentencing. In doing so, the courts would be compelled to consider: the nature and seriousness of the risks to an individual or the community; the defendant's conduct following his initial sentencing; and the statutory sentencing factors which they must ordinarily weigh before imposing punishment.[14]

S. 2123, but not H.R. 3713, would make it clear that resentencing proceedings would be subject to the victims' rights provisions of 18 U.S.C. 3771, and that an inquiry into facts and circumstances associated with the initial sentencing would be a prerequisite to consideration of a resentencing motion.[15] Section 3771 assures victims of the rights "to reasonable, accurate, and timely notice of any public court proceeding, involving the crime ..." and "to the right to be reasonably heard at any public proceeding in the district court involving ... sentencing ..."[16]

H.R. 3713, but not S. 2123, would insist on a sentence of imprisonment for not more than 5 years to be added to, and to be served after, any sentence imposed for the drug trafficking, exporting, or importing offenses, when heroin or fentanyl are involved.[17]

In addition, H.R. 2944 provides that no person shall be sentenced to enhanced punishment under the Controlled Substances Act if the conviction was for possession of a controlled substance, was classified as a misdemeanor in the relevant jurisdiction, or the conviction has been set aside.[18] Further, the government bears the burden of proof in proving beyond a reasonable doubt the existence of the prior conviction.[19]

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(...continued)

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."

[11] 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 802(44).

[12] S. 2123, §101(a)(1), (2), 101(b)(1), (2)/H.R. 3713, §2(a)(1), (2), 2(b)(1),(2); proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2), 802(57).

[13] S. 2123, §101(a)(1), (2), 101(b)(1), (2)/H.R. 3713, §2(a)(1), (2), 2(b)(1),(2); proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2), 802(58).

[14] S. 2123, §101(c)(2), H.R. 3713, §2(c)(2). H.R. 3713 alone would preclude retroactive application where the prior offense is a serious violent felony. It is unclear what impact this would have since the bills make serious violent felonies trigger offenses when they would have been when the pre-bill sentence was imposed.

[15] S. 2123, §101(c)(2).

[16] 18 U.S.C. 3771(a)(2), (4).

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

[18] H.R. 2944 §403(f).

[19] H.R. 2944 §403(f).

**Table 1. Mandatory Minimum Terms of Imprisonment: Controlled Substances**

| Offense | Present Law | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| I. Trafficking: §841(b)(1)(A)/ §960(b)(1) substances (e.g., 1 kilo + of heroin) | not less than 10 years or more than life | not less than 10 years or more than life<br>but not less than 5 years if: nonviolent; low-level; all info to gov't; no sale to minors; no serious drug/violent felony priors<br>H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | not less than 10 years or more than life (mandatory minimum applies only if leader of 5 or more) [retroactive] | not less than 5 years or more than life |
| if death or serious injury results | not less than 20 years or more than life | H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | not less than 20 years or more than life(mandatory minimum applies only if leader of 5 or more) [retroactive] | no change |
| with one prior felony drug conviction | not less than 20 years or more than life | not less than 15 years or more than life only if prior is serious drug/violent felony [retroactive]<br>H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | not less than 20 years or more than life - if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more (mandatory minimum applies only if leader of 5 or more) [retroactive] | not less than 10 years or more than life |
| with one prior felony drug conviction and death or serious injury results | life | no change | life - if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more (mandatory minimum applies only if leader of 5 or more) [retroactive] | no change |
| with two or more prior felony drug convictions | life | not less than 25 years or more than life only if priors are serious drug/violent felony [retroactive] | life- if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more (mandatory minimum applies only if leader of 5 or more) [retroactive] | not less than 25 years |

