Calendar No. 678

97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-476

# FEDERAL FIREARMS OWNERS PROTECTION ACT

## REPORT

OF THE

## COMMITTEE ON THE JUDICIARY

## UNITED STATES SENATE

TO ACCOMPANY

## S. 1030

together with

## SUPPLEMENTAL, ADDITIONAL, AND MINORITY VIEWS

JUNE 18 (legislative day, JUNE 8), 1982.—Ordered to be printed

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vided in section 845(a)(5) of title 18, United States Code, to complete affidavits or forms attesting to that exemption.".

AMENDMENTS TO SECTION 927

SEC. 107. Section 927 is amended by adding the words: "*Provided, however*, That any provision of any legislation enacted, or of any rule or regulation promulgated, by any State or a political subdivision which prohibits or has the effect of prohibiting the transportation of a firearm or ammunition in interstate commerce through such State, when such firearm is unloaded and not readily accessible, shall be null and void".

SEC. 108. The amendments (including any repeals) made by this Act shall become effective one hundred and eighty days after the date of the enactment of this Act.

## TITLE II—AMENDMENTS TO TITLE VII OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (18 U.S.C. APP. 1201–1203)

SEC. 201. Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (sections 1201, 1202, and 1203 of the appendix to title 18, United States Code) is hereby repealed.

## III. PURPOSE OF COMMITTEE AMENDMENT

The amendments adopted by the Committee in lieu of S. 1030 as introduced were intended to reduce administrative burdens, clarify the requirements of the bill, and address concerns raised by some Senators to the bill as introduced.

S. 1030 as introduced would have defined as "importer," and thus subjected to requirements for an importer's license, anyone who brought in one or more firearms. The amended bill limits this to persons who import firearms as a regular business venture. This narrows the category of persons who must obtain the license, and permits ordinary, small scale importations by citizens returning to the United States.

The original language of S. 1030 provided that a person barred from gun ownership by a conviction would be relieved from that bar if he received a pardon or restoration of civil rights. The amended bill adds the exception that this will not apply if the pardon or restoration expressly provides that the recipient may not own firearms. This allows flexibility should such a pardon or restoration be based upon considerations not relating to fitness to own a firearm.

Existing law bans most firearm transfers between residents of different States. S. 1030 banned such transfers if they would violate the laws either of the State where they were made or the State of the buyer's residence. The amended bill makes two changes: (1) the transfer must be face-to-face; (2) a licensee is presumed to have actual knowledge of the published laws of each State. The first change rules out private "mail order" sales, the second minimizes the government's

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initial burden of proving knowledge of State law where a sale in fact violated such law.

Existing law has been construed to bar licensees from owning private firearms collections; any transfers must be treated as business inventory. S. 1030 stated that nothing in the law would be construed to prohibit a licensee from maintaining a private collection, not part of his business inventory. It did not define the nature of the collection, nor make it clear that the exemption extended to acquisition and disposition as well as maintenance of the collection. The amended bill greatly clarifies this. It protects licensees who maintain or dispose of a private collection, provided that (1) no gun so disposed of, and which was transferred from the licenee's inventory, may be disposed within one year of the initial transfer unless fully recorded, and (2) no transfer may be made in order to evade the restrictions otherwise placed upon a licensee.

S. 1030 provided that a firearms license may not be revoked based on allegations of which the licensee has been acquitted in a criminal trial, or which have ended in any result other than his conviction. The amended bill allows the government to voluntarily drop criminal charges prior to trial and still proceed with revocation.

Similarly, S. 1030 barred forfeiture of seized firearms if the owner had been acquitted of charges, or if any finding other than guilty was entered, or if the enforcing agency failed to file such charges within 120 days. The amended bill allows the agency to bring a forfeiture action if it did not file charges at all or dropped them voluntarily before taking the defendant to trial. The forfeiture action must in any event be filed within 120 days.

Existing law broadly empowers agents to search licensee premises during business hours without warrant or cause. S. 1030 provided that probable cause relating to a violation of a gun law must exist. The amended bill makes several changes: (1) "reasonable" rather than "probable" cause is required, lowering the standard but only slightly; (2) an administrative warrant is required, giving procedural safeguards and creating a record of use; (3) certain limited exceptions are recognized where such cause is not needed—mainly for firearm tracing and for an annual courtesy inspection and instruction. These expressly allow tracing and instruction without permitting harassment.

