

**Understanding Kate's Law: S. 45, H.R. 361**  
**Expensive, Dangerous, Impractical**

<b>Violation</b>	<b>Current Law</b> (Average sentence = 16 months in prison)		<b>S. 45 (Cruz)<sup>1</sup></b>		<b>H.R. 361 (S. King)</b>	
	<b>Mandatory minimum</b>	<b>Statutory maximum</b>	<b>Mandatory minimum</b>	<b>Statutory maximum</b>	<b>Mandatory minimum</b>	<b>Statutory maximum</b>
8 U.S.C. § 1326(a): Attempted or actual illegal reentry after deportation or removal	None	2 years	5 years, if person has prior aggravated felony <sup>2</sup> conviction or 2 prior illegal reentry convictions	5 years; 20 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	5 years	6 years
§ 1326(b)(1): Attempted or actual illegal reentry of people with three or more prior misdemeanor convictions involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)	None	10 years	5 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	10 years; 20 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	5 years	10 years
§ 1326(b)(2): Attempted or actual illegal reentry of people with a prior conviction for an aggravated felony	None	20 years	5 years	20 years	5 years	20 years
§ 1326(b)(3): Attempted or actual illegal reentry of people previously excluded or removed for national security reasons	10 years, consecutive	None listed	10 years, consecutive	20 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	10 years, consecutive	None listed
§ 1326(b)(4): Attempted or actual illegal reentry of people with a prior conviction for a nonviolent offense	None	10 years	5 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	10 years; 20 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	5 years	10 years
New provision: Attempted or actual illegal reentry after being denied admission, excluded, deported or removed 3 or more times	n/a	n/a	5 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	10 years; 20 years, if person has prior aggravated felony conviction or 2 prior illegal reentry convictions	n/a	n/a
<b>Additional costs</b>	n/a		<b>+at least \$816 million per year</b> <b>+new prison construction and staff costs</b>		<b>+\$1.775 billion per year</b> <b>+\$9.45 billion in prison costs over 5 years</b>	

**Cost and Prison Impact:** According to the U.S. Sentencing Commission, Bureau of Prisons, and Congressional Budget Office,

- The current annual average cost of incarceration per inmate is \$30,619.85 (or \$2,551.65 per month, per prisoner).<sup>3</sup>
- It costs \$350 million to construct one new federal prison.<sup>4</sup>
- In FY 2015, there were **15,811** people sentenced for illegal reentry under 8 U.S.C. § 1326, serving average prison sentences of 16 months. A five-year mandatory minimum term would increase the average sentence by 300% (or 44 months).<sup>5</sup>
- In FY 2015, **5,879** illegal reentry offenders received sentence enhancements for having prior felonies that would qualify as aggravated felonies.<sup>6</sup>
- In FY 2013 (most recent data available), 2,140 (35 percent) of 6,046 illegal reentry offenders had at least **one** prior conviction for illegal reentry.<sup>7</sup> Of these, 65 percent had two or more prior deportations.<sup>8</sup> Assuming these deportations also resulted in convictions, **1,391** people (65 percent of 2,140 offenders) would be subject to the new 5-year mandatory minimum terms for having two or more prior illegal reentry convictions.
- Using these figures, and assuming the number of illegal reentry prosecutions each year remains unchanged going forward,
  - **H.R. 361** would **increase prisoner costs by \$1.775 billion each year** (15,811 people \* 44 months incarceration \* \$2,551.65/month/prisoner), increase the prison population by 57,727 people,<sup>9</sup> and require construction of 27 new prisons at a cost of **\$9.45 billion over the next five years**<sup>10</sup>
  - **S. 45** would **increase prisoner costs by \$816 million each year** (7,270 people \* 44 months incarceration \* \$2,551.65/month/prisoner) and presumably increase the prison population and require additional prison construction.

**Impact on Other Criminal Justice Reforms:** If enacted, Kate’s Law would undermine any savings from bipartisan mandatory minimum sentencing reforms, cost taxpayers billions, and require new staff and prisons:

Impact on ...	S. 45	H.R. 361	Smarter Sentencing Act	Sentencing Reform and Corrections Act <sup>11</sup>
<b>Prisoner costs</b>	+\$816 million per year	+\$1.775 billion each year	-\$3.1 billion over 10 years <sup>12</sup>	-\$722 million over 10 years
<b>Prison population</b>	Unknown	+57,727 new prisoners in first 5 years	-86,000 bed years over several years <sup>13</sup>	Not estimated
<b>Prison construction</b>	+\$350 million for each new prison needed	+\$9.45 billion over first 5 years for new prisons	-\$420 million over 10 years <sup>14</sup>	None assumed
<b>Prison staffing</b>	+\$100,000 for each new prison staff member needed <sup>15</sup>	+\$100,000 for each new prison staff member needed	-\$354 million over 10 years <sup>16</sup>	No savings
<b>Prison capacity</b>	Currently 116% of capacity, <sup>17</sup> plus an unknown number of new prisoners	Currently 116% of capacity, plus 57,727 new prisoners over 5 years	108% after 10 years <sup>18</sup>	Not estimated

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<sup>1</sup> S. 45 substantially rewrites 8 U.S.C. § 1346.