| Offense | Present Law | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| II. Trafficking: §841(b)(1)(B)/§960(b)(2) substance (e.g., 100g + of heroin) | not less than 5 years or more than 40 years | H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | not less than 5 years or more than 40 years (mandatory minimum applies only if the leader or supervisor of 5 or more) [retroactive] | not less than 2 years or more than 40 years |
| if death or serious injury results | not less than 20 years or more than life | H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | not less than 20 years or more than life (mandatory minimum applies only if the leader or supervisor of 5 or more) [retroactive] | no change |
| with one prior felony drug conviction | not less than 10 years or more than life | not less 10 years or more than life only if prior is serious drug/violent felony [retroactive]<br>H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | not less than 10 years or more than life if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more (mandatory minimum applies only if the leader or supervisor of 5 or more) [retroactive] | not less than 5 years or more than life |
| with one prior felony drug conviction and death or serious injury results | life | no change | if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more (mandatory minimum applies only if the leader or supervisor of 5 or more) [retroactive] | no change |
| III. Trafficking: §841(b)(1)(C)/ §960(b)(3), except per (b)(1)(A), (B), or (D), sch. I or II drugs, GHB, or 1 gram of Rohypnol | not more than 20 years | H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | only if type and quantity of (b)(1)(A) or (B) substances and part of 5 or more member trafficking group but not a leader or supervisor | no change |
| if death or serious injury results | not less than 20 years or more than life | H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | only if type and quantity of (b)(1)(A) or (B) substances and part of 5 or more member trafficking group but not a leader or supervisor [retroactive] | no change |

| Offense | Present Law | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| with one prior felony drug conviction | not more than 30 years | H.R. 3713 only: add consecutive sentence of not more than 5 years if heroin or fentanyl | if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more and only if type and quantity of (b)(1)(A) or (B) substances and part of 5 or more member trafficking group but not a leader or supervisor [retroactive] | no change |
| with one prior felony drug conviction and if death or serious injury results | life | no change | if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more and only if type and quantity of (b)(1)(A) or (B) substances and part of 5 or more member trafficking group but not a leader or supervisor [retroactive] | no change |
| IV. Trafficking: §841(b)(1)(D)/ §960(b)(4), 50 kilo. or less of marijuana or 10 kilo. of hashish | not more than 5 years | no change | only if type and quantity of (b)(1)(A) or (B) substances and part of 5 or more member trafficking group but not a leader or supervisor [retroactive] | no change |
| with one prior felony drug conviction | not more than 10 years | no change | if prior committed w/i 10 years; penalty for prior was 10 years or more; prior resulted in imprisonment for 13 months or more and only if type and quantity of (b)(1)(A) or (B) substances and part of 5 or more member trafficking group but not a leader or supervisor [retroactive] | no change |

**Source:** CRS from S. 2123, H.R. 3713, H.R. 2944, S. 502, and H.R. 920.

## 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.[20] To qualify, a defendant may not have used violence in the course of the offense.[21] He must not have played a managerial role in the offense if it involved group participation.[22] The offense must not have resulted in a death or serious bodily injury.[23] The defendant must make full disclosure of his involvement in the offense, providing the government with all the information and evidence at his disposal.[24] Finally, the defendant must have an almost spotless criminal record, that is, not more than 1 criminal history point.[25]

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.[26]

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.[27] 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."[28] 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.[29] In addition, the drug offenses have escalated mandatory

[20] 18 U.S.C. 3553(f)(" Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation ..."). See, generally, CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by (name redacted)

[21] 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").

[22] 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").

[23] 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").

[24] 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").

[25] 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").

[26] U.S.S.G. §4A1.1.

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

[28] *Id.* at 352.

[29] *Id.*

minimums for repeat offenders.[30] 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.[31]

S. 502/H.R. 920 would raise the qualification threshold to 3 criminal history points from 1 criminal history point and make no further changes.[32]

H.R. 2944 would expand the safety valve to mandatory minimums associated with the use of firearm during and in furtherance of a drug trafficking cases as well as to drug trafficking mandatory minimums.[33] The bill would also raise the criminal history point threshold to 3 as long as the defendant's prior criminal record did not consist of convictions for violence, firearms, racketeering, terrorism, or sex offenses.[34] H.R. 2944 would also discount convictions that were the product of a reduced, distressed, or coerced state of mind.[35]

S. 2123 and H.R. 3713 would change the safety valve as well. First, a defendant would be safety valve eligible with 3 or fewer criminal history points if he 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).[36]

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.[37]

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[30] *Id.*

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

[32] S. 502/H.R. 920, §2, proposed 18 U.S.C. 3553(f)(1).

