# Unfair and Unconstitutional: The New Federal Juvenile Crime and Gun Control Proposals

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## *Summary:*

### Too Fast, Too Big, No Legitimate Congressional Involvement--and Not Limited to Juvenile Crime

- This Issue Paper addresses some of most obvious problems with the Senate Bill 254, and with any House of Representatives counterpart which copies provisions from S. 254.
- S. 254 and its House counterpart are massive bills--far too large for any legislator to examine carefully before voting-especially when bills are brought to the floor almost as fast as they are drafted. Such mammoth legislation is an abdication of the responsibilities of representative government; if representatives do not even know what is in the bill they are voting on, they are not real representatives.
- S. 254 and its House counterpart violate the Tenth Amendment by imposing federal hegemony on states' authority over juvenile justice.
- S. 254 and its House counterpart purport to exercise Congressional powers, such as the power to regulate interstate commerce, that have only tenuous and trivial connections to juvenile justice. Although these bills claim to be a "law and order" bill, they are in fact a lawless usurpation of power.

### Gun Control Provisions

- Existing federal gun control law prohibits any use of records created for firearms regulation to be used to create a registry of gun owners. The Lautenberg Amendment to S. 254 in effect destroys this protection against the compilation of lists of people who exercise their constitutional rights.
- The Lautenberg Amendment applies to much more than gun shows. It ratifies the Clinton Administration's illegal practice of using the National Instant Check System to compile lists of gun buyers--including buyers who buy at gun stores, not at gun shows.
- The Brady Act was never intended to apply to transfers of firearms by private persons. The Act was intended only for sales by federally licensed dealers. That the Brady Act does not apply to private sales is not a "loophole" created by the NRA; it is the decision of Mrs. Brady

and her organization, in the language that they proposed to Congress in 1993, 1992, 1991, 1990, 1989, and 1988.

- Lautenberg does much more than require a NICS (National Instant Check System) verification of the gun purchaser's legal eligibility. In addition, there is a requirement that identity and address of the purchaser be permanently registered in writing.
- Lautenberg imposes an additional registration step unprecedented in Federal firearms control law: the sale must be reported within 10 days to the Department of the Treasury. Firearms sales in firearms stores do not even have that this requirement! (In a firearms store, the buyer fills out a registration form, but this form is retained by the dealer, and not sent to the federal government.)
- The Lautenberg Amendment is not about loopholes, it is about creating a firearms tracking system for private sales; today the gun shows, tomorrow *all* private sales.
- The amendment creates hugely onerous burdens to conducting a gun show, including an unlimited tax, registration of private sellers and perhaps attendees as well. This is a bullying attempt to destroy gun shows, which are currently the main method for political communication in the Second Amendment community.
- Violation of Lautenberg's convoluted system--even by mere attendees at gun shows--is made a felony, in gross disregard of the lack of seriousness of the underlying "crime."
- S. 254 imposes a *mandatory* one-year prison sentence on adults who violate the current federal prohibition on giving handguns to minors. Thus, a father who gives a family heirloom in a locked glass case to a son on the son's seventeenth birthday would spend a *mandatory* year in prison.
- S. 254 expands the ban on juvenile possession of handguns (which is properly a matter for state, not federal law), by extending the ban to so-called "assault weapons." As defined by federal law, "assault weapons" are ordinary firearms which have certain cosmetically incorrect features, such as bayonet lugs, or a "conspicuous" magazine. Young people should not be forbidden to possess firearms simply because the firearms look ugly to people who know nothing about firearms.
- The Appendix to this Issue Paper details the nineteen state and federal weapons control laws which were broken by murderers Eric Harris and Dylan Klebold.

## Other Civil Liberties Violations

- The media's obsessive focus on gun control has prevented public discovery-so far-of numerous provisions in S. 254 which effect major intrusions on civil liberties. These include:
- A provision allowing interception of the *content* of electronic communications without a warrant.
- Provisions to encourage suspicionless drug testing of students.
- A new federal law providing extra punishment for people who wear body armor during a crime-even if the armor has nothing to do with the crime (e.g., a liquor store owner cheats on his taxes, while wearing body armor for protection from robbery). Incredibly, the penalty does not apply to law enforcement officers who criminally violate a person's civil rights!
- An expansion of the scope and penalties of the federal law regarding "criminal street gangs"-so that the law would apply to activities which have nothing to do with gangs or streets.
- A major expansion of forfeiture powers, which would allow U.S. Attorneys to bring forfeiture cases for *state* felonies of all types and for many *state* misdemeanors.

## *Discussion:*

### I. Over-Federalization

Former Attorney General Edwin Meese writes:

In recent years, two tragic events have fundamentally changed the way many Americans view federal law-enforcement agencies and jeopardized public confidence in the federal government itself....
Since Ruby Ridge...Even those normally supportive of the police ask: Should the federal government have risked this loss of life and expended $10 million to capture a hermit whose only alleged crime was selling two sawed-off shotguns to an undercover federal agent?...

