

TO PROVIDE FOR INCREASED MANDATORY MINIMUM SENTENCES FOR CRIMINALS POSSESSING FIREARMS, AND FOR OTHER PURPOSES

OCTOBER 24, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 424]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 424) to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. MANDATORY PRISON TERMS FOR POSSESSING, BRANDISHING, OR DISCHARGING A FIREARM OR DESTRUCTIVE DEVICE DURING A FEDERAL CRIME THAT IS A CRIME OF VIOLENCE OR A DRUG TRAFFICKING CRIME.**

Section 924(c) of title 18, United States Code, is amended—

(1) by redesignating paragraphs (2) and (3) as paragraphs (5) and (6), respectively; and

(2) by striking paragraph (1) and inserting the following:

“(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States—

“(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

“(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

“(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, such additional sentence shall be imprisonment for 30 years.

“(2) In the case of the second or subsequent conviction of a person under this subsection—

“(A) if the conviction is for possession of a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 20 years;

“(B) if the conviction is for brandishing a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 25 years; or

“(C) if the conviction is for discharging a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 30 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to life imprisonment.

“(3) Notwithstanding any other provision of law, the court shall not impose a probationary sentence on any person convicted of a violation of this subsection, nor shall a term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used.

“(4) For purposes of this subsection, the term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible.”.

PURPOSE AND SUMMARY

H.R. 424, introduced by Representative Sue Myrick (R-NC), would amend § 924(c) of title 18, United States Code. It provides for an increased mandatory penalty for any person who possesses, brandishes or discharges a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime.

Currently, § 924(c) provides for a mandatory additional term of imprisonment for any person who “uses or carries” a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime. The term “federal crime of violence” is

defined in § 924(c)(3) of title 18, United States Code.<sup>1</sup> The term “drug trafficking crime” is defined in § 924(c)(2) of title 18, United States Code.<sup>2</sup> Current law provides for a five-year prison sentence for a first offense, in addition to any time received for the underlying offense, unless the firearm is a short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon, in which case the term of imprisonment is ten years for a first offense. If the firearm is a machinegun,<sup>3</sup> or a destructive device,<sup>4</sup> or is equipped with a firearm silencer or firearm muffler,<sup>5</sup> then the person shall receive an additional thirty years imprisonment for a first offense. For a second or subsequent offense under current law, the offender is subject to an additional twenty years, and if the firearm is a machine gun, destructive device or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.

H.R. 424 would strike the “uses or carries” language, and replace it with a graded penalty structure for possessing, brandishing or discharging a firearm during and in relation to a federal crime of violence or drug trafficking crime. If the charge is for possession, however, the government must prove that the firearm was possessed “in furtherance of” the commission of the crime.

H.R. 424 mandates an additional ten years imprisonment for a first offense for any person who possesses a firearm in furtherance of the commission of a crime. If a person brandishes a firearm, during and in relation to the commission of a crime, the additional prison term is fifteen years for a first offense. If the person discharges the firearm, during and in relation to the commission of a crime, the additional prison term is twenty years for a first offense. These increased penalties replace the bifurcated penalties in current law described above for short-barreled rifles, short-barreled shotguns or semiautomatic assault weapons and most other firearms. Additionally, if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the additional prison term shall be thirty years.

For a second or subsequent offense under H.R. 424, a person who possess a firearm, in furtherance of a crime, shall receive an additional term of imprisonment of at least twenty years. A person who brandishes a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least twenty-five years. A person who discharges a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least thirty years. If the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to life imprisonment.

<sup>1</sup> Section 924(c)(3) of title 18, United States Code, defines a “crime of violence” as “an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

<sup>2</sup> Section 924(c)(2) of title 18, United States Code, defines the term “drug trafficking crime” as “any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).”

<sup>3</sup> See 18 U.S.C. § 921(a)(23).

<sup>4</sup> See 18 U.S.C. § 921(a)(4).

<sup>5</sup> See 18 U.S.C. § 921(a)(24).

H.R. 424 also clarifies that courts may not impose a probationary sentence, nor may any term of imprisonment under § 924(c) run concurrently with any other term of imprisonment. Finally, the legislation defines “brandish” as “to display all or part of a firearm so as to intimidate or threaten, regardless of whether the firearm is visible.”

