

TRANSNATIONAL DRUG TRAFFICKING ACT OF 2015

—————
JUNE 3, 2016.—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. 3380]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3380) to provide the Department of Justice with additional tools to target extraterritorial drug trafficking activity, and for other purposes, 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. 3380 amends Federal law¹ to impose penalties for extraterritorial drug trafficking when the prosecution can prove that the defendant had “reasonable cause to believe” that the drugs will be imported into the United States, and to impose penalties on producers of precursor chemicals from other countries who (1) intend or know that these chemicals will be used to manufacture illegal drugs, and who (2) intend, know or have reasonable cause to believe that the drug will be imported into the United States. H.R. 3380 also amends Federal law to require the seller of a counterfeit drug to know the drug is counterfeit in order to be charged with a Federal crime.

Background and Need for the Legislation

In recent years, Federal law enforcement has witnessed a significant evolution in the practices of international drug trafficking organizations headquartered in many South and Central American nations. Increasingly, these organizations no longer rely on distribution networks in the United States, but instead sell their illicit products to Mexican traffickers, who, in turn, import the narcotics into the United States. Under current law, Federal prosecutors must prove that these “source-nation” manufacturers, wholesale distributors, brokers, and transporters, intend for the drugs to reach the United States. But the use of intermediary traffickers in Mexico makes it difficult, if not impossible in some instances, for the government to prove knowledge that the drugs are bound for America. The result is that “source-nation” traffickers escape prosecution because they claim ignorance of the drugs’ ultimate destination.

H.R. 3380 addresses this problem by amending the Controlled Substances Import and Export Act² (CSIEA) in two ways. First, it incorporates a “reasonable cause to believe” *mens rea* standard into the statute. This amendment will allow the Government to argue that the defendant had “reasonable cause to believe” the drugs he was conspiring to traffic were bound for the United States. Under this standard, a Federal prosecutor could use the circumstantial evidence of the drugs’ nexus to the United States (use of U.S. dollars, drug route, packaging, etc.) as direct evidence that the defendant had reasonable cause to believe that the drugs were destined for the United States.

Second, H.R. 3380 amends the CSIEA to prohibit extraterritorial trafficking of listed chemicals³ for the manufacture of controlled substances that are to be unlawfully imported into the United States. Current law only addresses extraterritorial trafficking of listed chemicals that results in the smuggling of the listed chemicals themselves or the finished controlled substance into the United States. H.R. 3380 would amend the CSIEA to reach chemical traffickers who knowingly facilitate and benefit from the trafficking operation, even if they do not actually take part in the manufacturing and trafficking conspiracy.

¹21 U.S.C. § 959.

²21 U.S.C. § 951 et seq.

³“Listed chemicals” are chemicals used in manufacturing controlled substances. See 21 U.S.C. § 802(33)–(35).

H.R. 3380 also amends Federal criminal counterfeit law to correct mistakes and to insert an intent requirement where Congress neglected to do so. This amendment is necessary because the Counterfeit Drug Penalty Enhancement Act,⁴ which imposed enhanced penalties for counterfeiting drugs, failed to include an intent requirement for anyone who “traffics in a counterfeit drug.”⁵ The result is that anyone who transports a counterfeit drug—a truck driver, parcel service, or even a patient with a prescription—could be prosecuted under this statute, even if they did not know the drug was counterfeit. That was not Congress’s intent in enacting this statute. Congress intended these penalties to apply to malefactors who traffic in drugs and knowingly use counterfeit marks on the drugs.⁶ H.R. 3380 amends Federal law to ensure the penalties will be applied properly.