After summarizing Waco, Attorney General Meese continued:

Both these tragedies are the direct result of federal jurisdiction in crimes once considered wholly within the province of state and local police agencies. In neither incident did the underlying crime involve interstate activity or pose a threat to the federal government. Without the federalization of law regulating firearms, a matter left to the states during most of our country's history, neither the BATF or FBI would have had jurisdiction at Ruby Ridge and Waco, and any law-enforcement would have been handled locally, if at all....
Federal law-enforcement authorities are not as attuned to the priorities and customs of local communities as state and local law enforcement. In the Ruby Ridge tragedy, for example, would the local Idaho authorities have tried to

apprehend Weaver in such an aggressive fashion?...More fundamentally, would Idaho officials have cared about two sawed-off shotguns? In the Waco situation, would the local sheriff's department have stormed the compound, or instead have waited to arrest David Koresh when he ventured into town for supplies, as he did frequently?

Edwin Meese, III, and Rhett DeHart, "How Washington Subverts Your Local Sheriff," *Policy Review*, Jan./Feb. 1996.

S. 254 aggravates the problems that led to Waco and Ruby Ridge. It adds a second layer of federal control to a group of offenses which for the most part have no place in the federal statute books. The severe sentences for minor offenses will not only cause injustice to many individuals, but will also further reduce the already low level of respect many Americans have for the federal government.

The men who created our Constitution knew better. The practical benefits of decentralized law enforcement were well known to the creators of our Constitution. The Constitution specifically authorizes federal enforcement of only three types of laws, all of which involve uniquely federal concerns. The first authorized federal criminal law enforcement is based on the Congressional power "To provide for the punishment of counterfeiting the securities and current coin of the United States." The counterfeiting enforcement power immediately follows the delegation of Congressional power "To coin money, regulate the value thereof, and of foreign coin...." U.S. Const., Art. I, sect. 8.

The second Congressional criminal power involves the power "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The third is that "Congress shall have Power to declare Punishment of Treason." Although currency, treason, and the high seas clearly involve areas of federal, and not state concern, it is notable that, even in those cases, the authors of the Constitution felt a need specifically to authorize Congressional law enforcement regarding these matters.

In addition to the enumerated federal criminal powers, it is possible to infer some additional power. For example, Congress is given authority to declare uniform rules of bankruptcy; federal law does and should continue to punish bankruptcy fraud, even when perpetrated within a single state. Congressional power over federal property implies the authority to create penalties for destruction of federal property.

While the body of the Constitution grants only narrow criminal law enforcement powers to the federal government, the Bill of Rights, in the Tenth Amendment, specifically reserves to the states all powers not granted to the federal government. (The Tenth Amendment problems which pervade S. 254 are not cured because some local law enforcement officials, blind or

heedless to the long-term threat of the erosion of state autonomy--eagerly anticipate near-term use of federal resources.)\

Even the *Federalist Papers*, which were, after all, an argument for increased federal power, made it clear that criminal law enforcement would not come under the federal sphere under the new Constitution. James Madison wrote that federal powers

"will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce....The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state."

Federalist no. 45.

Likewise, Alexander Hamilton, the most determined nationalist of his era, explained that state governments, not the federal government, would have the power of law enforcement, and that power would play a major role in assuring that the states were not overwhelmed by the federal government:

The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations and which will form so many rivulets of influence, running through every part of the society, cannot be particularized without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.
There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light--I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment....This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.

Federalist no. 51.

In contrast to the Constitutional system created by Madison, Hamilton, and the other founders, and ratified by the American people, an entirely different system has come into being over the course of this century. The enumerated powers of Congress "to lay and collect taxes" and "To regulate Commerce...among the several States" have been turned by specious judicial interpretation into Congressional powers over issues that have nothing to do with taxes or with interstate commerce. In the field of criminal law, the result has been a disaster, of which Waco and Ruby Ridge are only the most visible incidents.

S. 254 continues the failed policies of past decades, by using the Congressional power over interstate commerce as pretext for imposing drastic criminal penalties on activities which occur entirely within a state, which are often non-commercial, and whose control is the prerogative of the states.

How can Congresspersons who profess their heartfelt allegiance to the Tenth Amendment override the choices of state legislatures? How can Congresspersons who profess affection for the Second Amendment support drastic penalties for trivial regulatory offenses? How can Senators who say that they believe in original intent and that they admire conservative judges fail to heed the words of Chief Justice Rehnquist:

"the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'"

United States v. Lopez (1995).

## II. Gun Registration: The Necessary Step before Confiscation

Existing law, 18 USC §926(a)(3), specifically prohibits the Federal Government from creating a firearms registry:

"No such rule or regulation prescribed after the date of enactment of the Firearms Owners Protection Act may require that records required to be maintained under this chapter or *any portion of the contents of such records*, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

The intent of the Lautenberg Amendment is to repeal this prohibition by enacting a registry under the guise of closing a so-called loophole and creating a "tracing" system using mandatory gun show sale reports to the Treasury. The amendment would create its own huge loophole to enable registration of guns and owners. It is impossible to create a registry unless all firearms transfers are in the Government web.

Registration is the essential pre-condition to gun confiscation. Handgun Control, Inc.'s, Founding Chair, Pete Shields, explained the strategy:

"The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of all handguns and all handgun ammunition--except for the military, police, licensed security guards, licensed

sporting clubs, and licensed gun collectors--totally illegal." (Richard Harris, "A Reporter at Large: Handguns, *New Yorker*, July 26, 1976, p. 58.)

