



H.R. 1865 - Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (Rep. Wagner, R-MO)

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FLOOR SCHEDULE:

Scheduled for consideration on February 27, 2018 under a [rule](#).

TOPLINE SUMMARY:

[H.R. 1865](#), the Allow States and Victims to Fight Online Sex Trafficking Act, would create a new federal criminal law against websites that intentionally promote prostitution, lower the standard of proof necessary to prosecute websites for hosting sex trafficking content, create a civil right of action for sex trafficking victims, and ensure that certain state level prosecutions for sex trafficking can proceed notwithstanding Section 230 of the Communications Decency Act.

COST:

A [Congressional Budget Office](#) (CBO) estimates 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 spending would be subject to the availability of appropriated funds. Because those prosecuted and convicted under H.R. 1865 could be subject to criminal fines, the federal government might collect additional fines under the bill. 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 associated direct spending would not be significant because the bill would probably affect only a small number of cases.”

CONSERVATIVE CONCERNS:

- **Expand the Size and Scope of the Federal Government?** Yes, the bill would expand the federal criminal code by criminalizing actions previously not illegal under federal law.
- **Encroach into State or Local Authority?**
 - Some conservatives may be concerned that the bill would expand the federal footprint in a legal area (prostitution) that has traditionally been left almost entirely to the states, with the exception of federal laws against prostitution involving interstate travel. Others may believe that internet advertisement is a proper domain of regulation for the federal government even if the underlying action (prostitution) traditionally is not.

- Some conservatives may be pleased that Section 4 of the bill would create a carve out designed to protect state law criminal prosecutions based on actions that constitute a violation of Section 3 of the bill (promoting prostitution) or 18 USC 1591(a) of existing law (sex trafficking) so as to not be blocked by Section 230 of the federal Communications Decency Act (CDA). However, some conservatives may be concerned that such a carve out would erode the protections afforded to websites by Section 230 of the CDA.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

Federal law regarding prostitution is contained within the [Mann Act](#). Generally, the Mann Act prohibits prostitution or other illegal sexual activity involving interstate or foreign travel. The Mann Act also criminalizes sex trafficking activities that involve interstate or foreign travel. The Mann Act, however, does not contain language criminalizing online advertising of prostitution.

[18 U.S.C. 1591\(a\)](#) of existing law criminalizes sex trafficking activities that affect interstate commerce. These activities include recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting a person to engage in a commercial sex act. Benefiting financially by participating in a venture that has engaged in these activities is also a sex trafficking activity. Under this law, the defendant must undertake these activities knowing, or with reckless disregard, that force, threats, or coercion will be used against the person or knowing, or with reckless disregard, that the person is under 18 years old. However, if the offending activity is advertising, the defendant must have actual knowledge of the force, threats, or coercion or underage status of the person.

Section 2 of the bill would set forth several sense of congress provisions regarding the interaction of [section 230 of the Communications Decency Act](#) and the criminal prosecution of websites promoting prostitution and recklessly contributing to sex trafficking.

Section 3 of the bill would amend the Mann Act to create a new federal crime prohibiting intentionally promoting prostitution on a website. Specifically, the bill would criminalize the use or operation of a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person. The penalty would be a fine, a prison sentence up to 10 years, or both. Defendants would be immune from prosecution if they promoted prostitution to a jurisdiction where it is legal. This is called an affirmative defense.

Section 3 would add on an enhanced penalty if the promotion of prostitution involved five or more persons or was done with reckless disregard of the fact that the defendant's conduct contributed to sex trafficking, as prohibited under [18 U.S.C. 1591\(a\)](#). The affirmative defense provided by Section 3 would not extend to the enhanced penalty provisions. The enhanced penalty would carry a fine, prison sentence up to 25 years, or both. Accordingly, the bill would create a separate means of federally prosecuting websites that host content containing advertisements for sex trafficking with a lower standard of proof requirement (i.e., "reckless disregard" of merely contributing to sex trafficking vs. "knowing" an advertisement is selling sex trafficking). Some conservatives may be concerned that the lowered standard of proof for sex trafficking on websites could result in overbroad prosecution of sex trafficking.

Some conservatives may be concerned that the bill would expand the scope of the federal government by expanding the federal criminal code to ban promoting prostitution by websites. Prostitution has traditionally been regulated at the state level, and federal law has historically been limited to prohibiting prostitution that physically crosses state lines. The [Committee report](#) suggests that this expansion is called for so that prosecutors can more easily prosecute websites for the sex trafficking that occurs on their websites.¹ This is made possible by the lower standard of proof for sex trafficking that is attached by Section 3 to the prohibition on prostitution promotion.

Section 3 of the bill would create a civil right of action for victims of actions violating the enhanced penalty portion of the new criminal statute and require restitution.

Section 3 would also set forth that a defendant may be held liable under the new prostitution promotion provision where the defendant is responsible for the creation or development of all or part of the content provided through the website. The purpose of this section is to make sure that section 230 of the Communications Decency Act (CDA) does not block civil actions where the defendant goes beyond acting as an interactive computer service. Section 230 of the CDA (CDA 230) provides that interactive computer services, such as websites that publish third-party content, are not liable for the content posted on their site by a user.