Existing law provides an additional sentence (must be served consecutively) but not a mandatory sentence (no probation or parole) for use of a gun, or carrying of it, during a federal felony. The additional sentence becomes mandatory only upon second conviction under this section—which has never occurred. S. 1030 originally provided a mandatory but not additional sentence for use of a firearm in a federal felony. Exceptions were provided for self defense. This was criticized since (1) the sentence was not additional and (2) carrying during the felony, absent actual use, was not an occasion for special penalties. Amended S. 1030 meets both these criticisms. The sentence for use in a felony is made both additional and mandatory—it cannot be served concurrently with any term for the underlying felony, and probation and parole are banned. The imposition of an additional sentence for carrying during a felony is retained—thus keeping current additional sanctions against carrying during the felony. The Committee also

expanded the minimum sentence from one year to two for a first offense.

Existing law allows one convicted of a felony to apply for a relief from disability which, if granted based on his record and reputation, restores the right to own firearms. The existing relief provisions had several anomalies: they applied only to convicts, excluding those barred from gun ownership for other reasons (prior mental disorder, etc.); they could not be invoked by one convicted of even the most technical violation of the gun law itself; the provisions were vague, with burden on the applicant to satisfy them; and there was no provision for judicial review. S. 1030 would have applied relief provisions to everyone barred from gun ownership, would have made provisions for *de novo* review of denials, and would have put the burden on the issuing authority to establish such that it should not be granted. The amended bill retains the broadening of applicability, but permits the burden to revert to the applicant as under current law. Review is retained, but under standards of the Administrative Procedure Act. This retains the most vital reforms while eliminating those which encountered the most controversy.

S. 1030 contained provisions for a one-house veto of administrative regulations. The amended bill eliminates these.

The Committee amendments also impose a fourteen-day waiting period before a handgun which is purchased from a dealer, may be delivered. This is intended both as a "cooling off" period and to allow background checks by local police.

## IV. Hearings and Need for Legislation

The mandate for the addition of civil liberty guarantees to the Gun Control Act of 1968 was documented initially in oversight hearings on the Bureau of Alcohol, Tobacco and Firearms, held by the Senate Committee on Appropriations in July 1979, and in April, 1980. During those hearings, the Committee received testimony from a number of firearm owners and collectors who had been prosecuted for technical and unintentional violations of federal law. Several had, in addition, experienced confiscation of entire collections or inventories based upon allegations of isolated non-willful violations, and subsequently had been required to litigate in the courts in order to secure the return of firearms, or to oppose revocation of licenses, despite acquittal on all charges during previous criminal trials.

The Committee further heard testimony from a former Treasury official who estimated that 75 percent of firearms cases had been brought against individuals whose violations, if any, were unintentional. Written statements were also received from two members of the state judiciary, who commented that agents enforcing the firearms laws had repeatedly refused to bring cases against convicted felons in illegal possession of sawed-off shotguns and other prohibited weapons. The need for a redirection of enforcement efforts away from legitimate firearm owners and toward serious, intentional criminals was apparent.

Senator Dennis DeConcini, who chaired the hearings in the Appropriations Committee concluded:

> Frankly, I was shocked by yesterday's testimony. The problem appears much greater in scope and more acute in intensity than I had imagined. It is a sobering experience to listen to average, law-abiding citizens present evidence of conduct by an official law enforcement agency of the federal government which borders on the criminal. . . . The testimony offered yesterday, together with supporting documentary data, is extremely disquieting. . . . (It) indicates that BATF has moved against honest citizens and criminals with equal vigor. . . . The time has come to make some revisions in the Gun Control Act of 1968.