## III. How Lautenberg Imposes Registration for People Who do *Not* Buy Firearms Privately at Gun Shows.

Despite the explicit Congressional ban on compiling gun registration lists, the Clinton administration is compiling computer records of persons who lawfully purchase firearms. These records are obtained from the National Instant Check System (NICS). Under NICS, a person who buys a firearm from a Federal Firearms Licensee (FFL) must first receive FBI permission. The requirement for FBI permission applies no matter where the FFL sells the gun: at his store, or at a table at a gun show.

Currently, the FBI (at the insistence of the Clinton administration) is keeping NICS records of law-abiding gun owners, rather than destroying the records immediately, as the law requires. The FBI claims that it needs to retain these records for six months to make sure that the NICS system is working properly. Since computer back-up tapes are made daily, the six-month retention policy means, in effect, that the FBI will have permanent computer records of all gun buyers. Only if the NICS record is deleted immediately is it possible to prevent the compilation of gun owner registration lists.

A lawsuit is currently pending over the Clinton administration's illegal NICS lists. A Democratic judge denied a motion to block the Clinton registration system before a trial could take place. This decision was possible only because the judge simply refused to address the plaintiffs' strongest legal claims; instead, he based the entire decision on a secondary claim, while acting as if the main claims had not been raised. (Click here for the complaint and the memorandum of law filed by the plaintiffs.)

The Lautenberg Amendment authorizes the Clinton administration's illegal gun registration lists. It specifically allows record retention for 90 days. (Which means 90 separate computer back up tapes, even if the records on a computer are eventually deleted.)

This provision has *nothing* to do with private sales at gun shows. It deals with ratifying the Clinton Administration's illegal implementation of the 1993 Brady Act.

Plainly, the issue of "gun show sales" has been used as a Trojan Horse to import major items in the gun prohibition lobbies' agenda.

## IV. How Lautenberg Destroys Privacy for Private Firearms Sales--and Imposes far more than Background Checks.

The key to the Lautenberg registration system is clear. Two people who could legally buy and sell a firearm privately lose their privacy rights if they do business in a room where other people are lawfully buying and selling

firearms (a gun show). All private gun show sales must be transacted through a Federal Firearms Licensee (FFL).

According to the Lautenberg Amendment, the FFL must contact the FBI to conduct an Instant Check on the sale. The Lautenberg Amendment was sold to the public on this basis. But in fact, the Amendment goes much further--undermining its billing as a "commonsense" or "reasonable" extension of instant background checks to gun shows.

Despite having received FBI approval for the sale, the FFL is required to record the transaction in a record book and on a form. Such record-keeping has been required for purchases from FFLs since 1968, but such record-keeping has never been required of private sales. If this record-keeping were *all* that were required, it would still be excessive regulation of a private sale, but the requirement would emulate current legal requirements for FFL sales. But Lautenberg goes even further.

Currently, the BATF may inspect records of an FFL, but not collect them for *en masse* transfer to the Government. An FFL is required to retain sales records, but he is not required to deliver them to government, unless he goes out of business. The records are available for BATF inspection (to make sure that the dealer is keeping proper records), and are available for criminal investigators. But, a federal statute mandates that the records of law-abiding purchasers are *not* sent *en masse* to the federal government for compilation in a database.

Yet the Lautenberg Amendment requires an additional step of great significance. The FFL must report the gun show transaction to the Treasury within 10 days. This step does not exist currently for any FFL transaction; it is a totally new requirement. Lautenberg thus imposes heavier restrictions on private sales than are imposed on retail sales by licensed dealers. Lautenberg will create a new database for gun show sales that does not exist for any other FFL sale. This new requirement is very disturbing because how it might be used both now and in the future is unknown, but the possibility of it being a stepping stone to a registration database is obvious.

The full description of the transaction, including the firearm's serial number, may be entered into a databank, and retained permanently by the Department of the Treasury. The buyer's name is not supposed to be reported to the Treasury.

The Treasury reporting mandate overrides the current prohibition of registration of firearms and firearms transactions. It is impossible to reconcile the Lautenberg Amendment with existing law, and since it is a later-enacted statute, it will be interpreted as superceding the present prohibition.

## V. Destroying Gun Shows

The Lautenberg Amendment contains a litany of specious "findings" which claim to find that gun shows are a major cause of criminal violence in the United States. These "findings" are the mere invention of a few Congressional staffers, and are unsupported by any underlying committee hearings or other genuine Congressional fact-finding.

Research from the National Institute of Justice in 1998 and in 1986 has consistently found that no more than 2% of crime guns come from gun shows. Even the 2% figure may be too high, since a criminal might claim to have bought a gun at a gun show in order to avoid endangering the identity of his black market supplier. Moreover, most people who sell guns at gun shows are licensed dealers; there is no reason to assume that all criminal guns from gun shows come from private sales.

If the Lautenberg Amendment were merely about its purported objective--extending Instant Check to gun shows--the Amendment would be much shorter and simpler.

Instead, the Secretary of the Treasury is granted huge administrative powers to create laws regulating gun show sales. This gives the Treasury Secretary the power to create regulations whose intended effect will be to drastically reduce the number of gun shows.

Gun show promoters are also required to pay a tax to the Treasury. The Lautenberg Amendment does not limit the amount of this tax, or provide any guidelines regarding the tax. The Amendment is a carte blanche for unlimited, destructive taxation. .