During the Committee markup, there was considerable discussion about the applicability of the “reasonable cause to believe” standard. Ranking Member Conyers offered an amendment to limit the applicability of the standard only to persons who are organizers or leaders of the prohibited activity and in situations where the prohibited activity involves five or more participants. That amendment failed on a recorded vote. The Chairman opposed the amendment, because the intent of H.R. 3380 is to give the U.S. government the ability to pursue and prosecute significant, contributing members of drug trafficking organizations who may not be the organizers or leaders, but who are invariably located in the source nation—specifically, the criminals who are smuggling, brokering, and supplying for sale illicit narcotics. The amendment would have had the effect of protecting Colombian, Peruvian, Honduran, Salvadoran, Guatemalan, and other foreign nationals who are significant members of a drug trafficking organization, and thus would gut the core purpose of the bill, which is to target these drug trafficking organizations at their heart.

More specifically, the amendment sought to apply the most restrictive reading of the aggravating role enhancement in the U.S. Sentencing Guidelines to H.R. 3380,⁷ and require the government to prove beyond a reasonable doubt, to a jury, that a defendant is an organizer or leader of a drug trafficking organization and has employed 5 or more people. In the past, these terms have always been proven via a preponderance of the evidence during the sentencing phase of a criminal trial, and the ambiguity of who is an “organizer or leader” has led to a significant amount of litigation. By moving this responsibility from the judge to the jury, the amendment would have imposed a significant, inappropriate change from current practice that would make it extremely difficult for Federal prosecutors to pursue the foreign drug trafficking defendants targeted by H.R. 3380.

⁴ See Pub. L. No. 112–144, § 717, 126 Stat. 1026 (2012) (codified at 18 U.S.C. §§ 2318, 2320).

⁵ 18 U.S.C. § 2320(a)(4).

⁶ For evidence of Congress’s intent, see, e.g., 158 Cong. Rec. H3719 (daily ed. June 18, 2012) (statement of Rep. Smith of Texas: “Counterfeit drugs are fake drugs. They may be contaminated, contain the wrong ingredient or no ingredient at all, or have the right active ingredient but the wrong dose. *They are intentionally packaged to convince the consumer they are genuine.* Counterfeit drugs are illegal and can be harmful to a person’s health and even deadly.” (emphasis added)).

⁷ U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (2014).

Finally, it is worth noting that the costs of extraditing a defendant to the United States to stand trial can be significant.⁸ Given that, along with the fact that the U.S. government uses this provision to pursue individuals in source nations who are significant cogs in a drug organization’s distribution chain, and not mere “mules,” any fear that this provision will be used to target so-called “low-level” offenders is unfounded.

Hearings

The Committee on the Judiciary held no hearings on H.R. 3380.

Committee Consideration

On April 20, 2016, the Committee met in open session and ordered the bill H.R. 3380 favorably reported without amendment, 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 votes occurred during the Committee’s consideration of H.R. 3380.

1. An Amendment offered by Mr. Conyers, to limit applicability of the “reasonable cause to believe” standard only to persons who are organizers or leaders of the prohibited activity, and in situations where the prohibited activity involves five or more participants. Defeated 16 to 6.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	

⁸See, e.g., “Audit of the Department of Justice’s Management of International Fugitive Removal Activities,” Office of the Inspector General, U.S. Department of Justice, p. 39 (November 2014) (chart showing the cost of 64 separate international removal events in 2012 and 2013).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Ratcliffe (TX)			
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)			
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)		X	
Total	6	16	

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

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3380, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 6, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3380, the “Transnational Drug Trafficking Act of 2015.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3380—Transnational Drug Trafficking Act of 2015.

As ordered reported by the House Committee on the Judiciary
on April 20, 2016.

CBO estimates that implementing H.R. 3380 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant. We estimate that enacting H.R. 3380 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3380 would broaden the coverage of current laws relating to the illegal importation of controlled substances. As a result, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the bill would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 3380 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and subsequent direct spending would not be significant because the legislation would probably affect only a small number of cases.

H.R. 3380 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

On September 28, 2015, CBO transmitted a cost estimate for S. 32, the “Transnational Drug Trafficking Act of 2015,” as reported by the Senate Committee on the Judiciary on September 17, 2015.