#### BACKGROUND AND NEED FOR THE LEGISLATION

As noted above, §924(c) of title 18, United States Code, currently allows for a penalty enhancement for any person who “uses or carries” a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime. In the December, 1995, decision *Bailey v. United States*,<sup>6</sup> the Supreme Court interpreted the “use” prong of § 924(c). The Court held that a penalty increase for “use” of a firearm would only be applicable to persons who “actively employed” the firearm during and in relation to the commission of the crime.<sup>7</sup>

Justice O’Connor, writing for the unanimous Court, explained that the “active employment” interpretation derives from ordinary understanding and dictionary definitions of the word “use.” Otherwise, the “use” prong would be interpreted so expansively as to encompass “carry” within its definition. The Court noted that such an outcome could not have been what Congress intended, as courts normally assume that each word in a statute has a particular purpose. Justice O’Connor cited the long-standing canon of construction that instructs that “a legislature is presumed to have used no superfluous words.”<sup>8</sup>

The Supreme Court’s limited interpretation of “use” of a firearm overturned two consolidated decisions of the United States Court of Appeals for the District of Columbia Circuit. The court of appeals had crafted an “accessibility and proximity” test to determine “use” under § 924(c). It determined that the enhancement would apply “whenever one puts or keeps the gun in a particular place from which one (or one’s agent) can gain access to it if and when needed to facilitate a drug crime.”<sup>9</sup> The court of appeals noted that other circuits had adopted a definition which was considerably broader than its previous interpretation, focusing upon whether the “location of the gun was sufficient to permit the jury to conclude that the gun in some way facilitated the predicate \* \* \* offense.”<sup>10</sup>

In the *Bailey* case, the defendant, Roland J. Bailey, was stopped by two Washington, D.C. police officers, after they observed that the car he was driving had neither a front license plate nor an inspection sticker. When Mr. Bailey failed to produce a license, the officers instructed him to get out of the car. As he exited, the officers observed him push something between his seat and the front console. Upon investigation of the passenger compartment, the officers found twenty-seven small plastic bags containing a total of thirty grams of cocaine, and one round of ammunition. After plac-

<sup>6</sup>*Bailey v. United States*, 116 S.Ct. 501 (1995).

<sup>7</sup>*Id.* at 506.

<sup>8</sup>*Id.* at 507 (citing *Platt v. Union Pacific R. Co.*, 99 U.S. 48, 58 (1879)).

<sup>9</sup>*United States v. Bailey*, 36 F.3d 106, 115 (D.C. Cir. 1994).

<sup>10</sup>*Id.* at 113; see, e.g., *United States v. Crass*, 50 F.3d 81 (1st Cir. 1995) (upholding the conviction of defendant who had seventeen bags of cocaine and two pistols on a closet shelf, due to the close proximity of the drugs to the firearms).

ing Mr. Bailey under arrest, the officers searched the car and located in the trunk a loaded 9-mm pistol and \$3,216 in cash. He was convicted by the jury on all charges, and received two concurrent 51-month sentences, plus a consecutive 60-month term for violation of § 924(c).<sup>11</sup>

The facts of the consolidated case against petitioner Candisha Robinson involved a Metropolitan Police Department controlled drug buy. An undercover officer contacted Ms. Robinson's sister and told her that he wanted to buy crack cocaine. The sister lead him to Ms. Robinson's apartment, where the officer repeated his request to Ms. Robinson. After the sisters allowed him to enter the apartment, he observed them go into the bedroom and retrieve a rock of crack cocaine, which they then sold to him. The next evening, the officer made another controlled buy. After the second buy, police officers executed a search warrant of the apartment. Inside a locked trunk in the bedroom closet, they discovered a .22-caliber Derringer, 10.88 grams of crack cocaine, a marked \$20 bill from the first controlled buy, Ms. Robinson's 1990 tax return and a letter from her employer. The jury convicted her of five separate drug charges, and in addition to the prison term for the drug offenses, she received a 60-month term of imprisonment for a violation of § 924(c).<sup>12</sup>

The court of appeals upheld both convictions under the newly crafted "proximity and accessibility" test, concluding that, in order to defeat a challenge upon appeal, the government,

need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. Because the government presented such evidence at the trials of both Bailey and Robinson, the judgments of conviction in each case are affirmed.

Thus, the Supreme Court's decision that "use" requires "active employment" has had a significant impact upon federal drug and violent crime prosecutions and convictions across the country. Section 924(c) has been a valuable and frequently used tool of federal prosecutors. According to the United States Sentencing Commission, there were 9,182 defendants sentenced nationwide from 1991 to 1995 under § 924(c). The U.S. Sentencing Commission statistics also indicate that the vast majority of these cases (nearly 75%) in which a § 924(c) enhancement was sought were for drug trafficking and bank robbery. Since the *Bailey* decision, the number of federal cases involving a § 924(c) enhancement has declined by approximately 17%.

The circuit courts must also now address a deluge of appeals from defendants with previous convictions for "use" of a firearm under § 924(c). Upon appeal, prosecutors in many cases are being

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<sup>11</sup> *United States v. Bailey* 36 F.3d at 108–109.

<sup>12</sup> *Id.* at 109.

forced to concede that the jury instructions given prior to the Bailey decision were erroneous, and may justify reversal.<sup>13</sup>

H.R. 424 strikes the words uses or carries from § 924(c), and replaces them with a graded penalty structure for possessing, brandishing or discharging a firearm. The word “possession” has a broader meaning than either “uses” or “carries,” thus reversing the restrictive effect of the *Bailey* decision. In order to sustain a conviction for possession under § 924(c), the government must prove that a firearm was possessed “in furtherance of” the commission of the federal crime of violence or drug trafficking offense.