Gun prohibition advocates have consistently tried to reduce Congress's role in setting national firearms policy--because they know that Congress is responsive to the American public's support for the Second Amendment. Instead, the gun prohibition lobbies want unelected officials to be given power to create anti-gun laws.

Giving the Treasury Secretary the unilateral power to create laws and impose limitless taxes is a recipe for the destruction of gun show by administrative fiat.

## VI. Even People who *Attend* Gun Shows, without Buying, Would Need to be Registered

A "gun show vendor" is anyone at a show who might propose a sale. At gun shows, some attendees end up selling a firearm. For example, an attendee might purchase a $700 rifle, giving the buyer a $400 check and a $300 shotgun. Under the Lautenberg Amendment, an attendee who trades one gun for another is a "vendor."

Also at a gun show, two attendees might meet, and discuss their gun collections. If one attendee offers to sell a gun to the second person, and the two people consummate the sale a month later, both persons are in violation

of the Lautenberg Amendment-even if neither one brought a gun to the gun show.

Violation of the Lautenberg Amendment is a five year felony.

The Lautenberg Amendment indirectly requires a gun show promoter to register any all attendees at a gun show to avoid potential criminal liability for failure to register a "vendor."Otherwise, the gun show promoter could also be sent to prison for five years, just because two attendees met and decided to trade guns.

It would be foolish to count on the law always being applies reasonably--especially in light of how politically-appointed and ambitious U.S. Attorneys might try to make a name for themselves by pleasing an anti-gun White House with aggressive prosecutions. In assessing the intent of the Lautenberg Amendment, courts will not have the benefit of committee hearings, since Lautenberg circumvented the committee process in the Senate. The only legislative "history" is a succession of Senators posturing for television cameras, and never addressing the intricacies of Lautenberg's Trojan Horse language.

The gun show promoter is required to retain a copy of photo ID of all vendors and a registry of vendors. (As discussed, the promoter will also have to keep a copy of ID for people who attend the show, in case they suggest firearms transactions to each other). For what purpose are these photo IDs to be retained? Certainly not to stop illegal gun buyers; they would be stopped by the FBI's NICS check, which would be completed before the gun show ended. Rather, the requirement to register all gun show vendors/attendees is simply one more part of the Lautenberg scheme to abolish any vestige of privacy regarding firearms.

Already, the passage of Lautenberg in the Senate has generated intense hostility to the federal government and created a climate, which, if unchecked, *will* lead inexorably to defiance and evasion, thus creating a new and large class of felons out of otherwise good citizens. When the government seeks to intrude into what are long accepted civil rights, it can expect a backlash of resistance. The increasing federal control via the criminal and regulatory process, when considered in the context of the ongoing frivolous litigation against the firearms manufacturing industry, is an explosive mixture which is not at all understood either by the media, the public, and apparently least of all the Senate.

## VII. Target Shooting without a Written Note, and other "Juvenile" Firearms Ban Issues

Currently, federal law imposes an unworkable, inappropriate ban on the possession of handguns by minors. 18 U.S.C. 922(x). The conditions under which minors should possess handguns ought properly to be set by each state,

taking into account the conditions in each state. Rules that might make sense in Manhattan may be inappropriate for Montana.

There are some exceptions allowing juveniles to possess handguns while ranching or farming, or engaged in lawful target shooting or hunting. But even then, current federal law demands that the juvenile have prior written permission from her parents, and must carry that permission at all times with her while in possession of the handgun.

It would be a mistake to think that teenagers helping on their parents' ranches and farms are actually complying with this silly statute. On the ranch, they do not carry around prior written permission. Off the ranch, they may carry a handgun in their pickup truck for protection while driving on isolated rural roads at night, as people in their family have for many generations. It is doubtful that most farmers and ranchers even know of the federal statute--or have much interest in studying it.

For a lot of people, federal gun laws have become like the Internal Revenue Code: it exists, but the populace dislikes it, evades it, and does not want to waste energy trying to understand it. The Tax Code and the gun laws and regulations are frustrating, arcane laws which are genuinely understood by only a small group of specialists. We have seen how the citizenry feels about the Tax Code and the IRS. It would be naïve in the extreme to believe that firearms owners do not have the same opinions of the gun laws and the Bureau of Alcohol, Tobacco, and Firearms.

S. 254 makes the useful improvement of removing the written permission requirement for juveniles who are under parental supervision.

But S. 254 makes the law substantially worse by imposing a *mandatory* one year minimum sentence on any adult who transfers a handgun to a juvenile, regardless of the circumstances. A father who gives a family heirloom in a locked glass case to a son on the son's seventeenth birthday would spend a *mandatory* year in prison. Mandatory sentences may make good sound bites, but they are cruel and thoughtless when applied in the real world.

S. 254 also expands the scope of the juvenile prohibition by adding "semi-automatic assault weapons" and "large capacity ammunition feeding device" (any magazine holding more than 10 rounds) to the list of prohibited items.

Magazines holding more than 10 rounds for rifles or handguns are commonly used for target shooting, for predator control, for self-defense, and for other lawful and enjoyable purposes, such as plinking at tin cans. If a 17-year-old can be trusted with a rifle and a 10-round magazine, it does not make sense to turn him and his parents into criminals just for using a 15 round magazine instead of a 10 round magazine.