The language for both pieces of legislation is similar and CBO's estimates of the budgetary effects are the same.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 3380 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

The Committee estimates that H.R. 3380 specifically directs to be completed no specific rule makings 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. 3380 amends Federal law to impose a “reasonable cause to believe” standard on certain extraterritorial drug traffickers; to impose a similar standard on extraterritorial producers of listed chemicals; and to require the seller of a counterfeit drug to know the drug is counterfeit in order to be charged with a Federal crime.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3380 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

Section 1. Short Title. This section cites the short title of the bill as the “Transnational Drug Trafficking Act of 2015.”

Section 2. Possession, Manufacture or Distribution for Purposes of Unlawful Importation. This section amends Section 1009 of the Controlled Substances Import and Export Act⁹ to incorporate a “reasonable cause to believe” intent standard. This section also amends the CSIEA to prohibit extraterritorial trafficking of listed chemicals for the manufacture of controlled substances that are to be unlawfully imported into the United States, and similarly includes a “reasonable cause to believe” standard.

Section 3. Trafficking in Counterfeit Goods or Services. This section, in subsection (1), amends Federal law to fix an error in citation since the relevant definitions section is 18 U.S.C. § 2320(f) and not § 2320(e). In subsection (2), this section revises 18 U.S.C. § 2320(a) to include an intent requirement, which will ensure these penalties are applied properly.

⁹21 U.S.C. § 959.

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, and existing law in which no change is proposed is shown in roman):

CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT

* * * * *

**TITLE III—IMPORTATION AND EXPORTATION;
AMENDMENTS AND REPEALS OF REVENUE LAWS**

* * * * *

PART A—IMPORTATION AND EXPORTATION

* * * * *

**POSSESSION, MANUFACTURE OR DISTRIBUTION FOR PURPOSES OF
UNLAWFUL IMPORTATION**

SEC. 1009. (a) **It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or listed chemical—**

[(1) intending that such substance or chemical be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States; or

[(2) knowing that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States.] *It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or a listed chemical intending, knowing, or having reasonable cause to believe that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States.*

(b) It shall be unlawful for any person to manufacture or distribute a listed chemical—

(1) intending or knowing that the listed chemical will be used to manufacture a controlled substance; and

(2) intending, knowing, or having reasonable cause to believe that the controlled substance will be unlawfully imported into the United States.

[(b)] (c) It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in United States, to—

(1) manufacture or distribute a controlled substance or listed chemical; or

(2) possess a controlled substance or listed chemical with intent to distribute.

[(c)] (d) This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the

United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

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TITLE 18, UNITED STATES CODE

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PART I—CRIMES

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CHAPTER 113—STOLEN PROPERTY

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§ 2318. Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging

(a)(1) Whoever, in any of the circumstances described in subsection (c), knowingly traffics in—

(A) a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany—

- (i) a phonorecord;
- (ii) a copy of a computer program;
- (iii) a copy of a motion picture or other audiovisual work;
- (iv) a copy of a literary work;
- (v) a copy of a pictorial, graphic, or sculptural work;
- (vi) a work of visual art; or
- (vii) documentation or packaging; or

(B) counterfeit documentation or packaging, shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) As used in this section—

(1) the term “counterfeit label” means an identifying label or container that appears to be genuine, but is not;

(2) the term “traffic” has the same meaning as in [section 2320(e)] *section 2320(f)* of this title;

(3) the terms “copy”, “phonorecord”, “motion picture”, “computer program”, “audiovisual work”, “literary work”, “pictorial, graphic, or sculptural work”, “sound recording”, “work of visual art”, and “copyright owner” have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17;

(4) the term “illicit label” means a genuine certificate, licensing document, registration card, or similar labeling component—

- (A) that is used by the copyright owner to verify that a phonorecord, a copy of a computer program, a copy of a motion picture or other audiovisual work, a copy of a literary work, a copy of a pictorial, graphic, or sculptural

work, a work of visual art, or documentation or packaging is not counterfeit or infringing of any copyright; and

(B) that is, without the authorization of the copyright owner—

(i) distributed or intended for distribution not in connection with the copy, phonorecord, or work of visual art to which such labeling component was intended to be affixed by the respective copyright owner; or

(ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner's distribution channel and not for the purpose of verifying that a copy or phonorecord is non-infringing;

(5) the term "documentation or packaging" means documentation or packaging, in physical form, for a phonorecord, copy of a computer program, copy of a motion picture or other audiovisual work, copy of a literary work, copy of a pictorial, graphic, or sculptural work, or work of visual art; and

(6) the term "counterfeit documentation or packaging" means documentation or packaging that appears to be genuine, but is not.