CDA 230 blocks state-level prosecutions against interactive computer services brought under state laws that are inconsistent with CDA 230 (i.e., 230's prohibition on treating a hosting website as the publisher of third-party posts). Section 4 of the bill would create a carve out to ensure that state law criminal prosecutions based on actions that constitute a violation of Section 3 of the bill or 18 USC 1591(a) of existing law would not be blocked by CDA 230. This would preemptively ensure that such state level actions are "consistent" with CDA 230.

Some conservatives may be concerned that creating a carve out from CDA 230 weakens the section. CDA 230 was created to promote the robust development of the internet that would be hindered by allowing undue liability on websites for the content posted their users. However, according to the Committee Report, this carve out may be simply precautionary: "While the newly created law, and the federal sex trafficking law, should both be considered consistent with §230, as applied to certain bad-actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions."

Section 5 of the bill contains a savings clause to clarify that the bill does not preempt any civil action or criminal prosecution under federal or state law that was not limited or preempted by CDA 230.

AMENDMENTS:

1. [Rep. Walters](#) (R-CA)

- This amendment would expand the carve out provision of the underlying bill to also ensure that civil lawsuits based on conduct that violates 18 U.S.C. 1591 (existing sex trafficking law) are allowed notwithstanding the protections provided by CDA 230

¹ See, H. Rep. No. 115-572, pt. 1, at 5 (2018) ("Though under 18 U.S.C. §1591, a website may be held criminally liable for knowingly advertising sex trafficking, this knowledge standard is difficult to prove beyond a reasonable doubt. This is so because online advertisements rarely, if ever, indicate that sex trafficking is involved....A new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors. Prostitution and sex trafficking are inextricably linked, and where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.")

to interactive computer services. Some conservatives may believe this provision would further erode the protections afforded CDA 230 to interactive content providers.

- The amendment would make this expanded carve out apply retroactively so that past conduct can be subject to state criminal prosecution and law suits. Some conservatives may believe that this may violate the [U.S. Constitution's ban on ex post facto laws](#) outright or at least its spirit.
- The amendment would define, for purposes of 18 U.S.C. 1591 (existing sex trafficking law), "participation in a venture" as knowingly assisting, supporting, or facilitating sex trafficking activities (egs. recruiting, transporting, advertising, and soliciting). Under current law, the term is not defined.
- The amendment would allow state attorneys general to file lawsuits against violators of 18 U.S.C. 1591 on behalf of the residents of their state if the attorney general has "reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any [violator of 18 U.S.C. 1591]." Some conservatives may feel that this provision is too broad and would unduly expand potential litigation beyond cases intended to provide a legal remedy for individuals that were the victims of sex trafficking.
- **Supporting Groups:** [National Center on Missing & Exploited Children](#), [ECPAT USA](#), [Equality Now](#), [Rights4Girls](#), [New Jersey Coalition Against Human Trafficking](#), [#FightForUs](#), [Consumer Watchdog](#)
- **Opposing Groups:** [FreedomWorks](#)-(Key Vote No), [R Street](#) , Coalition [letter](#) of concern from [TechFreedom](#), [Engine](#), [FreedomWorks](#), [Citizens Outreach](#), [R Street Institute](#), and [Committee for Justice](#), [Engine](#), [TechFreedom](#), [Net Choice](#) (Congressman Cox [testimony](#)), [Committee for Justice](#)

2. [Rep. Goodlatte](#) (R-VA) – MANAGER'S AMENDMENT

- The amendment would make several technical corrections, and better tailor the new federal crime that would be created by the underlying bill on intentionally promoting prostitution to instances where the promotion occurs on a website.
- The amendment would strike the portion of Section 3 of the underlying bill that would set forth that a defendant may be held liable under the new prostitution promotion provision where the defendant is responsible for the creation or development of all or part of the content provided through the website.
- The amendment would limit the restitution requirement of the underlying bill to instances of sex trafficking.
- The amendment would extend the bill's underlying affirmative defense to the enhanced penalty that is carried with promoting prostitution of 5 or more persons.

3. [Jackson Lee](#) (D-TX)

- This amendment would require GAO to submit a report to Congress analyzing cases brought under the new federal crime that would be created by the underlying bill.

COMMITTEE ACTION:

H.R. 1865 was introduced on April 3, 2017, and referred to the House Committees on the Judiciary and Energy and Commerce. On December 12, 2017, Judiciary held a mark-up session where an amended version of the bill was ordered to be reported by voice vote.

OUTSIDE GROUPS:

In Support:

- According to the sponsoring office, the following groups and businesses support the bill: [National Center on Missing & Exploited Children](#), [ECPAT USA](#), [Equality Now](#), [Rights4Girls](#), [New Jersey Coalition Against Human Trafficking](#), [#FightForUs](#), [Consumer Watchdog](#), [National Fraternal Order of Police](#), [National Association of Assistant United States Attorneys](#), [Facebook](#), [Faith & Freedom Coalition](#), [U.S. Institute Against Human Trafficking](#), [Major Cities Chiefs Association](#), [Operation Texas Shield](#), [Concerned Women for America](#), [Eastern North Carolina Stop Human Trafficking Now](#), S.A.F.E.

In Opposition:

- [Electronic Frontier Foundation](#), [ACLU](#)

ADMINISTRATION POSITION:

A Statement of Administration Policy is not available.

CONSTITUTIONAL AUTHORITY:

"Congress has the power to enact this legislation pursuant to the following: Amendment XIII of the Constitution, which states that "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." Amendment XIV of the Constitution, which states that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 8, Clause 3 of the Constitution, which states "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

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