The Subcommittee on the Constitution of the Senate Committee on the Judiciary held additional hearings on Gun Control and Constitutional Rights in September, 1980. The Subcommittee heard from both the Treasury Department and the National Rifle Association, and also from three firearm collectors who had experienced confiscations of their entire collections for alleged violations. In two cases, charges were dropped, and in the remaining one, no charges were ever brought. The firearms taken in the last case—described as valuable collector items, engraved and inlaid with precious metals—were still being withheld, nearly three years after their taking. Additional documentary evidence was obtained from thirty-one of the dealers and collectors. The Subcommittee's subsequent report, "The Right to Keep and Bear Arms," concluded:

> Based upon these hearings, it is apparent that the enforcement tactics made possible by current firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and other high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. . . . The Bureau's own figures demonstrate that in recent years the percentage of its arrests devoted to felons in possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases (and that) 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and that a third involve citizens with no police record whatsoever. . . .
>
> The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical *malum prohibitum* charges, of individuals who lack all criminal intent and knowledge. . . . Since existing law permits a felony conviction upon these charges even where the individual has no criminal intent or knowledge, numerous collectors have been ruined by a felony record carrying a potential sentence of five years in a federal prison. Even in cases where the collectors secured acquittal, or grand juries failed to indict, or prosecutors refused to file criminal charges, agents of the Bureau have gen-

erally confiscated the entire collection of the potential defendant upon the ground that he intended to use in violation of the law. In several cases, the agents have refused to return the collection even after acquittal by jury. The defendant under existing law is not entitled to an award of attorney's fees; therefore, should he secure return of his collection, an individual who has spent thousands of dollars establishing his innocence of the criminal charge is required to spend thousands more to civilly prove his innocence of the same charges, without hope of securing any redress. . . .

In light of this evidence, reform of federal firearm laws is necessary to protect the most vital rights of American citizens. Such legislation is embodied in S. 1030.—The Right to Keep and Bear Arms (Committee Print), Report of the Subcommittee on the Constitution, February 1982, pp. 20–21.

The full Judiciary Committee held three additional days of hearings on S. 1030, on December 9 and 11, 1981, and February 8, 1982. The sponsor of S. 1030, Senator James McClure, and the sponsor of H.R. 3300, its House counterpart, Representative Harold Volkmer, testified that its purpose was to accomplish "a redirection of the Act and a redirection of enforcement. The redirection is aimed at those who traffic in illegal guns and to go after the criminal who uses the gun. We feel that society would be better served by reducing the number of crimes, by reducing the illegal use and illegal trafficking of guns, than by going after those who never use a gun in the commission of a crime, who only use a gun for legitimate purposes."

The Committee also heard the testimony of three firearm collectors and two firearm dealers who had suffered prosecution and confiscation of firearms based upon unintentional violations.

One particularly significant case was that of Richard Boulin, a Vietnam veteran and former police officer. Boulin was arrested and convicted for having sold, while a licensed dealer, firearms from a personal collection kept at his home. He had previously been advised by two agents that such sales would be legal, since the dealer's restrictions on place of sale and recordation applied only to his dealership inventory. Subsequent to his conviction—in the course of which the judge commented favorably on his character, but noted that intent is not an element of a Gun Control Act violation—Boulin discovered that the director of the Bureau had stated in writing that such conduct was completely lawful. Boulin summed up the effect:

What has this done to me personally? It has destroyed me, to a degree. Of course, I have lost my family. I lost $40,000 in firearms. . . . they took an everyday, ordinary person who had never been arrested for anything, who did not even have a traffic ticket against him, and made him into a felon. I cannot get a mortgage today. I find it hard to hold a job today because of the type of jobs that I work. It has made my life generally miserable. I lost a lot of friends. . . .

To cast one experience: I went into a restaurant in Rockville with my wife a year or so after I was arrested. There were a couple of policemen in uniform, sitting there, that I knew. I said "how are you doing?" They said, "we don't talk

to criminals. Get out of here," in front of my wife. You can imaginne—I don't know if you can really imagine—what it feels like.

In addition to the firearm collectors and dealers testifying, the Committee heard from critics of S. 1030, including Handgun Control, Inc., the U.S. Conference of Mayors, the New York City Bar Association, and the National Coalition to Ban Handguns. Testifying in support of the bill was the National Rifle Association, the National Sheriffs' Association, and the Citizen's Committee for the Right to Keep and Bear Arms. A written statement by the Fraternal Order of Police was also received, in which FOP stated that it "strongly support S. 1030," which it "considers to be a vast improvement over the Gun Control Act as it now exists. It clarifies, tightens, and makes rational the all too often vague and inconsistent provisions of that Act."