(c) The circumstances referred to in subsection (a) of this section are—

(1) the offense is committed within the special maritime and territorial jurisdiction of the United States; or within the special aircraft jurisdiction of the United States (as defined in section 46501 of title 49);

(2) the mail or a facility of interstate or foreign commerce is used or intended to be used in the commission of the offense;

(3) the counterfeit label or illicit label is affixed to, encloses, or accompanies, or is designed to be affixed to, enclose, or accompany—

(A) a phonorecord of a copyrighted sound recording or copyrighted musical work;

(B) a copy of a copyrighted computer program;

(C) a copy of a copyrighted motion picture or other audiovisual work;

(D) a copy of a literary work;

(E) a copy of a pictorial, graphic, or sculptural work;

(F) a work of visual art; or

(G) copyrighted documentation or packaging; or

(4) the counterfeited documentation or packaging is copyrighted.

(d) FORFEITURE AND DESTRUCTION OF PROPERTY; RESTITUTION.—Forfeiture, destruction, and restitution relating to this section shall be subject to section 2323, to the extent provided in that section, in addition to any other similar remedies provided by law.

(e) CIVIL REMEDIES.—

(1) IN GENERAL.—Any copyright owner who is injured, or is threatened with injury, by a violation of subsection (a) may

bring a civil action in an appropriate United States district court.

(2) DISCRETION OF COURT.—In any action brought under paragraph (1), the court—

(A) may grant 1 or more temporary or permanent injunctions on such terms as the court determines to be reasonable to prevent or restrain a violation of subsection (a);

(B) at any time while the action is pending, may order the impounding, on such terms as the court determines to be reasonable, of any article that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation of subsection (a); and

(C) may award to the injured party—

(i) reasonable attorney fees and costs; and

(ii) (I) actual damages and any additional profits of the violator, as provided in paragraph (3); or

(II) statutory damages, as provided in paragraph

(4).

(3) ACTUAL DAMAGES AND PROFITS.—

(A) IN GENERAL.—The injured party is entitled to recover—

(i) the actual damages suffered by the injured party as a result of a violation of subsection (a), as provided in subparagraph (B) of this paragraph; and

(ii) any profits of the violator that are attributable to a violation of subsection (a) and are not taken into account in computing the actual damages.

(B) CALCULATION OF DAMAGES.—The court shall calculate actual damages by multiplying—

(i) the value of the phonorecords, copies, or works of visual art which are, or are intended to be, affixed with, enclosed in, or accompanied by any counterfeit labels, illicit labels, or counterfeit documentation or packaging, by

(ii) the number of phonorecords, copies, or works of visual art which are, or are intended to be, affixed with, enclosed in, or accompanied by any counterfeit labels, illicit labels, or counterfeit documentation or packaging.

(C) DEFINITION.—For purposes of this paragraph, the “value” of a phonorecord, copy, or work of visual art is—

(i) in the case of a copyrighted sound recording or copyrighted musical work, the retail value of an authorized phonorecord of that sound recording or musical work;

(ii) in the case of a copyrighted computer program, the retail value of an authorized copy of that computer program;

(iii) in the case of a copyrighted motion picture or other audiovisual work, the retail value of an authorized copy of that motion picture or audiovisual work;

(iv) in the case of a copyrighted literary work, the retail value of an authorized copy of that literary work;

(v) in the case of a pictorial, graphic, or sculptural work, the retail value of an authorized copy of that work; and

(vi) in the case of a work of visual art, the retail value of that work.