H.R. 424 clarifies Congress’ intent with regard to § 924(c) offenses. The “uses or carries” test is replaced with increased penalties for escalating egregious conduct. For a first offense, a person will receive 10 years for possessing a firearm, 15 years for brandishing a firearm, and 20 years for discharging a firearm. Penalties are higher for second or subsequent offense, or if the firearm is a machinegun or destructive device, or is equipped with a firearm muffler or silencer. Moreover, the Committee does not intend to discriminate between various types of firearms, as current law does, to determine the appropriate number of additional years imprisonment. Regardless of the type of firearm possessed, a defendant will receive a mandatory additional 10 years for a first offense. H.R. 424 is supported by the National Fraternal Order of Police.

#### HEARINGS

No hearings were held in the 105th Congress on H.R. 424.

#### COMMITTEE CONSIDERATION

On July 16, 1997, the Subcommittee on Crime met in open session and ordered reported favorably the bill H.R. 424, as amended, by a voice vote, a quorum being present. On September 9, 1997, the Committee met in open session and ordered reported favorably the bill H.R. 424, with amendment, by a recorded vote of 17 to 8, a quorum being present.

#### VOTE OF THE COMMITTEE

##### ROLLCALL NO. 1

Date: September 9, 1997.

Subject: H.R. 424, to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes. Amendment offered by Ms. Jackson Lee to the Subcommittee amendment in the nature of a substitute. Defeated 7–16.

	Ayes	Nays	Present
Mr. Sensenbrenner .....	.....	X	.....

<sup>13</sup> See, e.g., *United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997) (conviction under § 924(c) “use” vacated and remanded for retrial on “carry” prong); *United States v. Green*, 1997 U.S. App. LEXIS 13580 (10th Cir. 1997) (same); *United States v. Lin*, 101 F.3d 760 (D.C. Cir. 1996) (holding that “under the supervening-decision doctrine \* \* \* Lin’s conviction under 18 U.S.C. § 924(c) must be reversed because the trial judge’s instruction permitted the jury to return a guilty verdict based on an interpretation of the statute that was subsequently foreclosed by the Supreme Court in *Bailey v. United States.*”); *United States v. Turner*, 914 F.Supp. 48 (W.D.N.Y.) (post-Bailey, Turner’s motion to vacate conviction was granted without opposition from the government).

	Ayes	Nays	Present
Mr. McCollum .....		X	.....
Mr. Gekas .....		X	.....
Mr. Coble .....		X	.....
Mr. Smith (TX) .....		X	.....
Mr. Schiff .....			.....
Mr. Gallegly .....		X	.....
Mr. Canady .....		X	.....
Mr. Inglis .....		X	.....
Mr. Goodlatte .....		X	.....
Mr. Buyer .....		X	.....
Mr. Bono .....		X	.....
Mr. Bryant (TN) .....			.....
Mr. Chabot .....		X	.....
Mr. Barr .....		X	.....
Mr. Jenkins .....		X	.....
Mr. Hutchinson .....		X	.....
Mr. Pease .....		X	.....
Mr. Cannon .....			.....
Mr. Conyers .....	X		.....
Mr. Frank .....			.....
Mr. Schumer .....			.....
Mr. Berman .....			.....
Mr. Boucher .....			.....
Mr. Nadler .....	X		.....
Mr. Scott .....	X		.....
Mr. Watt .....	X		.....
Ms. Lofgren .....	X		.....
Ms. Jackson-Lee .....	X		.....
Ms. Waters .....			.....
Mr. Meehan .....			.....
Mr. Delahunt .....	X		.....
Mr. Wexler .....			.....
Mr. Rothman .....			.....
Mr. Hyde, Chairman .....			.....
Total .....	7	16	.....

## ROLLCALL NO. 2

Date: September 9, 1997.

Subject: H.R. 424, to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes. Motion to order the previous question on the substitute amendment offered by Mr. Watt to the Subcommittee amendment in the nature of a substitute. Agreed to 17-7.

	Ayes	Nays	Present
Mr. Sensenbrenner .....	X		.....
Mr. McCollum .....	X		.....
Mr. Gekas .....	X		.....
Mr. Coble .....	X		.....
Mr. Smith (TX) .....	X		.....
Mr. Schiff .....			.....
Mr. Gallegly .....	X		.....
Mr. Canady .....	X		.....
Mr. Inglis .....	X		.....
Mr. Goodlatte .....	X		.....
Mr. Buyer .....	X		.....
Mr. Bono .....	X		.....
Mr. Bryant (TN) .....	X		.....
Mr. Chabot .....	X		.....
Mr. Barr .....	X		.....
Mr. Jenkins .....	X		.....