[33] H.R. 2944, §402(a)(1), proposed 18 U.S.C. 3553(f).

[34] H.R. 2944, §402(a)(2); proposed 18 U.S.C. 3553(f)(1)(A), (B) would read: "(1) the defendant – (A) does not have a criminal history category higher than I after any downward departure under the sentencing guidelines; (B) does not have – (i) a criminal history category higher than II after any downward departure under the sentencing guidelines; (ii) any prior conviction for an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another; and (iii) the offense of conviction that is – (I) an offense under section 922 or 924; (II) a sex offense (as defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006); (III) a Federal crime of terrorism (as defined in section 2332b(g)(5)); (IV) a racketeering offense under section 1962; or (V) conspiring to use and invest illicit drug profits under section 414 of the Controlled Substances Act."

[35] H.R. 2944, §402(a)(2); proposed 18 U.S.C. 3553(f)(1)(C)("committed the offense as the result of – (i) mental illness, cognitive deficits, or a history of persistent or serious substance abuse or addiction; (ii) financial, emotional, or mental distress; (iii) trauma suffered while serving on active duty in an armed conflict zone for a branch of the United States military; or (iv) victimization stemming from any combination of physical, mental, emotional, or psychological abuse or domestic violence, if the offense was committed at the direction of another individual who – (I) was a more culpable participant in the instant offense or played a significantly greater role in the offense; or (II) effectively coerced the defendant's involvement in the offense by means of threats or abuse either personally or from any person or group'').

[36] 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).

[37] 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).

**Table 2. Safety Valve**

| General | Covered Offenses/Qualifications | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| 18 U.S.C. 3553(f): Court may sentence under the USSG w/o regard to the statutory mandatory minimums | Covered offenses: 21 U.S.C. 841, 846, 960, 963 (trafficking controlled substances/attempt) | no change | 21 U.S.C. 841, 846, 960, 963 (trafficking controlled substances/attempt) and 18 U.S.C. 924(c)(firearm possession in furtherance) in relation to drug trafficking | no change |
| each prior sentence of less than 60 days = 1 criminal history point<br>each prior sentence of 60 days or up to 13 months = 2 criminal history points<br>each prior sentence of 13 months or more = 3 criminal history points<br>(category I = 0 or 1 point; category II = 2 or 3 points) | (1) no more than 1 criminal history point | no more than 4 criminal history points; but<br>no 3-point prior sentences;<br>no 2-point drug trafficking or violent offense prior convictions<br>court may waive the qualification if it concludes the point total over represents criminal history or prospect of recidivism | no more than 1 criminal history point; OR<br>no more than 3 criminal history points; and no violent, firearms, sex, terrorism, racketeering, or conspiracy to use of invest drug profits convictions; OR<br>offense committed as a result of: mental illness or drug addiction; financial, emotional, or mental distress; combat induced trauma; or direction or coercion of a victim of abuse or domestic violence | no more than 3 criminal history points |
| | (2) no use of threats, violence, or firearms | no change | (2) no use of threats or violence | no change |
| | (3) no resulting death or serious bodily injury | no change | no change | no change |
| | (4) not a leader or supervisor and not part of §848 (drug kingpin) enterprise | no change | (4) not a leader or supervisor of a group of 5 or more and not part of §848 (drug kingpin) enterprise | no change |
| | (5) tell all | no change | information may not be used in USSG calculations | no change |

**Source:** CRS from S. 2123, H.R. 3713, H.R. 2944, S. 502, and H.R. 920.

## 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.[38] 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.[39]

The ACCA limits qualifying state and federal drug offenses to those punishable by imprisonment for more than 10 years.[40] 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.[41] S. 2123 and H.R. 3713 would reduce the mandatory minimum penalty from 15 years to 10 years.[42] 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).[43] Again, however, H.R. 3713's retroactivity would only apply to defendants without a prior serious violent felony conviction.[44] In contrast, H.R. 2944 does not reduce these mandatory minimum penalties. However, it alters the definition of a "serious drug offense" to one punishable by imprisonment for not more than 10 years, resulting in a sentence of more than 13 months, conviction for which occurred within the last 10 years not counting time in prison.[45] In addition it alters the definition of "violent felony" to require a sentence of imprisonment for 13 months.[46] Further, it provides that an individual may not be sentenced under the provision unless the U.S. Attorney files an information with the court—served on the defendant or counsel—specifying the previous convictions to be relied upon.[47]

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.[48]

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[38] 18 U.S.C. 924(e). See, generally, CRS Report R41449, *Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview*, by (name redacted)

[39] 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 (name redacted)

[40] 18 U.S.C. 924(e)(2)(A).