(4) STATUTORY DAMAGES.—The injured party may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for each violation of subsection (a) in a sum of not less than \$2,500 or more than \$25,000, as the court considers appropriate.

(5) SUBSEQUENT VIOLATION.—The court may increase an award of damages under this subsection by 3 times the amount that would otherwise be awarded, as the court considers appropriate, if the court finds that a person has subsequently violated subsection (a) within 3 years after a final judgment was entered against that person for a violation of that subsection.

(6) LIMITATION ON ACTIONS.—A civil action may not be commenced under this subsection unless it is commenced within 3 years after the date on which the claimant discovers the violation of subsection (a).

* * * * *

§ 2320. Trafficking in counterfeit goods or services

(a) OFFENSES.—Whoever intentionally—

(1) traffics in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services,

(2) traffics in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive,

(3) traffics in goods or services knowing that such good or service is a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security, or

[(4) traffics in a counterfeit drug,]

(4) *traffics in a drug and knowingly uses a counterfeit mark on or in connection with such drug,*

or attempts or conspires to violate any of paragraphs (1) through (4) shall be punished as provided in subsection (b).

(b) PENALTIES.—

(1) IN GENERAL.—Whoever commits an offense under subsection (a)—

(A) if an individual, shall be fined not more than \$2,000,000 or imprisoned not more than 10 years, or both, and, if a person other than an individual, shall be fined not more than \$5,000,000; and

(B) for a second or subsequent offense under subsection (a), if an individual, shall be fined not more than \$5,000,000 or imprisoned not more than 20 years, or both,

and if other than an individual, shall be fined not more than \$15,000,000.

(2) SERIOUS BODILY INJURY OR DEATH.—

(A) SERIOUS BODILY INJURY.—Whoever knowingly or recklessly causes or attempts to cause serious bodily injury from conduct in violation of subsection (a), if an individual, shall be fined not more than \$5,000,000 or imprisoned for not more than 20 years, or both, and if other than an individual, shall be fined not more than \$15,000,000.

(B) DEATH.—Whoever knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a), if an individual, shall be fined not more than \$5,000,000 or imprisoned for any term of years or for life, or both, and if other than an individual, shall be fined not more than \$15,000,000.

(3) COUNTERFEIT MILITARY GOODS OR SERVICES AND COUNTERFEIT DRUGS.—Whoever commits an offense under subsection (a) involving a counterfeit military good or service or **【counterfeit drug】** *drug that uses a counterfeit mark on or in connection with the drug*—

(A) if an individual, shall be fined not more than \$5,000,000, imprisoned not more than 20 years, or both, and if other than an individual, be fined not more than \$15,000,000; and

(B) for a second or subsequent offense, if an individual, shall be fined not more than \$15,000,000, imprisoned not more than 30 years, or both, and if other than an individual, shall be fined not more than \$30,000,000.

(c) FORFEITURE AND DESTRUCTION OF PROPERTY; RESTITUTION.—Forfeiture, destruction, and restitution relating to this section shall be subject to section 2323, to the extent provided in that section, in addition to any other similar remedies provided by law.

(d) DEFENSES.—All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act shall be applicable in a prosecution under this section. In a prosecution under this section, the defendant shall have the burden of proof, by a preponderance of the evidence, of any such affirmative defense.

(e) PRESENTENCE REPORT.—(1) During preparation of the presentence report pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, victims of the offense shall be permitted to submit, and the probation officer shall receive, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

(2) Persons permitted to submit victim impact statements shall include—

(A) producers and sellers of legitimate goods or services affected by conduct involved in the offense;

(B) holders of intellectual property rights in such goods or services; and

(C) the legal representatives of such producers, sellers, and holders.