As for "semiautomatic assault weapons," the very name is an oxymoron. One semiautomatic rifle (e.g., a Marlin Camp Carbine) functions just like any other (e.g., a Colt AR-15A2). The federal "assault weapon" ban applies to

some but not all semiautomatics, and classifies guns on the basis of petty cosmetic characteristics--such as whether the gun has a bayonet lug, or whether the magazine protrudes "conspicuously" from the rest of the gun. There is no reasonable basis for sending parents and children to prison because a child's lawfully-used rifle has a bayonet lug or some other cosmetically incorrect feature.

## VIII. Body Armor, Drug Tests, and Electronic Communications

Although the media has confined its coverage of S. 254 almost exclusively to superficial descriptions of the gun control provisions, the bill is loaded with literally dozens of other infringements of civil liberties. It is no coincidence that anti-freedom measures--some having no connection to juvenile crime--are placed in S. 254; hidden within a larger bill, they may escape the public scrutiny that would prevent them from being enacted if they were exposed to daylight.

Thus S. 254 includes a "cloned pager" provision which for the first time allows the police to intercept *the content* of electronic communications without a warrant. A cloned pager can reveal information about an individual's travel schedule (e.g., the message to the pager may indicate that the person will be home for dinner at a certain time) or personal life (e.g., a message that the person is going to the doctor, or that the person will at some other location).

The cloned pager language follows in the footsteps of other expansions of wiretap authority (such as the one in the 1998 budget bill)-buried in a large, complex bill, where the public (which is generally skeptical about wire-tapping) will not know about it. Apparently "public safety" demands that the public be protected from any realistic chance to debate whether the federal government needs more power to spy on the public without a search warrant.

Also buried deep in S. 254 are provisions to encourage suspicionless drug testing for students (sections 1110 and 1611)--even though Littleton murderers Eric Harris and Dylan Klebold were both "drug free," according to their autopsies. (Harris and Klebold may well have used illegal drugs during their high school careers, but apparently not before the murders.)

One reason why Congress should stop passing gargantuan bills like S. 254 (and its cousins, like the 1994 crime bill, and the 1996 and 1998 budget bills) is that they contain obscure provisions which should not be obscured.

While almost entirely ignoring the wiretap and drug testing provisions of S. 254, the media did pay some glancing attention to the bill's provisions regarding body armor. But the media failed to report the details of the language-which turn a reasonable concept into a very unreasonable law. (Although even with perfect language, the body armor restrictions are legitimately the subject of state, not federal law.)

Section 1644 of S. 254 requires at least a two-level increase in sentencing levels for any crime in which the defendant used body armor. A two-level increase can add as much as 36 months to a defendant's sentence.

There is no requirement that the defendant's "use" be in conjunction with a crime of violence, or be for any type of offensive purpose. The enhancement would apply to a persons who collects cash for illegal sports betting, and sometimes wears body armor, simply because he is afraid of being robbed.

Similarly, many gun store owners and employees wear body armor, to protect themselves from robbery. Thus, they are "using" (wearing) body armor when they "perpetrate" any of the many possible paperwork violations of the federal gun laws. The two-level sentence enhancement could easily take a gun store owner's paperwork violation from a sentencing range in which prison is optional into a range requiring a year or more in prison.

There is also no requirement that the defendant actually wear the body armor; simple "use" is sufficient. A divided Supreme Court has ruled that the federal sentence enhancement (30 years) for "use" of a machine gun in a crime can include "using" the gun by trading it for contraband. Similarly, non-clothing of "use" body armor--such as using it to pay a gambling debt--would trigger the sentence enhancement.

Reflecting a view of law enforcement that would have horrified the framers of the Constitution, the bill grants a special exemption from the body armor sentencing enhancement: the exemption applies only to law enforcement officers who while "acting under color of the authority" of law enforcement, "violate the civil rights of a person."

In other words, police officers who wear body armor while robbing drug dealers, prostitutes, and gambling operations are immune from the sentencing enhancement. So are police officers who rape, rob, or murder while on the job.

If the police arrest a liquor store owner for federal tax evasion, and the owner is wearing body armor, he may spend an additional three years in prison. But if the arresting officers, who are also wearing body armor, rape the arrestee with a toilet plunger, they are specifically exempt from additional punishment.

The idea that deliberate violations of civil rights--including the perpetration of major violent felonies--by law enforcement officers ought to receive a special immunity from prosecution would have appalled the Congresses that ratified the Bill of Rights and the Fourteenth Amendment.

Law enforcement officers do, of course, often have a serious need to wear body armor. But so do other persons, such as security guards, or persons who live in dangerous neighborhoods. Law enforcement officers--like security officers and persons who live in dangerous neighborhoods--are not supposed to use their body armor to assist the perpetration of violent crimes. Law

enforcement is supposed to uphold the rule of law, not to be exempt from the law. The special exemption for crimes perpetrated by law enforcement personnel is an insult to the rule of law.

## IX. Definition of "Criminal Street Gang" and Enhanced Penalties for "Gang" Crimes

Everyone (except gang members) is against "criminal street gangs." But S. 254's expansive definitions (section 204) makes many petty crimes into supposed "criminal street gang" crimes, with draconian penalties. The expansion of Federal jurisdiction into the "street gang" is a particularly egregious example of federalization of what ought to be the exclusive province of the states.

There is difference between a genuine gang (such as the Crips)--which typically has dozens or thousands of members--and a mere group of friends. Three juvenile delinquents may spend a lot of time together, and even commit various crimes together, but they are not a real gang. (The three are, of course, still criminals, and can be punished for violating whatever laws they violate, including conspiracy statutes.)