Subsequent to these hearings, Senator Orrin Hatch, chairman of the Subcommittee on the Constitution, introduced in Committee an amended form of S. 1030. This bill contained a number of changes negotiated between Senator McClure and representatives of the Treasury Department, and was intended to remove deficiencies which had become apparent since the original drafting of S. 1030, and delete provisions subject to controversy which may have impeded prompt action on the legislation. The amended bill contained additional guarantees against improper mail order sales, against abuse of interstate sales and provisions allowing dealers to keep private firearm collections, created procedures for administrative warrants for inspection and new, less burdensome, and procedures for appealing denials of a relief from disability to own firearms.

## V. Section-by-Section Analysis

*Section 101.* Section 101 incorporates three changes from existing law. Subsections (c), (d), and (e) eliminate the requirement that individuals who distribute only ammunition, but not firearms, obtain federal firearm licenses. Regulation of ammunition-only licensees, many of whom are convenience markets or rural general stores, has proven burdensome and of no utility in crime control.

Subsection (f) for the first time defines "engaged in the business" in the context of firearm manufacture, importation, and dealing, and of ammunition manufacture. Existing law requires that those engaged in these businesses obtain a federal license. Many firearm hobbyists sell or trade firearms from their collections, and hearings have repeatedly established that many such hobbyists had been charged and convicted for technically violating the broad reading which courts had given this section.

Lower courts have applied two different but similar tests for engaging in the business. Neither is especially clear, and both can be applied to a hobbyist to whom profit is a secondary objective. Under one test, anyone who "is engaged in any business of selling firearms, which occupies time, attention and labor for the purpose of livelihood or profit" has engaged in the business; under the other anyone who "has guns on hand" or can obtain them and is willing to sell has so engaged. Compare *United States* v. *Williams*, 502 F.2d 581 (8th Cir. 1974) with *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975). S. 1030 would sub-

stantially narrow these broad parameters by requiring that the person undertake such activities as part of a regular course of trade or business and for the principal objective of livelihood or profit. It expressly provides that these requirements do not extend to hobbyists who are involved with their personal collection nor to those who occasionally do gunsmithing work.

This provision would not remove the necessity for licensing from part-time businesses, or individuals whose principal income comes from sources other than firearms but whose main objective with regard to firearm transfers is profit rather than hobby. A sporting goods store or pawn shop which derived only a part of its income from firearm sales, but handled such sales for the principal objective of business and profit, would still require a license.

A third change relates to the definition of "crime punishable by imprisonment for a term exceeding one year," a conviction for which bars a citizen from possessing firearms. S. 1030 works two changes to this subsection. The first is a recognition that what constitutes a conviction shall be determined in accord with the law of the jurisdiction where the underlying proceeding were held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, a conviction for which may be treated as misdemeanor or felony at the option of the court. Since the federal prohibition is keyed to the state's conviction, state law should govern in these matters. In the case of "open ended" offenses which are classed as felonies but may be reduced by the trial court, it is intended that these constitute a "crime punishable by imprisonment for a term exceeding one year" unless and until the court enters a decision to treat the offense as a misdemeanor.

S. 1030 would also exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision as to pardons in 18 U.S.C. section 1202, relating to possession of firearms, but through oversight does not include such provision in 18 U.S.C. section 922, dealing with their purchase or receipt. This oversight has resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision that he may possess it. *Thrall* v. *Wolfe*, 503 F.2d 318 (7th Cir. 1974). This change would remove that anomaly. In the event that the official granting the pardon, restoration of rights or expungement of record does not desire it to restore the right to firearm ownership, this provision is rendered inapplicable where the order or pardon expressly provides that the person may not possess firearms.

A new subsection (a) (22) is added that provides a definition of the term "handgun": The original 1968 Gun Control Act did not contain such a definition. The Committee, in adopting several amendments affecting only handguns, felt it was necessary to include a general definition of a handgun.

*Section 102.* Section 102 of S. 1030 amends 18 U.S.C. section 922, which generally describes prohibited acts under the Gun Control Act. Section 102 effects two major changes in the list of proscribed acts.