(f) DEFINITIONS.—For the purposes of this section—

(1) the term “counterfeit mark” means—

(A) a spurious mark—

(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and

(iv) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36;

but such term does not include any mark or designation used in connection with goods or services, or a mark or designation applied to labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature used in connection with such goods or services, of which the manufacturer or producer was, at the time of the manufacture or production in question, authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation;

(2) the term “financial gain” includes the receipt, or expected receipt, of anything of value;

(3) the term “Lanham Act” means the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes”, approved July 5, 1946 (15 U.S.C. 1051 et seq.);

(4) the term “counterfeit military good or service” means a good or service that uses a counterfeit mark on or in connection with such good or service and that—

(A) is falsely identified or labeled as meeting military specifications, or

(B) is intended for use in a military or national security application;

(5) the term “traffic” means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export,

obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of; and

[(6) the term “counterfeit drug” means a drug, as defined by section 201 of the Federal Food, Drug, and Cosmetic Act, that uses a counterfeit mark on or in connection with the drug.]

(6) *the term “drug” means a drug, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).*

(g) LIMITATION ON CAUSE OF ACTION.—Nothing in this section shall entitle the United States to bring a criminal cause of action under this section for the repackaging of genuine goods or services not intended to deceive or confuse.

(h) REPORT TO CONGRESS.—(1) Beginning with the first year after the date of enactment of this subsection, the Attorney General shall include in the report of the Attorney General to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, an accounting, on a district by district basis, of the following with respect to all actions taken by the Department of Justice that involve trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, copies of motion pictures or other audiovisual works (as defined in section 2318 of this title), criminal infringement of copyrights (as defined in section 2319 of this title), unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances (as defined in section 2319A of this title), or trafficking in goods or services bearing counterfeit marks (as defined in section 2320 of this title):

(A) The number of open investigations.

(B) The number of cases referred by the United States Customs Service.

(C) The number of cases referred by other agencies or sources.

(D) The number and outcome, including settlements, sentences, recoveries, and penalties, of all prosecutions brought under sections 2318, 2319, 2319A, and 2320 of title 18.

(2)(A) The report under paragraph (1), with respect to criminal infringement of copyright, shall include the following:

(i) The number of infringement cases in these categories: audiovisual (videos and films); audio (sound recordings); literary works (books and musical compositions); computer programs; video games; and, others.

(ii) The number of online infringement cases.

(iii) The number and dollar amounts of fines assessed in specific categories of dollar amounts. These categories shall be: no fines ordered; fines under \$500; fines from \$500 to \$1,000; fines from \$1,000 to \$5,000; fines from \$5,000 to \$10,000; and fines over \$10,000.

(iv) The total amount of restitution ordered in all copyright infringement cases.

(B) In this paragraph, the term “online infringement cases” as used in paragraph (2) means those cases where the infringer—

(i) advertised or publicized the infringing work on the Internet; or

(ii) made the infringing work available on the Internet for download, reproduction, performance, or distribution by other persons.

(C) The information required under subparagraph (A) shall be submitted in the report required in fiscal year 2005 and thereafter.

(i) TRANSSHIPMENT AND EXPORTATION.—No goods or services, the trafficking in of which is prohibited by this section, shall be transshipped through or exported from the United States. Any such transshipment or exportation shall be deemed a violation of section 42 of an Act to provide for the registration of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946” or the “Lanham Act”).

* * * * *

Dissenting Views

INTRODUCTION

H.R. 3380, the “Transnational Drug Trafficking Act of 2015,” amends section 959 of the Controlled Substances Act¹ to make it easier for prosecutors to convict foreign drug traffickers responsible for importing into the United States illegal drugs and chemicals used to make those drugs by lowering the requisite proof of intent. Nevertheless, by lowering the intent requirement required to obtain a conviction under section 959, the bill would inherently subject more individuals to mandatory minimum penalties. We have long-opposed the imposition of mandatory minimum sentences because of their extraordinary injustice, role in causing prison overcrowding, and the excessive costs to taxpayers they cause. Mandatory minimum sentences have had a particularly devastating impact on minority communities across our Nation. Given the fact that H.R. 3380 would subject more individuals to mandatory minimum sentences, we must respectfully dissent.