	Ayes	Nays	Present
Mr. Hutchinson .....	X		
Mr. Pease .....	X		
Mr. Cannon .....			
Mr. Conyers .....		X	
Mr. Frank .....		X	
Mr. Schumer .....			
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson-Lee .....		X	
Ms. Waters .....			
Mr. Meehan .....			
Mr. Delahunt .....		X	
Mr. Wexler .....			
Mr. Rothman .....			
Mr. Hyde, Chairman .....			
Total .....	17	7	

ROLLCALL NO. 3

Date: September 9, 1997.

Subject: H.R. 424, to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes. Motion to report. Agreed to 17-8.

	Ayes	Nays	Present
Mr. Sensenbrenner .....	X		
Mr. McCollum .....	X		
Mr. Gekas .....	X		
Mr. Coble .....	X		
Mr. Smith (TX) .....	X		
Mr. Schiff .....			
Mr. Gallegly .....	X		
Mr. Canady .....	X		
Mr. Inglis .....	X		
Mr. Goodlatte .....	X		
Mr. Buyer .....	X		
Mr. Bono .....	X		
Mr. Bryant (TN) .....	X		
Mr. Chabot .....	X		
Mr. Barr .....	X		
Mr. Jenkins .....	X		
Mr. Hutchinson .....	X		
Mr. Pease .....		X	
Mr. Cannon .....	X		
Mr. Conyers .....		X	
Mr. Frank .....		X	
Mr. Schumer .....			
Mr. Berman .....			
Mr. Boucher .....			
Mr. Nadler .....			
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....			
Mr. Meehan .....			
Mr. Delahunt .....		X	
Mr. Wexler .....			

	Ayes	Nays	Present
Mr. Rothman .....	.....	.....	.....
Mr. Hyde, Chairman .....	.....	.....	.....
Total .....	17	8	.....

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 424, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

*H.R. 424—A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes*

Summary: Enacting H.R. 424 would clarify and increase mandatory minimum prison sentences for the use of a firearm during the commission of federal crimes that are either crimes of violence or drug trafficking crimes. Assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would result in additional costs of about \$10 million over the next five years to accommodate more prisoners in federal prisons. Enacting H.R. 424 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. H.R. 424 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would impose no costs on state, local, or tribal governments.

Current law provides for a mandatory minimum of five years in prison for “using or carrying” a firearm during the commission of a federal crime of violence or drug trafficking crime. Even though the “minimum” sentence is five years, many offenders receive reduced sentences of less than five years for cooperating with federal prosecutors. Under H.R. 424, the mandatory minimum sentence for possessing a firearm during the commission of such crimes would

be 10 years. Brandishing a firearm while committing such offenses would result in a 15-year mandatory minimum sentence, and the discharging of a firearm during the commission of such crimes would result in a 20-year mandatory minimum sentence. These penalties would be in addition to any prison time received for the conviction of the underlying offense, and penalties would be higher for a second offense, or if a machinegun, destructive device, firearm muffler, or firearm silencer is used.

Estimated cost to the Federal Government: CBO estimates that implementing H.R. 424 would increase discretionary spending for prison operating costs by about \$10 million over the 1998–2002 period, subject to appropriation of the necessary amounts. The following table summarizes the estimated budgetary impact of the bill.

	By fiscal years in millions of dollars—					
	1997	1998	1999	2000	2001	2002
SPENDING SUBJECT TO APPROPRIATION						
Spending for Prison Operations Under Current Law:						
Estimated Authorization Level <sup>1</sup> .....	2,768	2,867	2,966	3,069	3,176	3,287
Estimated Outlays .....	2,603	2,764	2,946	3,049	3,155	3,265
Proposed Changes:						
Estimated Authorization Level .....	0	( <sup>2</sup> )	1	2	3	4
Estimated Outlays .....	0	( <sup>2</sup> )	1	2	3	4
Spending for Prison Operations Under H.R. 424:						
Estimated Authorization Level <sup>1</sup> .....	2,768	2,867	2,967	3,071	3,179	3,291
Estimated Outlays .....	2,603	2,764	2,947	3,051	6,158	3,269

<sup>1</sup>The 1997 level is the amount appropriated for that year. The estimated authorization levels for 1998 through 2002 reflect CBO baseline estimates, assuming adjustment for inflation.

<sup>2</sup>Less than \$500,000.

The costs of this legislation fall within budget function 750 (administration of justice).

Because this bill would apply to convicted felons who would serve lengthy sentences under current law, CBO expects that the full budgetary effects of H.R. 424 would not be realized until after 30 years when the additional prison population resulting from this bill would reach an estimated 4,500 prisoners and remain steady thereafter. Thus, assuming no significant change in the number of convictions, the cost to the prison system on a long-term basis would total about \$40 million annually (in 1997 dollars for operating costs). Furthermore, additional prisons would have to be constructed over the next 30 years to support such an increase in prison population. Based on information from the Bureau of Prisons, CBO estimates that added construction costs would likely exceed \$340 million (in 1997 dollars over the 30-year period).

Basis of estimate: For purposes of this estimate, CBO assumes that the bill will be enacted within the next few months, and that the necessary funds will be appropriated at or near the beginning of each fiscal year.