[41] 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 present 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).

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

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

[44] H.R. 3713, §§6(b)(2), 2(a)(1).

[45] H.R. 2944 §403(c).

[46] H.R. 2944 §403(c).

[47] H.R. 2944 §403(d).

[48] 18 U.S.C. 924(c)(2), (3).

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 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.[49]

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.[50] 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.[51]

S. 2123 and H.R. 3713 would make clear that a conviction must have become final before it could be counted for purposes of enhancing the mandatory minimum.[52] They would also reduce the repeat offender mandatory minimum from imprisonment for not less than 25 years to not less than 15 years.[53] 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 into account the defendant's post-conviction conduct, the nature and seriousness of threats to individual or community safety, and the generally applicable sentencing

[49] 18 U.S.C. 924(c)(1), (5).

[50] 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").

[51] 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").

[52] 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."

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

factors.[54] 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.[55] S. 2123 differs from H.R. 3713 in one respect. As it would do in case of drug mandatory adjustments, it would make it clear that resentencing proceedings would be subject to the victims' rights provisions of 18 U.S.C. 3771, and that an inquiry into facts and circumstances associated with the initial sentencing would be a prerequisite to consideration of a resentencing motion.[56] Section 3771 assures victims of the rights "to reasonable, accurate, and timely notice of any public court proceeding, involving the crime ..." and "to the right to be reasonably heard at any public proceeding in the district court involving ... sentencing ..."[57]

While H.R. 2944 also requires that a conviction be final to be counted for purposes of enhancing the mandatory minimum, it does not reduce the repeat offender mandatory minimum from imprisonment.[58] In addition, the bill would modify the current statutory trigger's "during and in relation to any crime of violence or drug trafficking crime" language to "not include any possession not on the person of, or within arm's reach and otherwise readily and immediately accessible to the defendant at the time and place of the offense."[59]

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.[60] 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:[61]

- false statements in connection with the purchase of a firearm or ammunition;[62]
- sale of a firearm or ammunition to, or possession by, a convicted felon or other disqualified individual;[63]
- while in the employ of a disqualified individual, receipt or possession of a firearm or ammunition;[64]
- knowing transportation of stolen firearms or ammunition;[65]

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

[55] H.R. 3713, §5(b)(2).

[56] S. 2123, §§104(b)(2), 105(b)(2).

[57] 18 U.S.C. 3771(a)(2), (4).

[58] H.R. 2944 §421.

[59] H.R. 2944 §421.

[60] 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.

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

[62] 18 U.S.C. 922(a)(6).

[63] 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.*

[64] 18 U.S.C. 922(h).

[65] 18 U.S.C. 922(i).

- knowing sale, possession, or pledge as security of stolen firearms or ammunition;[66] or
- transfer or possession of a machine gun under certain circumstances.[67]

In contrast, H.R. 2944 contains no such provision.

**Table 3. Sentencing for Firearms Offenses**

| Offense | Present Law | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| I. 18 U.S.C. 924(a)(2)(penalty for §922 firearms offenses) | violations of the following subsections of 18 U.S.C. 922 are punishable by imprisonment for not more than *10 years:* | violations of the following subsections of 18 U.S.C. 922 are punishable by imprisonment for not more than *15 years*: | no change | no change |
| | (a)(6) false statements in the acquisition of a firearm | no change | no change | no change |
| | (d) sale of a firearm to an ineligible person | no change | no change | no change |
| | (g) possession of a firearm by an ineligible person | no change | no change | no change |
| | (i) interstate transportation of a stolen firearm | no change | no change | no change |
| | (j) possession of a stolen firearm that has travelled in interstate commerce | no change | no change | no change |
| | (o) unlawful transfer of a machinegun | no change | no change | no change |
| II. 18 U.S.C. 924(e)(Armed Career Criminal)(3 strikes) | imprisonment for not less than *15 years* for firearm possession by an ineligible person w/ 3 prior violent felony or serious drug convictions | imprisonment for not less than *10 years* for firearm possession by an ineligible person w/ 3 prior violent felony or serious drug convictions [retroactive but H.R. 3713 bars retroactivity when the prior conviction is for a serious violent felony] | no change | no change |

