

Legal Sidebar

Sentencing Reform at the End of the 114th Congress

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On December 23, 2016, the House Judiciary Committee [reported](#) the Sentencing Reform Act of 2015 ([H.R. 3713](#)). The Senate Judiciary Committee had previously reported a corresponding proposal, as Title I of the Sentencing Reform and Corrections Act of 2015 ([S. 2123](#)). The 114th Congress ended before final differences could be resolved. The two bills would have adjusted sentencing provisions in the case of certain drug and firearms convictions. More specifically, they would have:

- afforded federal courts the opportunity to avoid by way of “safety valves” certain mandatory minimum sentences when sentencing low-level, non-violent drug offenders;
- modified the mandatory minimum sentences applicable to certain recidivist drug offenders;
- completed the task of making the Fair Sentencing Act (FSA) retroactive;
- revised the mandatory minimum sentences for the possession of a firearm in furtherance of various drug or violent offenses;
- reduced the Armed Career Criminal Act (ACCA) mandatory minimums, but increased the maximum sentence for unlawful firearm possession.

Safety Valves: Existing [law](#) permits federal courts to sentence certain low-level, non-violent drug offenders who possess virtually spotless criminal records, without regard to otherwise applicable mandatory minimum. The two bills would have expanded the authority to cover low-level, non-violent drug offenders who possess minor but less pristine criminal records. They would have also given the courts greater sentencing flexibility in the form of a mini-safety valve that would have reduced the 10-year mandatory minimum for the highest category of drug trafficking offenses. Eligible defendants would have needed to be low-level, non-violent offenders with no prior convictions for a serious drug or serious violent felony and whose trafficking did not involve a child. As in the existing safety valve, eligible offenders would have needed to have made full disclosure to authorities.

Minimums for Recidivists: The mandatory minimum [sentences](#) for repeat offenders convicted of serious drug trafficking are particularly strict. They can be triggered by any prior drug felony conviction and come with a mandatory minimum 20-year term of imprisonment in the case of the most serious trafficking offenses. An offender with two or more prior drug felony convictions faces a mandatory minimum of life imprisonment. The bills would have pruned the predicate offenses to serious drug or serious violent felonies and reduced the mandatory minimums to 15 years for one prior conviction and 25 years for two or more prior convictions. The bills would have given these amendments retroactive effect by authorizing the courts to adjust sentences that became final before to the amendments were enacted, with one exception. The House bill would have limited retroactive application to defendants with prior serious drug convictions; the Senate measure would have permitted application to defendants with either prior serious drug or prior serious violent felony convictions.

Fair Sentencing Act: [At one time](#), trafficking in 5000 grams of cocaine powder and 50 grams of crack cocaine carried the same penalties. The Fair Sentencing Act ([FSA](#)) adjusted that 100 to 1 ratio prospectively. The earlier 100 to 1 ratio,

however, remains in place for cases that had become final before enactment of the FSA. The U.S. Sentencing Commission adjusted the relevant Sentencing Guidelines to reflect the FSA and made the amended Guidelines retroactively applicable. [Courts](#) may resentence old cases under the new Guidelines, but are bound by the pre-FSA mandatory minimums. The bills would have fixed the incongruity. They would have made the FSA retroactive to any case where a court's preferred sentence was constrained by the old mandatory minimums.

Possession of a Firearm in Furtherance: Present [law](#) establishes a series of mandatory minimum penalties for possessing, brandishing, or discharging a firearm during and in furtherance of a crime of violence or drug trafficking. Second and subsequent convictions result in a mandatory minimum sentence of 25 years in prison. This provision has been [construed](#) to treat successive counts as successive convictions. As a result, defendants convicted of multiple counts after a single trial are subject to multiple 25-year prison terms. The bills would have reduced the mandatory minimum to 15 years and eliminated the stacking by making it clear that the term "prior convictions" means prior final convictions.

Firearm possession: Unlawful [possession](#) of a firearm is generally punishable by imprisonment for not more than 10 years. The Armed Career Criminal Act ([ACCA](#)), however, establishes a 15-year mandatory minimum for an unlawful possession conviction of a defendant with three or more prior violent felony or serious drug convictions. The bills would have increased the maximum penalty for unlawful possession generally to 15 years, but reduced the ACCA mandatory minimum to 10 years. In addition, they would have given the ACCA reduction retroactive effect by authorizing the courts to resentence convicted under 15-year mandatory minimum.

Differences: The House bill and the Senate bill differed in several respects.

The Senate bill included a second title devoted to corrections reform, a matter which the House addressed in separate legislation ([H.R. 759](#)).

The Senate bill alone would have created two new mandatory minimums – one dealing with interstate domestic violence and the other with violation of certain arms export controls.

The House bill alone would have added a 5-year mandatory minimum for trafficking in fentanyl either with, or as a substitute for, heroin.

The Senate bill would have called upon the Attorney General to prepare an inventory of federal criminal statutes; the House bill instead would have instructed the Attorney General and the U.S. Sentencing Commission to report on mandatory minimum sentencing statutes.

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