According to the U.S. Sentencing Commission, enacting H.R. 424 would increase the average sentence imposed on certain offenders by about 60 months. Additional time served, however, could be less than 60 months because of sentence reductions for good behavior or for cooperating with federal prosecutors. Based on information from the U.S. Sentencing Commission, CBO expects that the prison population would increase by at least 380 prisoners over the next five years, taking into account the fact that some convicted felons

currently receive sentences of less than five years. At an annual cost per prisoner of about \$8,700 (at 1997 prices), CBO estimates that the costs to support these additional prisoners would total about \$10 million over the 1998–2002 period. This estimate assumes that no additional prisons would be constructed over the next five years to accommodate this increase in prison population. Because the bill would increase a five-year sentence to a sentence of 10 years or more, most of the costs of implementing H.R. 424 would occur after 2002.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: The bill contains no intergovernmental or private-sector mandates as defined in UMRA and would not impose costs on state, local, or tribal governments.

Estimate prepared by: Susanne S. Mehlman.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

#### SECTION-BY-SECTION ANALYSIS

*Section 1. Mandatory Prison Terms for Possessing, Brandishing, or Discharging a Firearm or Destructive Device During a Federal Crime That is a Crime of Violence or a Drug Trafficking Crime.*— This section strikes the current language of § 924(c) of title 18, United States Code, which allows for an increased penalty for any person who “uses or carries a firearm,” during and in relation to the commission of a federal crime of violence or drug trafficking crime. It replaces the “uses or carries” test with increased penalties for any person who “possesses” “brandishes,” or “discharges” a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime. Possession must also be “in furtherance of the crime.” The Committee believes that distinguishing various actions in this manner will result in more appropriate sentences for persons convicted under § 924(c).

The Committee recognizes that the distinction between “in furtherance of” and “during and in relation to” is a subtle one, and may initially prove troublesome for prosecutors. Nevertheless, the Committee believes that “in furtherance of” is a slightly higher standard,<sup>14</sup> and encompasses the “during and in relation to” language.

Both Webster’s New International Dictionary and Black’s Law Dictionary define “furtherance” as the “act of furthering, helping forward, promotion, advancement, or progress.”<sup>15</sup> Most case law in-

<sup>14</sup>In the *Bailey* decision itself, the Court of Appeals for the District of Columbia Circuit noted that “Congress expressly retained the ‘in relation to’ requirement in preference to a more restrictive ‘in furtherance of’ requirement.” (emphasis added). *United States v. Bailey*, 36 F.3d at 116.

<sup>15</sup>Webster’s New International Unabridged Dictionary 1022 (2d ed. 1959); Black’s Law Dictionary 675 (6th ed. 1990).

interpreting “in furtherance of” pertains to conspiracy charges.<sup>16</sup> However, the cases and the usual understanding of the words do provide some guidance for interpreting the phrase in this context.<sup>17</sup> The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity.

The facts of the *Bailey* decision, reiterated above, provide a good example. The Committee believes that the evidence presented by the government in that case may not have been sufficient to sustain a conviction for possession of a firearm “in furtherance of” the commission of a drug trafficking offense. In that case, a prosecution expert testified at Mr. Bailey’s trial that drug dealers frequently carry a firearm to protect themselves, as well as their drugs and money.<sup>18</sup> Standing on its own, this evidence may be insufficient to meet the “in furtherance of” test. The government would have to show that the firearm located in the trunk of the car advanced or promoted Mr. Bailey’s drug dealing activity. The Committee believes that one way to clearly satisfy the “in furtherance of” test would be additional witness testimony connecting Mr. Bailey more specifically with the firearm.

To sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used “during and in relation to” the commission of the federal crime of violence or drug trafficking crime. In *Smith v. United States*,<sup>19</sup> the Supreme Court enunciated what is needed to meet this test. The Court determined that “the phrase ‘in relation to’ clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.”<sup>20</sup> The Court further explained that the “language ‘allays explicitly the concern that a person could be’ punished under § 924(c)(1) for committing a drug trafficking offense \* \* \* even though the firearm’s presence is coincidental or entirely ‘unrelated’ to the crime.”<sup>21</sup> The Committee intends to leave undisturbed the body of case law which has interpreted the phrase “during and in relation to” in the context of prosecutions for violations of § 924(c).

H.R. 424 also defines the term “brandish,” for purposes of a § 924(c) charge. A person brandishes a firearm if he or she “display[s] all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible.” The Committee expects that even when a person displays the outline of a firearm through clothing or other similar shroud the definition of brandish will be satisfied. For example, this would encompass such conduct

<sup>16</sup> See Fed. R. Evid. 801 (d)(2)(E).

<sup>17</sup> See, e.g., *People v. Trilck*, 132 N.W.2d 134, 136–137 (1965) (stating that the word furtherance is not an obscure, technical word, but rather a commonplace word understood by an ordinary person as advancement or promotion).

<sup>18</sup> *United States v. Bailey*, 116 S.Ct. at 504.