[66] 18 U.S.C. 922(j).

[67] 18 U.S.C. 922(o).

| Offense | Present Law | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| | "serious drug offense" = one punishable by imprisonment for not more than 10 years | no change | "serous drug offense" = one punishable by imprisonment for not more than 10 years, resulting a sentence of more than 13 months, conviction for which occurred w/i 10 years (not counting time in prison) | no change |
| | "violent felony" = burglary, arson, extortion felony or felony with use of physical force element | no change | "violent felony" = burglary, arson, extortion felony or felony with use of physical force element, resulting a sentence of more than 13 months | no change |
| | includes ct. finding of a juvenile involved in a violent felony | no change | includes ct. finding of a juvenile involved in a violent felony, but does not include a finding which occurred more than 10 years ago (not counting time in prison) | no change |
| III. Various mandatory minimums for firearm possession associated w/ drug trafficking and violent felony, 18 U.S.C. 924(c) | imprisonment for not less than *25 years* for carrying of a firearm during and in relation to, or possession in furtherance of, a crime of violence or drug trafficking offense, in the case of second or subsequent conviction | imprisonment for not less than *15 years* for carrying of a firearm during and in relation to, or possession in furtherance of, a crime of violence or drug trafficking offense, in the case of second or subsequent conviction [retroactive; but H.R. 3713 bars retroactivity when the prior conviction is for a serious violent felony] | imprisonment for not less than *25 years* for carrying of a firearm during and in relation to, or possession in furtherance of, a crime of violence or drug trafficking offense, in the case of second or subsequent conviction | no change |
| | | no change | "during and in relation to" = possession on the person or within easy reach | no change |
| | permits treating conviction of successive counts w/l the same prosecution as "second or subsequent convictions" | prior conviction must be final to be counted [retroactive] | prior conviction must be final to be counted | no change |

**Source:** CRS from S. 2123, H.R. 3713, H.R. 2944, S. 502, and H.R. 920.

## Fair Sentencing Act

Originally, the Controlled Substances Act made no distinction between powder cocaine and crack cocaine (cocaine base).[68] 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.[69] 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.[70] The Sentencing Commission subsequently revised the Sentencing Guidelines to reflect the change and made the modification retroactively applicable at the discretion of the sentencing court.[71]

The FSA reductions apply to cocaine offenses committed thereafter. They also apply to offenses committed beforehand when sentencing occurred after the time of enactment.[72] Federal courts have discretion to reduce a sentence imposed under a Sentencing Guideline that was subsequently substantially reduced.[73] The FSA, however, does not apply to sentences imposed prior to its enactment,[74] and it does not apply in sentence reduction hearings triggered by new Sentencing Guidelines.[75] In such proceedings, the courts remain bound by the mandatory minimums in effect prior to enactment of the FSA.[76]

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.[77] H.R. 2944 would simply make the FSA retroactively applicable.[78]

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

[69] P.L. 99-570, §§1002, 1004; 100 Stat. 3707-2, 3207-6 (1986); 21 U.S.C. 841, 960 (1988 ed.).

[70] P.L. 111-220, §2; 124 Stat. 2372 (2010); 21 U.S.C. 841, 960.

[71] 18 U.S.C. 3582(c); U.S.S.G. §1B1.10; U.S.S.G. App. C, Amends. 750, 759 (eff. Nov. 1, 2012).

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

[73] 18 U.S.C. 3582)(c)(2).

[74] *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 other Circuit Courts of Appeal in concluding that the FSA is not retroactive for the benefit of a defendant like Carrasquillo-Oscasio, 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).