The first change relates to transfers of firearms between residents of different states. Existing 18 U.S.C. section 922(a) (3), (5) 2nd 922

(6)(3) generally prohibit transfers of firearms between residents of different states, except where the recipient is a federal firearms licensee, or the transfer meets other narrow criteria. This was intended to prevent the use of interstate sales to defeat local gun restrictions, but in fact bars almost all interstate transfers, even where no law would be violated. Section 102 amends this bar to permit interstate transfers so long as they violate neither firearm laws of the place of sale nor those of the purchaser's residence, and so long as purchaser and seller met in person during the negotiation or transfer. The latter provision is intended to exclude "mail order" sales, where order and delivery are made by mail or wire. Necessarily, restrictions which are meant to have no extraterritorial application are not violated by transactions outside the locality. A law restricting modes of conducting business within a locality, and applicable only to sales within the locality and not to purchases made by its residents elsewhere, is not violated by a resident's purchase of a firearm outside its boundaries. Conversely, a waiting period on delivery of a firearm to a resident, wherever bought in the state, and permit systems relating to ownership or possession of a firearm, wherever bought, are intended to have application outside a locality's boundaries and must be complied with.

The Committee amendments add a provision that a licensed dealer is presumed, in absence of evidence to the contrary, to have knowledge of the published ordinances of other jurisdictions to whose residents he transfers firearms. This was added to meet arguments that a dealer could otherwise make improper transfers so long as he did not acknowledge such laws. The amendment is intended to reverse the initial burden of proof on the issue of knowledge, and not to create an evidentiary presumption.

A second major change incorporated in section 102 creates a coordinated and consistent definition of persons prohibited from possessing, transporting, and receiving firearms. Existing law is deficient in that 18 U.S.C. section 922 defines four classes of persons forbidden firearms receipt, while section 1202 defines six classes—only two of which resemble section 922's categories—of persons forbidden firearm possession and transportation. Thus, for instance, fugitives from justice and users of certain drugs are forbidden firearms receipt but not firearm possession; illegal aliens are forbidden firearm possession, yet not forbidden to receive firearms. Moreover, the prohibition on transfers of firearms to these classes applies only to licensed dealers, and not to other citizens.

S. 1030 replaces these inconsistent rules with a straightforward and consistent one. Section 102(f)(1) makes the ban on transfers to prohibited persons applicable to "any person", rather than federal licensees alone. The remainder of sections 102 (f) and (g) amend 18 U.S.C. section 922 to prohibit firearm possession, receipt or transportation by convicted felons, fugitives from justice, users of certain drugs, persons subject to an adjudication as a mental defective or a commitment order, illegal aliens, those who have received a dishonorable discharge, and those who have renounced their citizenship. Section 102(h) imposes a prohibition on carrying of firearms while in the employment of any prohibited person, and 102(i) carries over

the current ban on firearm receipt by one under indictment for a felony.

A new subsection is added to Section 922 that provides for a 14-day waiting period prior to the delivery of a handgun after its purchase. There are two exceptions to this requirement: (1) where the physical danger of an individual may be involved, or (2) where the 14-day waiting period requirement had been complied with during the previous 12 month period.

*Section 103.*—Section 103 of S. 1030 amends 18 U.S.C. section 923, which relates to issuance of federal firearms licenses and duties of licensees. Section 103 effects five significant changes in the law.

First, subsection (c) authorizes licensees to maintain private firearms collections independent of their business operations. Existing requirements that licensees maintain inventory and disposition records on the business premises, and record on firearms sold, have led to a construction that all sales by a licensee, even of firearms from his own collection, kept at his home, and never part of the business inventory, must be recorded. *See United States* v. *Scherer*, 523 F. 2d 371 (7th Cir. 1975). The Committee heard testimony from one licensee who was told on the one hand by federal agents that sale from his personal collection need not be recorded, and on the other hand arrested, charged and convicted for failure to record such sales. The Committee further received evidence that the enforcing agency had itself vacillated on the question of whether and how such sales must be recorded. The need for a concise, clear standard is evident.