<sup>19</sup> *Smith v. United States*, 508 U.S. 223 (1993).

<sup>20</sup> *Id.* at 238.

<sup>21</sup> *Id.* (citing *United States v. Stewart*, 779 F.2d 538, 539 (1995) (Kennedy, J.)).

as a person pointing a firearm through a coat pocket, so that only the outline of the barrel of the firearm is visible. The Committee intends that the test of whether the firearm intimidated or threatened be an objective one. Thus, unavailability of witnesses or disputes between witness recollections would not preclude prosecutors from bringing a charge for brandishing a firearm under § 924(c).

Under § 924(c)(1)(A), for possession in furtherance of the commission of the crime, a person shall receive, in addition to any penalties for the underlying offense(s), a minimum of ten years imprisonment. Under subsection (c)(1)(B), for brandishing during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of fifteen years imprisonment. Under subsection (c)(1)(C), for discharging a firearm during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of twenty years imprisonment. If the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, the additional sentence shall be at least thirty years for a first offense. The Committee notes that currently, under § 924(j), any person who causes the death of another through the use of a firearm, in the course of a violation of subsection § 924(c), may be punished by death, or by imprisonment for any term of years or for life.

Under § 924(c)(2)(A), for a second or subsequent conviction, a person who possesses a firearm shall receive an additional twenty years imprisonment. Under subsection (c)(2)(B), a person who brandishes shall receive an additional twenty-five years imprisonment, and under subsection (c)(2)(C), a person who discharges shall receive an additional thirty years imprisonment. If the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, such additional sentence shall be life imprisonment.

Under § 924(c)(3), no court may impose a probationary sentence, nor may any term of imprisonment imposed for a violation of § 924(c) run concurrently with any other term of imprisonment. This includes any term of imprisonment imposed for the underlying crimes of violence or drug trafficking offenses in which the firearm was employed.

#### AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
*Washington, DC.*

Hon. HENRY HYDE,  
*Chairman, Committee on the Judiciary, House of Representatives,*  
*Washington, DC.*

DEAR MR. CHAIRMAN: I am writing to convey the views of the Department of Justice on H.R. 424 as reported by the Subcommittee on Crime in anticipation of the consideration of this measure by the full Judiciary Committee.

H.R. 424 is designed to respond to the 1995 decision of the Supreme Court in *Bailey v. United States*, 116 S. Ct. 501, which narrowly interpreted 18 U.S.C. 924(c), the statute that punishes persons who use or carry a firearm during and in relation to the com-

mission of a felony crime of violence or drug trafficking offense. Prior to the Court's decision in *Bailey*, the courts of appeals had generally construed this statute broadly to reach conduct in which, for example, a drug dealer possessed a firearm in connection with his drug activities. In *Bailey*, however, the Court observed that the statute did not proscribe possession, but rather "use," of a firearm and held accordingly that to violate section 924(c) a person must "actively employ" a firearm.

We believe that, as a matter of policy, the scope generally given to the statute by the courts of appeals before *Bailey* served better to protect the public safety. Therefore, last Congress and again earlier this year, the Administration proposed a relatively simple amendment to restore the law to its pre-*Bailey* scope by substituting the word "possesses" for the phrase "uses or carries." See H.R. 810. The Administration bill would also have increased the current mandatory five-year penalty to ten years if the firearm were discharged or were used to cause serious bodily injury (e.g., to pistol whip a victim).

In its current form, H.R. 424 would not restore the statute to its pre-*Bailey* parameters, and indeed, through its unprecedented requirement that possession of a firearm include the presence of ammunition, it would actually narrow the post-*Bailey* scope of section 924(c). In addition, the Subcommittee-approved version of H.R. 424 employs a problematic, three-tiered penalty structure that seems both unsound and likely to engender substantial, unnecessary litigation. Consequently, while we appreciate the intent of the Subcommittee to respond to the *Bailey* decision, we believe the bill is inadequate from the standpoint of protecting public safety and of deterring and punishing violent and drug trafficking crimes involving firearms. We are therefore unable to support H.R. 424 in its present form. A more detailed exposition of our views follows.

#### *Defining "possess"*

Our principal objection to H.R. 424 stems from its proposed narrow definition of the term "possess." The bill provides that "a person is deemed to possess a firearm if the firearm and ammunition for the firearm are proximate and immediately accessible to the person." We believe that defining "possess" is both unnecessary and inappropriate, particularly considering the requirement in section 924(c) that the weapon be possessed "during and in relation to" the underlying crime. See *United States v. Smith*, 508 U.S. 223, 238 (1993) ("The phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence."). Moreover, the definition chosen in H.R. 424 is seriously flawed.

