

STOP ADVERTISING VICTIMS OF EXPLOITATION ACT OF 2015

JANUARY 27, 2015.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 285]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 285) to amend title 18, United States Code, to provide a penalty for knowingly selling advertising that offers certain commercial sex acts, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 285 clarifies that 18 U.S.C. § 1591, which criminalizes the knowing sex trafficking of minors and others through force, fraud, or coercion, can be violated when a defendant knowingly advertises a victim for a commercial sex act. This provision requires the government to prove that defendants accused of benefitting financially through the sale of such advertising knew that the victim was a minor or a victim of force, fraud, or coercion. The bill is technology neutral and applies to both advertisements online, as well as traditional advertisements.

Background and Need for the Legislation

Pimps and traffickers sexually exploit children through street prostitution, in adult strip clubs, brothels, sex parties, motel rooms, hotel rooms, and other locations throughout the United States. The growth of the Internet and other technological advances, including mobile smartphones, has greatly facilitated the commercial sexual exploitation of children by providing a convenient way to market these victims to potential purchasers. Individuals can now use websites to advertise, schedule, and purchase sexual encounters with minors. According to the Polaris Project, U.S. law enforcement has identified online advertisements as the primary platform for buying and selling sex with minors, and an FBI study found more than 2,800 minor victims were advertised on just one online advertisement service in 2008.¹ It is estimated that revenue from online advertisements of prostitution generally (not just involving minors) surpassed \$45 million in 2012 alone.²

H.R. 285 clarifies that the existing Federal sex trafficking statute, 18 U.S.C. § 1591, extends to traffickers who knowingly sell sex with minors and victims of force, fraud, or coercion through advertising, as well as people or entities that knowingly benefit from such advertising. The Supreme Court has repeatedly held that, when a Federal statute contains an explicit *mens rea* provision, that standard applies to every element of the offense.³ Under current law, the government can show that a defendant either knew or recklessly disregarded the fact that a victim was a minor or involved through force, fraud, or coercion. H.R. 285 requires the government to prove beyond a reasonable doubt that a defendant who benefits from the advertising of a trafficking victim under 18 U.S.C. § 1591(a)(2) knew that the advertising involved a victim who the defendant knew was a minor or a victim of force, fraud, or coercion.⁴

¹POLARIS PROJECT, INTERNET BASED HUMAN TRAFFICKING, <http://www.polarisproject.org/component/content/article/1-national-human-trafficking-hotline/257-Internet-based>.

²AIM GROUP, ONLINE PROSTITUTION-AD REVENUE CROSSES CRAIGSLIST BENCHMARK, JULY 2013, available at <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark>.

³See, e.g., *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *United States v. X-Citement Video*, 513 U.S. 64 (1994).

⁴“Knowingly” does not have a uniform Federal definition. The Fifth, Tenth, and Eleventh Circuits define “knowingly” as meaning a defendant committed a criminal act “voluntarily and intentionally, and not because of mistake or accident.” Fifth Circuit Instruction 1.37; Tenth Circuit Instruction 1.37; Eleventh Circuit Instruction 9.1A. The Seventh and Ninth Circuits employ an instruction to the effect that “‘knowingly’ . . . means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident.” Seventh Circuit Instruction 4.10; Ninth Circuit Instruction 5.6. Other circuits have taken a case-by-case approach to the definition of “knowingly.”

H.R. 285 clarifies that people who advertise sex trafficking can face *criminal* liability. The bill is technology neutral and applies to both advertisements online, as well as traditional advertisements. Under current law, Section 1595 of Title 18 extends the possibility of civil liability to defendants who violate Section 1591. However, under Section 230 of the Communications Decency Act,⁵ online publishers of third-party advertisements are generally immune from civil liability for such advertisements.⁶ H.R. 285 does nothing to disrupt or modify the civil immunity already provided by Section 230.

During markup, the Committee rejected an amendment to exempt sex trafficking advertisers from the existing mandatory penalties in Section 1591. The amendment would have provided special treatment and potentially more lenient sentences to those who traffic children through advertising, rather than through other means. The trauma to the child is no less when they are trafficked through advertising—in fact, it is arguably worse, given that online advertising makes it easier to sell these children even more frequently.

Hearings

The Committee on the Judiciary held no hearings on H.R. 285.

Committee Consideration

On January 21, 2015, the Committee met in open session and ordered the bill H.R. 285 favorably reported by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall vote occurred during the Committee's consideration of H.R. 285.

1. Amendment #1, offered by Mr. Johnson. The amendment exempts traffickers who committed their crime through advertising from the existing mandatory minimum sentences in 18 U.S.C. § 1591. Defeated 7 to 20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)			

⁵ 47 U.S.C. § 230.