It is notable that S. 254's broad definition of a "criminal street gang" has nothing to do with committing gang crimes in the street. A group of agoraphobics who stayed indoors for twenty years could still qualify as a "criminal street gang."

It is reasonable for legislators to address both indoor and outdoor crimes. It is not reasonable for legislation to label people with damning terms like "criminal street gang" if the people are not street gangsters.

As S. 254 amends existing statutory language, an "informal" "association" of "3 or more persons" (reduced from 5, in current law) must meet the following requirements to be a "criminal street gang":

"a primary activity" is the commission of certain crimes. This provision refers to "a primary activity," rather than "the primary activity." Logically, only one item in any set can be "primary." But the language about "a" primary activity implies that the group could have "several" primary activities. The language obviously raises problems of vagueness, but one thing is certain: "a primary activity" need not be the group's main reason for existence.

The second requirement for being a "criminal street gang" is that one member must engage in a "pattern of criminal gang activity." To the ordinary speaker of English, the word "pattern" implies many instances of the activity. (i.e. "George Steinbrenner has a pattern of personal conflicts with the managers of the New York Yankees.") But in S. 254, a "pattern" is defined as two or more crimes--from a very broad list--committed within a five year period. The "pattern of criminal gang activity" could be satisfied by a crime in 1994, and another crime in 1998.

The third requirement is that the activities of the gang "affect interstate or foreign commerce." This requirement is trivial, since prosecutors can argue that any activity has at least a minor effect on the economy, any economic effect can be construed as somehow affecting interstate commerce. Unfortunately, federal courts have been very sympathetic to such tenuous reasoning.

Most people who hear the phrase "gang crimes" would think of drive-by shootings, fencing stolen property, first degree assault, and a few other major violent felonies. This is how the existing "criminal street gang" statute works. Let us examine each of the crimes that S. 254 adds to the "criminal street gang" list:

*The federal explosives statute, the federal arson statute, and the federal extortion statute.* Many of the crimes in these statutes are serious violent felonies, and already severely punished for federal law. Other crimes are not as serious--such as threatening to injure the reputation of a dead person. 18 U.S.C. 875(d). But all these crimes, major and minor alike, are swept into the definition of "criminal street gangs," as if America's cities were threatened by teenagers driving through neighborhoods, and shouting libels about persons who have passed away.

*Gambling offenses.* It is a federal crime for a person "engaged in the business" of betting (this could include a professional gambler, as well as a bookie) to transmit information by telephone. The offense includes using a telephone (including a modem) to receive information about sporting events.

In the context of federal gun laws, being "engaged in the business" of firearms sales can included a part-time activity, if the activity is for profit, and regular. 18 U.S.C. 921(a)(21). Thus, it is certainly plausible that the "commissioner" of a weekly football pool, who makes a profit on the bets, would violate this statute.

Congress has set a two year maximum penalty for violation of the gambling law. But S. 254 raises the penalty to ten years, and turns every office participant into a member of a "criminal street gang."

*Alien smuggling.* Alien smuggling is, under certain circumstances, something that gangs actually do. But there are already strict laws against alien smuggling. Existing sentencing guidelines already impose extra penalties for smuggling aliens in connection with other crimes, as part of a conspiracy. To the extent that there are problems with those laws, the problems should be addressed directly, though the alien laws themselves, and not as an unknown provision in a juvenile crime bill.

S. 254's language about "criminal street gangs" is much narrower and better than the language in its predecessor, S. 54, in the 105th Congress. But S. 254 still inappropriately expands the scope of "criminal street gang" statute to activities which may have nothing to do with criminal street gangs.

S. 254 compounds the damage by creating a separate crime for mere solicitation to join a "criminal street gang." Read literally (the way prosecutors tend to read statutes), S. 254 makes it a major federal felony for a person to ask, "Want to join the office football pool?"

In addition to the prison term, a person convicted under S. 54 is subject to the draconian federal forfeiture laws. 21 U.S.C. 853.

## X. Forfeiture Expansion

In addition to the already-stringent general federal forfeiture laws, there is currently a special forfeiture statute to which applies to: 1. Transfer of military information to a foreign government; and 2. Any federal crime in which a person was physically harmed (e.g., an assault or a rape).

The current law states that if the convicted criminal makes money from selling his story of the crime (e.g., a sensationalist newspaper or television program pays him for an interview), then the profits from the sale may be forfeited.

S. 254 significantly expands the statute. (Section 1614). Instead of involving only transfer of military secrets, and federal crimes involving physical harm, S. 254 would expand the law to include *any* felony-including *state* law felonies. S. 254 would also include any *state or federal misdemeanor* involving physical harm.

Rather than just applying to profits from the sale of a story to the media, the statute as revised by S. 254 would allow forfeiture of any enhanced value, in any property owned by the criminal, which resulted from the crime.

To state the obvious, forfeitures for state law violations ought to be determined by state legislatures, and carried out by state and local prosecutors. The federal government should not interfere with state criminal laws, by using federal forfeiture statutes to make the punishment of the crime more severe.