<sup>2</sup> See 8 U.S.C. § 1101(a)(43) (2016). Aggravated felonies include state or federal convictions or foreign convictions for which the prison term was completed within the last 15 years. Aggravated felonies are (A) murder, rape, or sexual abuse of a minor; (B) illicit trafficking in a controlled substance (as defined in 21 U.S.C. § 802), including a drug trafficking crime (as defined in 18 U.S.C. § 924(c)); (C) illicit trafficking in firearms or destructive devices (as defined in 18 U.S.C. § 921) or in explosive materials (as defined in 18 U.S.C. § 841(c)); (D) laundering of monetary instruments (as described in 18 U.S.C. §§ 1956, 1957), if the amount exceeds \$10,000; (E) an offense described in 18 U.S.C. §§ 842(h) or (i), 844(d), (e), (f), (g), (h), or (i) (relating to explosive materials offenses); 18 U.S.C. §§ 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) (relating to firearms offenses); or 26 U.S.C. § 5861 (relating to firearms offenses); (F) a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment is at least one year; (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year; (H) an offense described in 18 U.S.C. §§ 875, 876, 877, or 1202 (relating to the demand for or receipt of ransom); (I) an offense described in 18 U.S.C. §§ 2251, 2251A, 2252 (relating to child pornography); (J) an offense described in 18 U.S.C. § 1962 (relating to racketeer influenced corrupt organizations), or an offense described in § 1084 (if it is a second or subsequent offense) or § 1955 (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed; (K) an offense that— (i) relates to the owning, controlling, managing, or supervising of a prostitution business; (ii) is described in 18 U.S.C. §§ 2421, 2422 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or (iii) is described in any of 18 U.S.C. §§ 1581–1585 or 1588–1591 (relating to peonage, slavery, involuntary servitude, and trafficking in persons); (L) an offense described in— (i) 18 U.S.C. §§ 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason); (ii) 50 U.S.C. § 3121 (relating to protecting the identity of undercover intelligence agents); or (iii) 50 U.S.C. § 3121 (relating to protecting the identity of undercover agents); (M) An offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000, or is described in 26 U.S.C. § 7201 (relating to tax evasion) in which the revenue loss to the government exceeds \$10,000; (N) an offense described in paragraph 8 U.S.C. § 1324(1)(A) or (2) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of this chapter; (O) an offense described in 8 U.S.C. §§ 1325(a), 1326 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph; (P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. §§ 1543, 1546(a) (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of this chapter; (Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more; (R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year; (S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year; (T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years’ imprisonment or more may be imposed; and (U) an attempt or conspiracy to commit an offense described in this paragraph.

<sup>3</sup> 80 FR 12523 (Mar. 9, 2015), <https://www.federalregister.gov/articles/2015/03/09/2015-05437/annual-determination-of-average-cost-of-incarceration>.

<sup>4</sup> Congressional Budget Office, S. 1410, Smarter Sentencing Act of 2014 (Sept. 11, 2014), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/s141000.pdf>.

<sup>5</sup> U.S. SENTENCING COMM’N, FY 2015 SOURCEBOOK OF SENTENCING STATISTICS Tbl. 50 (2016), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table50.pdf>. The 16-month sentence average is reflective of the sentences actually being served – 82 percent of illegal reentry offenders sentenced in FY 2015 had sentences for which the mean was 14 or 15 months. About 18 percent served sentences for which the mean ranged from 22 to 32 months. Only five people had sentences for which the mean exceeded 60 months.

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<sup>6</sup> U.S.S.G. § 2L1.2 (2016) <http://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-2-l-x#NaN>; U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS – OFFENDER BASED FY 2015 58-59 (2016), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use\\_of\\_SOC\\_Offender\\_Based.pdf.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use_of_SOC_Offender_Based.pdf.pdf).