⁶ Courts generally apply Section 230(c)(1) immunity where: (1) a defendant is a provider or user of an interactive computer service; (2) the defendant is being treated as a publisher or speaker of the challenged content for liability purposes; and (3) the content at issue is information provided by another information content provider. Courts have overwhelmingly found that defendants that provide access to online content are providers or users of an interactive computer service as broadly defined by section 230, and accordingly immune from civil liability. See *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Peters (CA)			
Total	7	20	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises 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.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

With respect to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, an estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 was not submitted to the Committee before the filing of the report.

Duplication of Federal Programs

No provision of H.R. 285 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

No provision of H.R. 285 directs a specific rule making within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 285 clarifies that 18 U.S.C. § 1591, which criminalizes the knowing sex trafficking of minors and others through force, fraud, or coercion, can be violated when a defendant advertises such a victim for a commercial sex act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 285 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title. This section cites the short title of the bill as the “Stop Advertising Victims of Exploitation Act of 2015.”

Section 2. Advertising that Offers Certain Commercial Sex Acts. This section expands 18 U.S.C. § 1591 to include the advertising of commercial sex acts involving a minor or an individual engaged in such an act through force, fraud, or coercion. Additionally, this section adopts a knowing standard for those accused of benefitting financially or otherwise from the sale of advertising depicting these individuals under 18 U.S.C. § 1591(a)(2).

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) 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 italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART I—CRIMES

* * * * *

CHAPTER 77—PEONAGE, SLAVERY, AND TRAFFICKING
IN PERSONS

* * * * *

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, *advertises*, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, *except where, in an offense under paragraph (2), the act constituting the violation of paragraph (1) is advertising*, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, **or obtained** *obtained, or advertised* had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, **or obtained** *obtained, or advertised* had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

* * * * *

Dissenting Views

INTRODUCTION

H.R. 285, the “Stop Advertising Victims of Exploitation Act of 2015,” amends the Federal sex trafficking statute¹ to prohibit the advertising of certain commercial sex acts. We agree with the bill’s laudable goal of prosecuting those who facilitate sex trafficking, but disagree with the bill’s expansion of mandatory minimum sentencing because of the serious public policy concerns it presents. While the acts prohibited by the legislation will often warrant long sentences, mandatory minimum sentences are the wrong way to determine the punishment under this or any other criminal statute. Specifically, mandatory minimum sentencing distorts rational sentencing, wastes taxpayer money, and often leads to sentences that are not appropriate under the facts of particular cases, even when as applied to serious offenses.

No matter how well-intentioned H.R. 285 may be, we do not believe these significant public policy concerns can be disregarded. An amendment rejected during the markup would have ameliorated our concerns by clarifying that mandatory minimum sentences would not apply to the new offense, while still providing that offenders could be punished under the statute’s maximum penalty. Unfortunately, without this important change, we are unable to

¹ 18 U.S.C. § 1591 (2015).

support this legislation and accordingly we dissent from the Committee views on this legislation.

DESCRIPTION AND BACKGROUND

H.R. 285 is primarily intended to prevent the advertising of acts of commercial sex trafficking via the Internet. The bill amends section 1591 of title 18 of the United States Code, which deals with the Federal crime of sex trafficking, to include advertising of certain commercial sex acts as a punishable offense. Section 1591 currently prohibits conduct such as recruiting, enticing, harboring, transporting, and providing victims or benefitting financially from commercial sex acts involving minors, or adults who are forced or coerced into participating in the acts. H.R. 285 also amends section 1591 to include advertising in its penalty provisions, which impose mandatory minimum sentences of 10 or 15 years, depending on the circumstances of the crime.

For offenses under section 1591(a) of the current statute, one may be punished for acting “knowingly” or “in reckless disregard” of the fact that a victim is a minor or one whose participation in the acts was forced or coerced. For instances where one benefits from a sex trafficking venture in violation of section 1591(a)(2) when the conduct of the venture in violation of section 1591(a)(1) consists of advertising, section 2(b) of the bill requires knowledge as to these facts and the “reckless disregard” standard would not apply.

CONCERNS WITH H.R. 285

By adding advertising to the list of prohibited conduct related to sex trafficking, H.R. 285 may subject a range of communications providers and facilitators to mandatory minimum sentences. Regardless of the nature and circumstances surrounding the offense, the role of the offender in the particular crime, and the history and characteristics of the offender, H.R. 285 would require a judge to impose a 10- or 15-year sentence. Even if everyone involved in a case—the arresting officer, prosecutor, judge, and victim—believes that the mandatory minimum would be an unjust sentence for a particular defendant in a case, H.R. 285 would nevertheless mandate that it be imposed.