Secondly, Congress is currently considering major forfeiture reform legislation sponsored by Rep. Henry Hyde. The proper time to propose forfeiture expansion should be when the forfeiture reform bill is being debated. It is wrong for forfeiture expansion to be smuggled into a juvenile crime bill, where it will be hidden from public scrutiny.

The fact that forfeiture expansion-like wiretap expansion-must be concealed within giant bills having no connection for wiretapping or forfeiture reflects the fact that the American people do not want more wiretapping and more forfeiture.

## XI. Conclusion

S. 254 is not the type of bill which could become a good bill through revised drafting. Simply put, S. 254 addresses crimes the overwhelming majority of which have no place in the federal criminal law.

The sponsors of this legislation might note that they do not attend that the provisions in their bill be applied unreasonably--such as by prosecuting two friends who meet at a gun show, and agree to swap a shotgun for a rifle. But the sponsors' intent is no defense at all to the application of this bill as written; if enacted, the bill will be applied as written.

It is plain beyond doubt that Congress never contemplated abortion protestors when enacting the RICO statutes. But prosecutors do not enforce according to the motives of Congress; they enforce according to the literal text of the law. And because of the literal text of the law, Sammy Weaver, Vicki Weaver, and William F. Degan are dead as the result of a federal law which makes it a felony just to possess--without any violent purpose--a shotgun whose barrel is too short. Nicole Richardson is serving a ten-year federal prison term just for answering the phone, and telling an undercover federal agent where her boyfriend (a drug dealer) could be found.

Especially when prosecutors can earn notches on their belts by winning convictions for long mandatory sentences, laws are applied as written. As a former criminal prosecutors, we know that most prosecutors push written statutes as far as the language can possibly go. Families Against Mandatory Minimums can supply hundreds of horror stories of harsh federal laws being applied just as written, against minor offenders.

Significantly, S. 254 appropriates millions of dollars for extra prosecutors. Since all the offenses covered by S. 254 are, based on the Constitution's text and original intent, exclusively matters of state concern, it is exclusively the decision of the people in the states, acting through their state legislatures, to decide how many prosecutors are appropriate. There are no state or federal prosecutors in this country who are going soft on murders, arsons, and the like. So at least some of the new prosecutors will necessarily have to look for "new" offenses to justify their funding.

Many of these new "criminals" sent to federal prison for years and years will be decent citizens who have run afoul of some of the unreasonable provisions in the Lautenberg Amendment, or in the existing federal paperwork gun laws.

Ever since the heinous murders in Colorado on April 20, Congresspeople have been talking incessantly about the need for better examples for our country's youth. If "character counts," then Congress can demonstrate good character by rejecting oppressive legislation which violates the rights of youths and adults; by deciding to act calmly and rationally rather than in a atmosphere of panic to "do something"; and by upholding the rule of law through adherence to the Constitution.

# Appendix:
# Nineteen Weapons Control Law
# Violations by Eric Harris, Dylan Klebold, and Others

Murderers Eric Harris and Dylan Klebold appear to have violated numerous federal and state weapons control laws, as detailed below.

This list differs substantially from a list of weapons law violations which was compiled by the National Rifle Association; while the NRA list includes various crimes which were committed during the course of the murders (e.g., discharge of a firearm on school property), this list includes only offenses which were completed before Harris and Klebold began their murder spree.

It appears that Harris and Klebold violated at least 17 different state and federal weapons control laws. Mark E. Manes, the man who allegedly sold the handgun to Harris and Klebold, may have violated at least one federal and one state law. If Harris or Klebold's parents knew of their children's handgun possession, the parents would be in violation of one Colorado law.

Because Harris and Klebold killed themselves, it is not at this point clear which of them violated the particular laws below. But it is clearly that before Harris and Klebold committed a single violent act, they had already violated enough state and federal weapons control laws to be sent to prison for the rest of their lives.

## State of Colorado Laws

Terrorist Training. Colorado Revised Statutes § 18-9-120.
"(1) As used in this section, unless the context otherwise requires:
(a) 'Civil disorder' means any planned public disturbance involving acts of violence by an assemblage of two or more persons that causes an immediate danger of, or results in, damage or injury to property or to another person.
(b) 'Explosive or incendiary device' means:...
(II) Any explosive bomb, grenade, missile, or similar device;
(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which:
(A) Consists of or includes a breakable receptacle containing a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound; and
(B) Can be carried or thrown by one person acting alone.
(C) 'Firearm" means any weapon which is designed to expel or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon....
(2) Any person who teaches or demonstrates to any person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person and who knows that the same will be unlawfully used in furtherance of a civil disorder and

any person who assembles with one or more other persons for the purpose of training or practicing with, or being instructed in the use of, any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person with the intent to unlawfully use the same in furtherance of a civil disorder commits a class 5 felony."

Possessing a Dangerous or Illegal Weapon. 18-12-102.
"(1) As used in this section, the term 'dangerous weapons' means a...short shotgun...
(3) A person who knowingly possesses a dangerous weapon commits a class 5 felony."

Unlawfully Carrying a Concealed Weapon. C.R.S. 18-12-105.
"(1) A person commits a class 2 misdemeanor if such person knowingly and unlawfully:
(b) Carries a firearm concealed about his or her person."