No other criminal statute of which we are aware contains a definition of "possess," despite the fact that the term is used in many statutes punishing possession of controlled substances or stolen or counterfeit property, as well as in the statute most closely related here—punishing possession of a firearm by a convicted felon (18 U.S.C. 922(g)). The occurrence of a definition of "possess" in section 924(c) but not in section 922(g) or other statutes concerning possession of drugs would give rise to confusing jury instructions in the

case of a prosecution of an individual under both statutes. Moreover, the term “possess” has long been interpreted by the courts and has given rise to no great difficulty. Therefore, we see no necessity, and much potential for confusion, if in this frequently used statute a definition were to be enacted. We urge its deletion from the bill.

Even if a definition of “possess” were appropriate, the one chosen in H.R. 424 is deeply flawed. The requirement that a firearm be “proximate and immediately accessible” would not, for example, cover the common situation in which a drug dealer keeps a firearm with his drugs or with the proceeds or instrumentalities of his drug business. Such firearms pose a grave danger to undercover law enforcement agents and innocent bystanders, as well as to officers conducting a search. The only time the proposed definition would reach such firearms is when a drug dealer happens to be arrested while immediately adjacent to a firearm. In addition to adequately protecting the public safety, the definition would create an unjust and arbitrary result (dependent on the location of the arrest) not consistent with the purpose of section 924(c), which aims to punish and deter all use of firearms to facilitate drug trafficking and other serious offenses.

At least equally inconsistent with the interest of public safety is the part of the definition of “possess” that would require the presence of ammunition. Such a definition would actually narrow the current scope of section 924(c) as interpreted by *Bailey*. Moreover, the requirement is fundamentally inconsistent with current law. A “firearm,” for purposes of federal prosecution, need not be either loaded or operable. See 18 U.S.C. 921(a)(3); *United States v. Gutierrez-Silva*, 983 F.2d 123 (8th Cir. 1993); *United States v. Yannott*, 42 F.3d 999, 1005–7 (6th Cir. 1994), cert. denied, 115 S. Ct. 1172 (1995). This is because the potential for danger arising from an unloaded or inoperable weapon is still substantial if either the possessor or others, who may also initiate violence, do not know the weapon cannot fire. In addition, it would be virtually impossible to prove the presence of proximate and immediately accessible ammunition for a firearm observed in a drug dealer’s possession during an undercover drug transaction, unless the dealer is arrested during or immediately after the transaction, which might give rise to a needlessly dangerous situation. Adding a requirement to “possession” that ammunition be present is therefore inconsistent, unsound, and unsafe.

#### *The penalty structure*

We also have serious concerns about the rather complex three-tiered penalty scheme proposed in H.R. 424. We believe that those who possess firearms during and in relation to felony crimes of violence and drug trafficking crimes must be severely punished, and our proposal would both ensure the appropriate scope of section 924(c) and maintain tough penalties. Under current law, a violation of section 924(c) generally carries a five-year mandatory penalty, although the penalty is increased to 10 years if the firearm is a semiautomatic assault weapon or a gangster-type weapon, such as a sawed-off shotgun. H.R. 424 would double the penalty for possessing a firearm to 10 years; raise it to a mandatory 15 years if

a firearm were brandished; and raise it to a mandatory 20 years if a firearm were discharged. By raising the minimum penalty to 10 years, the proposal eliminates the current distinction between assault weapons and others.

In our view, the existing penalty scheme, which accounts for the different dangers associated with different weapons, is appropriate. Moreover, the novel concept of increasing the penalty for “brandishing” a firearm is problematic. Under the bill, “to brandish” is “to display all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible.” Even assuming “display” could be indirect whereas “visible” means “directly visible,” a bank robber with a wholly concealed firearm who states, “I have a gun—hand over your money,” would presumably be subject to the 10-year penalty, whereas a robber uttering the same words while pointing to a bulge near his shoulder would be subject to the 15-year penalty. We question whether such a dramatic difference in sentence is appropriate for such essentially equivalent offenders. In our view, the separate brandishing category is unsound.

Finally, we recommend that H.R. 424 include, as the Administration’s proposal does, a penalty increase for causing serious bodily injury through the use of a firearm. Such an increase is a common and appropriate feature of statutes aimed at deterring and punishing violent crimes. We believe it should be incorporated in this bill.

*Other issues*

Finally, we note for the Committee’s consideration three technical matters. First, 18 U.S.C. 929, a companion statute to 18 U.S.C. 924(c), should be amended in a parallel and conforming fashion to section 924(c). Second, a death penalty for persons who violate section 924(c) and cause death through the use of a firearm has been in place since 1994. *See* 18 U.S.C. 924(j). Hence, the death penalty language found on page 3, lines 17–18, of H.R. 424 is redundant. Finally, on page 3, line 25, the word “used” should be stricken and replaced with whatever verbs ultimately are adopted for defining the conduct prohibited under section 924(c).

I hope the foregoing is useful to the Committee. Please do not hesitate to communicate with us if the Department may be of further assistance.