<sup>7</sup> U.S.S.G. § 2L1.2(b)(1)(A) (requiring 4-point enhancement whenever a person has a prior illegal reentry conviction); U.S. SENTENCING COMM’N, ILLEGAL REENTRY OFFENSES Tbl. 3, 20 (Apr. 2015) (using FY 2013 data to find that 2,140 (35.4 percent) of 6,046 illegal reentry offenders received 4-level guideline enhancements because they had prior illegal reentry convictions), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015\\_Illegal-Reentry-Report.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf).

<sup>8</sup> *Id.* at 15, Fig. 9. More than 65 percent of illegal reentry offenders have one or more prior deportations. Using that as a guide, if 65 percent of the 2,140 people who had prior illegal reentry convictions also had more than one prior deportation, and those deportations resulted in convictions, then 1,391 people could be subject to the mandatory minimum sentence called for by S. 45 for having two or more prior illegal reentry convictions.

<sup>9</sup> U.S. SENTENCING COMM’N, ESTIMATED EFFECT OF CREATING A 5 YEAR MANDATORY MINIMUM FOR ILLEGAL REENTRY OFFENSES (2016), [http://famm.org/wp-content/uploads/2015/09/summary\\_table\\_illegalreentry.pdf](http://famm.org/wp-content/uploads/2015/09/summary_table_illegalreentry.pdf). This prison impact assessment was based on FY 2014 data, which showed that 17,763 illegal reentry offenders were sentenced, and assumed that all served the average sentence of 15 months incarceration and would see their sentences increased to the mandatory minimum of 60 months.

<sup>10</sup> A typical Bureau of Prisons facility holds between 1,000 and 2,000 inmates. *See* BUREAU OF PRISONS, POPULATION STATISTICS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp). Assuming that the prison population does not decline dramatically and that each prison would hold 2,000 people, H.R. 361 could require the building of 27 prisons to accommodate more than 57,000 new inmates over the next five years. According to the Congressional Budget Office, a new prison costs \$350 million to construct. CONGRESSIONAL BUDGET OFFICE, S. 1410, SMARTER SENTENCING ACT OF 2014 (Sept. 11, 2014), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/s141000.pdf>. Assuming DOJ built 27 prisons at \$350 million per prison, costs would total \$9.45 billion.

<sup>11</sup> CONGRESSIONAL BUDGET OFFICE, S. 2123, SENTENCING REFORM AND CORRECTIONS ACT (May 17, 2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/s2123-r.pdf>.

<sup>12</sup> CONGRESSIONAL BUDGET OFFICE, S. 1410, SMARTER SENTENCING ACT OF 2014 (Sept. 11, 2014), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/s141000.pdf>.

<sup>13</sup> Statement of Judge Patti B. Saris, Chair, U.S. Sentencing Comm’n, for the Hearing on “Reevaluating the Effectiveness of Mandatory Minimum Sentences” before the Committee on the Judiciary of the United States Senate, Sept. 18, 2013, [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20130918\\_SJC\\_Mandatory\\_Minimums.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20130918_SJC_Mandatory_Minimums.pdf) (finding a savings of 45,312 prison bed years over time for the Smarter Sentencing Act’s reductions to mandatory minimum drug sentences, plus an additional savings of 37,400 bed years for the Smarter Sentencing Act’s provision making the Fair Sentencing Act of 2010 retroactive). Additionally, Congressional Budget Office estimates found that the Smarter Sentencing Act’s expansion of the drug “safety valve” would save 3,500 person-years over a 10-year period. CBO, S. 1410 Analysis, at 5.

<sup>14</sup> CBO, S. 1410 Analysis, at 5.

<sup>15</sup> In its own cost estimate calculations for the Smarter Sentencing Act, the DOJ assumed a cost of \$100,000 to the agency for each additional staff member hired. *See* Dep’t of Justice, Smarter Sentencing Act Analysis, <http://famm.org/wp-content/uploads/2014/02/DOJ-SSA-Cost-Savings-Estimate-2014.pdf>.

<sup>16</sup> CBO, S. 1410 Analysis, at 5.

<sup>17</sup> U.S. DEP’T OF JUSTICE, TOP MANAGEMENT AND PERFORMANCE CHALLENGES 2016, <https://oig.justice.gov/challenges/2016.pdf#page=10> (capacity measured as of September 30, 2016). As of January 26, 2017, the Bureau of Prisons listed its total inmate population as about 189,000 inmates. *See* BUREAU OF PRISONS, POPULATION STATISTICS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp).

<sup>18</sup> CBO, S. 1410 Analysis, at 5. The federal prison population has declined since CBO analyzed S. 1410, so presumably the bill would reduce overcrowding even more now.