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Jeff Sessions and the Conservative Nostalgia for Harsh Sentencing

Manuel Madrid

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Attorney General Jeff Sessions's full-court press for more tough-on-crime policies has found a home in Congress.

Speaking before a crowd of law enforcement officials and prosecutors on August 8 in Little Rock, Arkansas, Sessions called for legislation to reinstate an aggressive Reagan-era sentencing law that targets repeat offenders.

"I was a United States Attorney before the Armed Career Criminal Act—and I was United States Attorney afterward," Sessions said. "I've seen its importance firsthand as we worked to reduce crime in America. ... We need Congress to fix the law so that we can keep violent career criminals off of our streets."

About an hour before the speech, Republican Senators Orrin Hatch of Utah, Tom Cotton of Arkansas, and Lindsey Graham of South Carolina offered a glimpse into what such a fix would look like with their new bill, the **Restoring the Armed Career Criminal Act of 2018**. The proposed legislation revises the language in the original act and broadens its scope to avoid possible legal challenges, while extending hefty mandatory minimum prison sentences to violent and nonviolent criminals alike.

The Armed Career Criminal Act, which passed in 1984 as part of a suite of harsh criminal justice reforms, was intended to give leverage to local prosecutors when charging repeat offenders. The law mandates a 15-year mandatory minimum prison sentence without parole for anyone convicted of unlawful gun possession following at least three prior federal or state felony convictions (think of it as a "four strikes and you're out" sort of arrangement). The catch is that those prior convictions must have been for either "violent felonies" or "serious drug offenses."

Defining a "serious drug offense" under the act is rather straightforward, legally speaking, but defining a "violent felony" is not.

The definition of the term "violent felony" in the act includes any felony crime that "involves conduct that presents a serious potential risk of physical injury to another." Beyond the vagueness of the definition (Does driving drunk present such a risk? What about illegal weapon

possession?), the act doesn't account for the existing patchwork quilt of state definitions for violent crimes and felonies. Given that the act penalizes *both* state and federal convictions, the provision fails to specify sufficiently what sort of conduct is deserving of "armed career criminal" status.

Litigation surrounding the provision bounced around federal circuit courts for years, ending up on the doorstep of the Supreme Court on five separate occasions. In 2015, the high court finally ruled in *Johnson v. United States* that the statutory definition of "violent felony" in the act—commonly known as the "residual clause"—was unconstitutionally ambiguous, and struck it down. The following year, the justices decided that *Johnson* could be applied retroactively, allowing defendants charged under the residual clause to demand resentencing.

The Senate bill would circumvent the high court's ruling by eliminating the "violent felony" and "serious drug offense" provisions altogether. Instead, it would replace them with a single category of "serious felony," defined as any state or federal crime punishable by ten years or more. The bill has been endorsed by the National Sheriffs' Association and the National Association of Police Organizations.

"This takes care of the issue of vagueness brought up in the Supreme Court case, but it doesn't solve the real question at hand," says Trevor Burrus, a research fellow at the libertarian Cato Institute. "Ultimately, you'd want a bill to define [violent crimes] as clearly, as narrowly, and as to the point as possible. This bill doesn't do that."

While the original act might have been defended on the grounds that it at least attempted to hone in on *some* violent criminals, the Cotton-Hatch-Graham redux abandons all pretenses of even trying. Under the new bill, nonviolent crimes such as identity theft, fraud, and money laundering could earn a person the label of armed career criminal. And the list goes on: Property crimes like burglary and theft and a score of drug-related crimes would all be on the table.

Before the 2015 Supreme Court decision, about 600 offenders were charged each year under the Armed Career Criminal Act. That number **dropped to 265 last year**. The change would likely open the floodgates to more mandatory minimum prison sentences, which already disproportionately affect minorities. In 2017, more than half of felons charged with unlawful possession of a firearm were black and almost 20 percent were Hispanic. Only 4.4 percent were charged as armed career criminals.

"There's going to be a lot of unintended consequences," says Molly Gill, vice president of policy for the nonprofit advocacy group Families Against Mandatory Minimums. "Your Armed Career Criminal Act is no longer necessarily going to be going after people who are violent at all."

"Prosecutors already use mandatory minimums to coerce people to give up their jury trial rights. ... I think we should be concerned about giving prosecutors an even bigger sledgehammer than they already have," Gill adds.

Sessions stressed the importance of the Armed Career Criminal Act as a tool for prosecutors in **his speech** in Little Rock, citing recidivism rates among released prisoners as evidence.

“Nationwide, the Supreme Court’s decision has resulted in more than 1,400 violent career criminals back onto our streets,” Sessions said. “600 of those 1,400 criminals have been arrested again—it’s only been three years since the Court decision, but 42 percent have already reoffended.” According to a Justice Department spokeswoman, the attorney general cited U.S. Bureau of Prisons data. (The spokeswoman did not respond to the *Prospect*’s request for the data set or additional details about the data referenced by Sessions.)

The attorney general also did not provide details about the specific offenses in his remarks, such as whether they were technical violations of parole, violent crimes, or drug-related crimes. The attorney general used recidivism rates from a 2016 **U.S. Sentencing Commission** report to make the case for updating the act, while ignoring the agency’s actual recommendations on how to fix it. In its **report to Congress** that same year, the Sentencing Commission suggested legislators *narrow* the scope of the act, not reinstate it as Sessions requested or broaden it as the Senate bill proposes.

“Our goal is not to fill up the prisons,” Sessions told the crowd of law enforcement officials and prosecutors as he concluded his remarks. “Our goal is to reduce crime and to keep every American safe.”

The problem is that the crime-fighting policies preferred by the attorney general are outdated and unlikely to accomplish much beyond filling up prisons and ballooning public costs caused by incarceration.

During his time in the Senate, Sessions, along with Senator Cotton, persuaded other Republicans to join them in torpedoing a bipartisan sentencing reform bill in 2016 which would have shortened existing mandatory minimums and narrowed the scope of drug convictions that triggered them.

As attorney general, Sessions has pulled back from the Obama-era reforms that eased up on mandatory minimums for low-level, nonviolent drug offenders. Instead, prosecutors are now directed to level the most severe charges possible for the longest possible sentences. The Justice Department has **confirmed reports** that the attorney general has also ramped up efforts within the agency to use capital punishment more often on violent criminals.

The drastic expansion of the Armed Career Criminal Act proposed in the Cotton-Hatch-Graham bill would accelerate the federal government’s backsliding on criminal justice, achieving little more than earning the praise from a minority of conservative politicians nostalgic for the hardline policies of decades past.