Sincerely,

ANDREW FOIS,  
*Assistant Attorney General.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in *roman*):

## SECTION 924 OF TITLE 18, UNITED STATES CODE

## § 924. Penalties

(a) \* \* \*

\* \* \* \* \*

(c) [(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.] (1) *A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States—*

(A) *possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;*

(B) *brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or*

(C) *discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years;*

*except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, such additional sentence shall be imprisonment for 30 years.*

(2) *In the case of the second or subsequent conviction of a person under this subsection—*

(A) *if the conviction is for possession of a firearm as described in paragraph (1), the person shall, in addition to the sentence*

*imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 20 years;*

*(B) if the conviction is for brandishing a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 25 years; or*

*(C) if the conviction is for discharging a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 30 years; except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to life imprisonment.*

*(3) Notwithstanding any other provision of law, the court shall not impose a probationary sentence on any person convicted of a violation of this subsection, nor shall a term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used.*

*(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible.*

**[(2)]** *(5) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).*

**[(3)]** *(6) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—*

*(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or*

*(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*

\* \* \* \* \*

## DISSENTING VIEWS

We oppose this legislation because of the unduly severe mandatory minimum penalties it includes: 10 years for possession of a gun, 15 years for brandishing a gun and 20 years for discharging a gun, without any evidence that this increase in penalty is necessary or even advisable.

Under the penalty structure imposed by this legislation, if a defendant is convicted of possessing 5 grams of crack and is found to have possessed a gun at the time, he will receive a mandatory 15 year sentence. But if this is not a first drug offense, the defendant will receive a mandatory 25 year sentence.

If the defendant opened his coat to display a gun tucked into his pants during the course of this drug offense, he will receive a mandatory 20 year sentence. But, again, if this is not the defendant's first drug offense, he will receive a mandatory 30 year sentence.

Finally, if the defendant discharged a firearm in the course of the offense—perhaps by simply shooting it into the air—he will receive a mandatory 25 year sentence, 35 years if this is not his first offense.

A comparison between these penalties and the penalties for other violent crimes is instructive. Voluntary manslaughter carries a penalty of five years; aggravated assault, less than two years; assault with intent to murder, less than three and one-half years; criminal sexual abuse, under six years; and kidnapping carries a penalty of approximately four years.

In our view, the fact that a defendant can receive five years for manslaughter, two years for serious assault, three and one-half years for assault with intent to murder, six years for rape and four years for kidnapping, but between 15 and 35 years for possessing a gun in connection with a drug offense where no one is injured defies logic. It is ludicrous for the House to pass a measure requiring some drug offenders to receive a penalty 6 times greater than the penalty for rape and 7 times greater than the penalty for voluntary manslaughter when these defendants haven't caused any bodily injury.

Moreover, the Department of Justice, which has strongly urged Congress to amend Title 18 section 924(c) of the United States Code ever since the Supreme Court's decision *Bailey v. United States*,<sup>1</sup> has not requested any change in the penalty structure, and in fact, has sent the Committee a letter declaring the existing penalty structure "appropriate."<sup>2</sup>

The Department of Justice's letter also notes that the penalty structure created by this legislation eliminates the current distinc-

<sup>1</sup> 116 S. Ct. 501 (1995).

<sup>2</sup> Letter from Andrew Fois, Assistant Attorney General for Legislative Affairs, Department of Justice, to Congressman Henry J. Hyde, Chairman, House Judiciary Committee, September 8, 1997.

tion between assault weapons and others. This is clearly intentional. Under current law, a violation of section 924(c) generally carries a five year mandatory penalty, although the penalty is increased to ten years if the firearm is a semiautomatic assault weapon or a gangster-type weapon such as a sawed-off shot gun. Ever since the ban on semi-automatic assault weapons was passed into law as part of the 1994 Omnibus Crime Bill,<sup>3</sup> the majority has actively sought ways to diminish the significance and the impact of the ban. The new penalty structure imposed by this legislation is simply another way that the majority is attempting to subvert the assault weapons ban without actually voting to repeal the ban.

Despite these concerns, in a voice vote, the majority opposed an amendment in the nature of a substitute offered by Congressman Scott, and supported by the American Bar Association,<sup>4</sup> which would have left the current penalty structure intact and ordered the United States Sentencing Commission, the body Congress has charged with creating a reasoned and appropriate penalty structure, to study whether the current sentences are adequate and make recommendations to Congress as to whether the penalties need adjustment.

Because the penalties imposed by this legislation are unduly harsh and because no evidence has been presented suggesting that such harsh penalties are necessary, we dissent from the passage of H.R. 424.

JOHN CONYERS, Jr.  
BOBBY SCOTT.  
ZOE LOFGREN.  
MAXINE WATERS.  
WILLIAM D. DELAHUNT.  
BARNEY FRANK.  
MELVIN L. WATT.  
SHEILA JACKSON LEE.

○

<sup>3</sup>Title XI, Subtitle A, Pub. L. 103-322, Sept. 13, 1994.

<sup>4</sup>Letter from Robert B. Evans, Director of the Government Affairs Office, American Bar Association, to Congressman John Conyers, Jr., Ranking Member, House Judiciary Committee, September 16, 1997.