DESCRIPTION AND BACKGROUND

Section 959(a) of the Controlled Substances Act outlaws the manufacture or distribution of controlled substances and certain chemicals with knowledge or intent that they will be illegally imported

¹Section 959 provides:

(a) Manufacture or distribution for purpose of unlawful importation

It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or listed chemical-

(1) intending that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States; or

(2) knowing that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States.

(b) Possession, manufacture, or distribution by person on board aircraft

It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to-

(1) manufacture or distribute a controlled substance or listed chemical; or

(2) possess a controlled substance or listed chemical with intent to distribute.

(c) Acts committed outside territorial jurisdiction of United States; venue

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

21 U.S.C. §959 (2016).

into the United States. This prohibition applies to anyone in the United States or outside our borders because section 959 is not limited to the prosecution of foreign nationals. Section 959 only provides that it is intended to be used to prosecute acts committed outside the territorial jurisdiction of the United States. Under this law, the government is required to prove as an element of the offense that a defendant manufactured or distributed a controlled substance or listed chemical with the intent (section 959(a)(1)) or knowledge (section 959(a)(2)) that such substance or chemical would be illegally imported into the United States or within 12 miles of the coast of the United States. A conviction under this statute may result in the imposition of a mandatory minimum sentence of five or ten years, depending on the quantity and type of controlled substance involved, pursuant to section 960 of title 21 of the United States Code, which sets forth the applicable penalties for section 959.

The Department of Justice (DOJ) asserts that the burden of proving actual knowledge is very difficult to meet as there is often no direct evidence that a defendant knew drugs or chemicals used to make such drugs were intended to be imported into the United States. The DOJ argues that many suppliers, manufacturers, wholesale distributors, brokers, and transporters from Columbia and Peru avoid prosecution because the final destination of drugs is rarely if ever discussed among conspirators.² As a result, the DOJ “faces barriers in building extradition cases against foreign drug kingpins, particularly from Colombia and Peru, the leading global producers of cocaine.”³ Kingpins from these countries often use Mexican traffickers as intermediaries to transport narcotics into the United States. An explanation of the substantive provisions of H.R. 3380 follows.

Section 2 of the bill amends section 959 of title 21 of the United States Code. It redesignates subsections (b) and (c) of section 959 as subsections (c) and (d). Subsection (a), as amended, would make it unlawful to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or a listed chemical if the individual intended, knew or had reasonable cause to believe that such substance or chemical would be illegally imported into the United States or into waters within a distance of 12 miles of the coast of the United States. Section 2 adds subsection (b) to section 959, which, as amended, makes it unlawful for any individual to manufacture or distribute a listed chemical, intending or knowing that the listed chemical would be used to manufacture a controlled substance if such individual intended, knew, or had reasonable cause to believe that the controlled substance would be illegally imported into the United States.

Section 3 amends section 113 of title 18 of the United States Code to add a knowledge requirement to the offense of trafficking a drug with a counterfeit mark. As amended, section 113 would require the government to prove that an individual knew that a drug

² *Combating Transnational Organized Crime: International Money Laundering as a Threat to Our Financial Systems: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 21 (2012) (statement of Jennifer Shasky Calvery, Chief, Asset Forfeiture and Money Laundering, U.S. Department of Justice).

³ Press Release, Senator Dianne Feinstein, U.S. Senate, *Senate Passes Bill to Combat Transnational Drug Trafficking* (Oct. 8, 2015).

sold, distributed, or otherwise trafficked had or used a counterfeit mark.

CONCERNS

Without question, drug abuse has taken a devastating toll on communities across our Nation. While it is clear that we must take steps to reduce the flow of illegal drugs into the United States, H.R. 3380 is not the solution. By amending section 959 to allow prosecution under a lower intent threshold and thereby no longer require proof that a defendant knew or intended that the drugs would be imported into the United States, this measure would establish liability if an individual had “a reasonable cause to believe” that the drugs would be imported into the United States. As a result of lowering the intent standard, H.R. 3380 may unjustly lead to unreasonably long sentences being imposed on lower-level offenders through the imposition of mandatory minimum sentences pursuant to section 960 of the Controlled Substances Act, which is made applicable to convictions under section 959. H.R. 3380 would inherently expose more individuals to the potential imposition of mandatory minimums.