Unlawfully Carrying a Weapon--Unlawful Possession of a Weapon--School, College, or University Grounds. C.R.S. 18-12-105.5.
"(1) A person commits a class 2 misdemeanor if such person knowingly and unlawfully and without legal authority carries, brings, or has in such person's possession a deadly weapon...in or on the real estate and all improvements erected thereon of any public...high school."
(2). Requires a sentence of 12 to 24 months, as opposed to the normal class 2 misdemeanor sentence of up 12 months.

Possession of handguns by juveniles. C.R.S. 18-12-108.5.
"(1)(a) Except as provided by this section, it is unlawful for any person who has not attained the age of 18 years knowingly to have any handgun in such person's possession."
"(c)(1). Illegal possession of a weapon by a juvenile is a class 2 misdemeanor."

Note: The May 5 issue of the *Denver Post* reports that 22 year old Mark E. Manes sold the handgun to Harris and Klebold in Feb. 1999, when both Harris and Klebold were 17. The *Post* also reports that Manes has a long record of driving offense and underage drinking violations. According to the *Post*, Manes' mother is a long-time Handgun Control, Inc., activist, who always taught Manes about the "evilness" of handguns.

Unlawfully Providing or Permitting a Juvenile to Possess a Handgun. C.R.S. 18-12-108.7.
"(1)(a) Any person who intentionally, knowingly, or recklessly provides a handgun with or without remuneration to any person under the age of 18...or any parent or legal guardian of a person under eighteen years of age who knows of such juvenile's conduct which violates section 18-12-108.5 and fails to make reasonable efforts to prevent such violation commits the crime of unlawfully providing or permitting a juvenile to possess a handgun."

(b) Class 4 felony.
(2)(a) and (b). If the parent "is aware of a substantial risk that such juvenile will use a handgun to commit a felony offense," the parent's crime is a class 4 felony.

Possession, Use, or Removal of Explosives or Incendiary Devices. C.R.S. 18-12-109.
"(2) Any person who knowingly possesses or controls an explosive device commits a class 4 felony."

Possession of a loaded firearm in a motor vehicle. 33-6-125.
"It is unlawful for any person, except a person authorized by law or by the division, to possess or have under his control any firearm, other than a pistol or revolver, in or on any motor vehicle unless the chamber of such firearm is unloaded."

Note: Most of the above statutes have exceptions, none of which applied to Harris and Klebold.

**Federal Law, Gun Control Act**

Possession of Firearms by Drug Users. 18 U.S.C. 922(g)(3).
"(g) It shall be unlawful for any person--
(3) who is an unlawful user of or addicted to any controlled substance... to...possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Gun Free School Zones Act. 18 U.S.C. 922(q).
"(2)(a) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."

Sale of Handgun to a Minor. Possession of Handgun by a Minor. 18 U.S.C. 922(x).
"(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile--
(A) a handgun;...
(2) It shall be unlawful for any person who is a juvenile to knowingly possess--
(A) a handgun;..."

Penalties for above offenses. 18 U.S.C. 924.
(a)(2). Violation of 922(g) is up to 10 years imprisonment.
(4). Violation of 922(q) is up to 5 years imprisonment, which must be consecutive to any other sentence.
(6). Violation of 922(x) is up to one year imprisonment. Up to 10 years if the transferor know or had reasonable cause to know that the juvenile intended to use the handgun in a crime of violence.

## Federal Law, National Firearms Act

The federal Gun Control Act covers rifles, shotguns, and handguns, and was enacted in 1968 (and has since been greatly amended). The National Firearms Act (NFA) was enacted in 1934, and covers a smaller category of weapons. For NFA purposes only, a "firearm" is defined to include sawed-off shotguns, and "destructive devices." 26 U.S.C. 5845(a)(1) and (8). "Destructive devices" include "any explosive...bomb...or similar device." 26 U.S.C. 5845(f)(1). With that definition in mind, here are the NFA violations committed by Harris and Klebold:

Making Tax. 26 U.S.C. 5821.
Requires a $200 tax for the construction each NFA "firearm." The two sawed-off shotguns were made into NFA "firearms" when Harris or Klebold sawed off the barrel to less than 18 inches. Harris and Klebold also failed to pay the $200 tax for each bomb they made.

Making. 26 U.S.C. 5822.
Prohibits making any NFA firearm unless the maker has registered with the Secretary of the Treasury, and identified in advance the firearm that will be made.

Registration. 26 U.S.C. 5841(c).
Requires manufacturers of NFA "firearms" (the sawed-off shotguns, and the bombs) to register each firearm with the Secretary of the Treasury.

Identification. 26 U.S.C. 5842.
Requires that every maker (Harris and Klebold) of NFA firearms place serial numbers on them.

Record and Returns. 26 U.S.C. 5843.
Requires manufacturers to keep certain records.

Prohibited Acts. 26 U.S. 5861.
"It shall be unlawful for any person--
(f) to make a firearm in violation of the provisions of this chapter."

Each violation of the above laws is punishable by up to 10 years in prison. Each sawed-off shotgun and each bomb constitutes a separate violation.

## Other Federal Laws

Explosives Law. 18 U.S.C. 842.
"(i) It shall be unlawful for any person--
(2) who is an unlawful user of or addicted to any controlled substance....
(4)....to...possess any explosive which has been shipped or transported in interstate or foreign commerce."

""(j) It shall be unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary [of the Treasury]."

Explosives Law penalties. 18 U.S.C. 844.
(a) Up to ten year prison term for violation of 842(i).
(b) Up to one year for 842(j).

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