[75] *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. §3882 provide such grounds. In a §3882 proceeding, the court applies the statutory penalties in effect at the time of the original sentencing").

[76] *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 option 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 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.

[77] S. 2123, §106(c); H.R. 3713, §7(c). The section, with changes found only in H.R. 3713 appearing 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 111-120; 124 Stat. 2372), or if a <u>previous</u> motion made *pursuant to sections 2 or 3 of the Sentencing Act or* under this section to reduce the sentence was<u>, after the date of enactment of the Act, denied after a complete review of the motion on the merits</u> *denied by a court because a reduction in the defendant's term of*
(continued...)

**Table 4. Retroactivity of the Fair Sentencing Act**

| Offense | Present Law | S. 2123/ H.R. 3713 | H.R. 2944 | S. 502/ H.R. 920 |
|---|---|---|---|---|
| FSA, P.L. 111-220 (2010) increased the amounts of crack cocaine need to trigger mandatory minimum sentences | amendments are ordinarily not retroactive | a court may reduce a sentence for pre-FSA offenses to reflect FSA changes on its own motion or that of the defendant, Bureau of Prisons, or prosecutor, but: | a court may reduce a sentence for pre-FSA offenses to reflect FSA changes on its own motion or that of the defendant, Bureau of Prisons, or prosecutor | a court may reduce a sentence for pre-FSA offenses to reflect FSA changes on its own motion or that of the defendant, Bureau of Prisons, or prosecutor, but: |
| | | court is not required to reduce; and may not if: | no comparable provision | court is not required to reduce; and may not if: |
| | | S. 2123 only: the sentence was already imposed or reduced to reflect FSA changes; H.R. 3713 only: the sentence already imposed or reduced to a one greater that FSA mandatory minimum; or | no comparable provision | no comparable provision |
| | | a motion under this section to reduce has already been denied; also under H.R. 3713, a motion under FSA to reduce has already been denied | no comparable provision | a motion under this section or FSA to reduce has already been denied |

**Source:** CRS from S. 2123, H.R. 3713, H.R. 2944, S. 502, and H.R. 920.

(...continued)

*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."

[78] H.R. 2944, §404(a)("A court that imposed a sentence for a covered offense, may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect as the time the covered offense was committed").

# New Mandatory Minimums

H.R. 3713 and H.R. 2944 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 for not less than 10 years when death resulted from interstate domestic violence.[79] 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.[80] 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.[81]

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.[82] Another prohibits IEEPA violations that involve supplying goods or services for the foreign development of weapons of mass destruction.[83] The third prohibits IEEPA violations that furnish certain foreign entities with goods and services that are subject to export restrictions.[84]

In contrast, H.R. 2944 does not create new mandatory minimum sentences for crimes.

# Inventory of Federal Crimes

S. 2123 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

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

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

[81] 50 U.S.C. 1705.

[82] 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.

[83] 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).

[84] 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.

federal statutory crimes would have to identify for each offense: the attendant penalties and mens rea; the number of referrals for prosecution, prosecutions, convictions, and sentences imposed; as well as the number of prosecutions which did not require proof of a mens rea.[85] The compilation of federal regulatory offenses would be organized by enforcing agency and would require the same information for regulatory offenses as required for statutory offenses.[86] The Attorney General and pertinent agency head would also be responsible for the creation of a publicly available online index of such offenses.[87] Similarly, H.R. 2944 requires the Attorney General to produce and publish a list of "the various Federal law violations that carry criminal penalties."[88] In addition, federal agencies must obtain the Attorney General's approval to add a criminal penalty to an agency regulation.[89] Finally, the Attorney General must develop procedures to provide coordination between the Department of Justice and other federal agencies to determine whether criminal or civil penalties are most appropriate to address unlawful conduct that involves federal agencies; and to coordinate between federal and state law enforcement officers to reduce duplicative prosecutions.[90]

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[85] S. 2123, §109(b).
[86] S. 2123, §109(c).
[87] S. 2123, §109(d).
[88] H.R. 2944 §101(a).
[89] H.R. 2944 §101(b).
[90] H.R. 2944 §102(a).