As a matter of longstanding principle, we believe mandatory minimum sentences are unjust and unwise. Mandatory minimum sentencing has led to extraordinary injustice, prison overcrowding, and excessive costs to taxpayers. Intended to, among other things, reduce unwarranted disparity among similarly situated defendants, mandatory minimum sentencing has instead produced both unwarranted uniformity and disparity. The United States Sentencing Commission “unanimously agreed that mandatory minimum sentences in their current form often apply too broadly, are set too high, and are unevenly applied.”⁴ For example, in drug offenses, the type and weight of a drug is alone sufficient to trigger a mandatory minimum sentence. The type and quantity of drugs are, however, poor proxies for culpability, because very different offenders, with varying degrees of culpability, can be subject to the same mandatory minimum sentence. “Mandatory minimums currently apply in large numbers to every function in a drug organization.”⁵ This unwarranted uniformity means that a drug “mule” carrying a backpack filled with drugs on several occasions, for relatively small amounts of remuneration, may potentially be subject to the same sentence as a drug kingpin, who arranges the trips and reaps enormous profits.

While we would prefer that mandatory minimum sentences be removed from Federal law altogether, we believe the amendment offered by Ranking Member John Conyers, Jr. represented a reasonable compromise that would have addressed some of our concerns while not harming the goal of the bill. The amendment would have limited the application of the “reasonable cause to believe” addition to the statute to individuals who are organizers or leaders of the prohibited activity, when such activity involved five or more participants. This modification would have focused the bill’s changes to current law, and any expanded application of manda-

⁴ *Sentencing Reform and Corrections Act of 2015: Hearing on S. 2123 Before the S. Comm. on the Judiciary*, 114th Cong. — (2015) (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Commission, at 1)

⁵ *Id.* at 3.

tory minimum sentences, on those we understand the bill was drafted to cover, namely the true leaders of drug organizations, otherwise known as “drug kingpins.” If adopted, lower-level offenders would *not* have been absolved of liability, but would still have been subject to the prohibitions under the terms of the current statute. Unfortunately, this amendment failed by a vote of 6 to 16.⁶

CONCLUSION

Transnational trafficking of illegal drugs that are imported into the United States is a serious problem and appropriate steps should be taken to address this issue. While H.R. 3380 is a well-intentioned effort to combat the importation of controlled substances into the United States, it unfortunately has the result of expanding the scope of mandatory minimum sentencing, which should, at the very least, be focused on only the high-level offenders that we understand to be the real focus of this bill. Instead, H.R. 3380, as reported by the Committee, retains the possibility that lower-level offenders may be subjected to sentences intended for kingpins, a result that we cannot support.

For the foregoing reasons, we respectfully dissent.

MR. CONYERS, JR.
MS. JACKSON LEE.
MR. JOHNSON, JR.
MR. RICHMOND.
MR. JEFFRIES.
MR. CICILLINE.

⁶Unofficial Tr. of Markup of H.R. 3380, the “Transnational Drug Trafficking Act,” by the H. Comm. on the Judiciary, 114th Cong. 61 (2016).

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

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House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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Majority (202) 225-2927
Minority (202) 225-3841

May 3, 2016

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Goodlatte,

I am writing to notify you that the Committee on Energy and Commerce will forgo action on H.R. 3380 so that it may proceed expeditiously to the House floor for consideration.

This is done with the understanding that the Committee on Energy and Commerce's jurisdictional interests over this and similar legislation are in no way altered. In addition, the Committee reserves the right to seek conferees on H.R. 3380 and requests your support when such a request is made.

I would appreciate your response confirming this understanding and ask that a copy of our exchange of letters on this matter be included in the *Congressional Record* during consideration of the bill on the House floor.

Sincerely,



Fred Upton
Chairman