The imposition of a mandatory minimum sentence of 10 or 15 years is particularly troublesome when one considers the possible scope of defendants who could be prosecuted under H.R. 285. Notably, the prohibition on advertising does not explicitly apply only to a sex trafficker who places an advertisement, and could conceivably be applied to individuals and entities who facilitate, but have a minor role in, publishing the advertisement. Those who are employed by a venture that benefits financially from the advertisement, but whose role in the organization does not place them in the chain of decision making with respect to acceptance or publishing of illegal advertisements could also be prosecuted under the bill.² In the online context in which advertising networks are often complex and automated, there may be circumstances in which an em-

² 18 U.S.C. § 1591(a)(2) (2015) subjects to liability “whoever knowingly—(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1).”

ployee of a communications company may be found liable under the statute, but whose role in the offense is so attenuated that it would not warrant a mandatory minimum sentence of 10 or 15 years.

Mandatory minimum sentences are the wrong way to determine punishment under the Federal sex trafficking statute, or any other statute. Mandatory minimums not only lead to unjust outcomes for individuals, but also have serious systemic consequences by contributing to the problem of overincarceration. As of September 2010, 75,579 Federal prisoners—more than one-third (39.4%)—were serving mandatory minimum sentences.³ This represents a 155% increase from the number of Federal prisoners serving mandatory minimum sentences in 1995 (29,603).⁴ Since Congress enacted harsh mandatory minimums in the 1980s, the Federal prison population has exploded by over 800% to more than 216,000 inmates today.⁵

In addition, higher than warranted sentences resulting from mandatory minimum sentencing strain public finances. For example, the average cost of incarceration for a Federal inmate in fiscal year 2011 was \$28,893.40.⁶ In fact, the U.S. Department of Justice has referred to the increased year-to-year spending on Federal prisons as “unsustainable” and a threat to public safety.⁷ For fiscal year 2014, close to a third (28.8%) of the Justice Department’s \$27.7 billion budget was earmarked for Federal prisons and detention.⁸ Every dollar expended on lengthy mandatory minimum incarcerations is a dollar that cannot be spent on crime prevention, victim services, training, investigation, and prosecution.⁹ Absent smarter sentencing policies and reformation of mandatory minimum sentences, prison populations and their associated costs will continue to escalate.¹⁰ We need to take steps to ensure that sentences are appropriately severe, but are not set beyond levels that no longer serve legitimate criminal justice purposes.

An amendment offered by Representative Henry C. “Hank” Johnson, Jr. (D-GA) that would have addressed these significant concerns was defeated by a vote of 7 to 20 during the markup. The amendment would have removed application of the statute’s mandatory minimum prison sentences to advertising and instead allow a judge to apply an appropriate sentence under the circumstances of the case up to the statute’s existing maximum penalty of life in prison. Given the complicated nature of internet communications networks and other forms of advertising, which would be affected by this bill, the role of the judge in evaluating each case is particu-

³United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal System, at 148 (Oct. 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_07.pdf.

⁴*Id.* at 81, *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf.

⁵Bureau of Prisons, Historical Information, *at* http://www.bop.gov/about/history/and_inmate_statistics/offenses, *at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

⁶Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. No. 52 at 16711 (Mar. 18, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-03-18/pdf/2013-06139.pdf>.

⁷Michael E. Horowitz, Inspector General, Top Management and Performance Challenges Facing the Dep’t of Justice—2013, *at* <http://www.justice.gov/oig/challenges/2013.htm>.

⁸U.S. Senate Committee on Appropriations, Summary: Fiscal Year 2014 Omnibus Appropriations Bill 5–7 (Jan. 13, 2014), *at* <http://www.appropriations.senate.gov/newsroom/method=news.view&id=5aa8e660-f52e-4074-945f-9618eb963ae9>.

⁹*Id.*

¹⁰Horowitz, *supra* n.7.

larly important. While long sentences may be appropriate under the facts of a particular violation of law, Congress cannot know the facts of every case in advance. Removing mandatory minimums while still permitting the lengthy statutory maximum penalty of life imprisonment, as Representative Johnson's amendment would have done, would provide the appropriate spectrum of sentences for culpability and proportionate punishment.

CONCLUSION

We must do more to combat sex trafficking by taking steps such as strengthening our laws and providing additional resources for law enforcement and victim services. In our haste to combat this tragic crime, however, we must also consider the public policy implications of our legislative actions. Unfortunately, the expansion of mandatory minimum penalties resulting from H.R. 285 would make it an inflexible and often inappropriate means of addressing the range of those who could be prosecuted under the statute.

For the foregoing reasons, we must respectfully dissent.

MR. CONYERS, JR.
MS. JACKSON LEE.
MR. JOHNSON, JR.
MR. GUTIERREZ.