Section 103(c) of S. 1030 as reported out sets such a standard. This subsection permits a licensee to maintain and dispose of a private firearms collection on equal terms with a private, nonlicensed person. S. 1030 as reported also incorporates two restrictions on this right. First, should the licensee transfer firearms from his inventory into his collection, they are deemed to remain part of the inventory for one year after the transfer, and are subject to all recording requirements if sold during that period. The licensee would be required to re-transfer any such firearms into his inventory, then transfer them at his premises with appropriate recording. A second restriction would deem the firearms part of the licensee's business inventory if he made the transfers with the intent of willfully evading his duties as a licensee—with primary intent to make improper transfers later, rather than to promote his collection. These limitations were added to meet objections that S. 1030, as originally introduced, might allow a licensee to transfer firearms into his personal collection in order to evade his duties as a licensee.

S. 1030, section 103(e) amends 18 U.S.C. 923(f), which sets out license revocation procedures. First, 103(e) expressly provides that the hearing on appeal in federal district court shall be "*de novo*." Some courts have construed existing provisions to authorize avoiding a formal fact-finding hearing unless "substantial doubt" as to the factual findings is apparent. *See Perri* v. *Department of Treasury*, 637 Fed. 180 F. 2d 180 (9th Cir. 1981). This amendment is intended to render such interpretations inapplicable to 18 U.S.C. 923(f).

A second change is found in section 103(e), which bars license revocation based on charges of which the licensee has been vindicated in a criminal action. The purpose is to eliminate the practice, docu-

mented in hearings before the Committee, of prosecuting a licensee, then following with revocation proceedings should he be found innocent or charges be dismissed. The effect in these cases was to burden a licensee with additional costs of legal defense despite his initial vindication. To ensure that the prosecuting agency has leeway to drop criminal charges and proceed with revocation should its evidence prove too weak for the former but sufficient for the latter, the government is permitted to voluntarily terminate criminal proceedings prior to trial and still proceed administratively. This section is not meant to preclude license revocation or denial where the acquittal relates to different transactions or activities than are involved in the license revocation proceedings.

18 U.S.C. 923(g), relating to recordkeeping and administrative searches of licensee premises, is amended by section 103(g) to grant licensees protection against warrantless or unreasonable searches and seizures. 103(g)(1) permits enforcing agents to enter a licensee's premises during business hours to examine his records and inventory. This power is subject to two limitations. First, there must be reasonable cause, not necessarily probable cause, to believe a violation of law has occurred and that evidence of the violation may be found. Second, this cause must be demonstrated before a federal magistrate and a warrant obtained. The warrant requirement serves to protect against unreasonable exercises of power, to limit the scope of the intrusion, and the record created by the application and affidavit will provide a record to judge the propriety of such actions.

103(g)(2) creates an exception to the requirement of establishing reasonable cause where any of three circumstances exist. An exception is granted, first, where the intrusion is a reasonable inquiry as part of a criminal investigation of persons other than the dealer himself. Such inquiries may occur before there is reasonable cause to believe that any particular person committed a violation, and to require proof of such violation might unduly hinder law enforcement. Second, an exception is granted for what have become known as "courtesy inspections," the purpose of which is not investigation but assistance to the licensee by pointing out minor recordkeeping errors. These may be made up to once a year, upon reasonable notice, and shall not be the basis of a prosecution except for sales to illicit purchasers. Finally, an exception is granted for inquiries directed at determining the disposition of a particular firearm or firearms. Whatever the basis of the inspection or investigation, the enforcing agency is authorized to physically seize only records which are material to a violation of law, and copies of these are to be provided within a reasonable time.

These sections of S. 1030 represent significant changes from the bill as originally introduced. They were made to meet objections that section 103 might be read to unduly limit license revocation following pretrial dismissal or plea bargaining, or interfere with needs for firearm tracing and criminal investigation. The Committee feels that the changes made with regard to this section will clarify its terms, avoid the possibility that this section will be construed to bar reasonable inquiries, and still grant to licensees remedial action in protection of the rights they, like all Americans, have under the fourth amendment.

In addition to these changes, section 103 also codifies certain standards which mark no change from current practice. 103(d) provides

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that, to support a license revocation, a violation of law must be willful. Since the existing Gun Control Act requires license issuance and renewal unless, inter alia, the licensee has "willful violated any of the provisions of this chapter," 18 U.S.C. 923(d)(1)(C), courts have universally held that willfulness must be shown to revoke a firearms license under existing law. *See Shyda* v. *Director, B.A.T.F.*, 448 F. Supp. 409 (M.D. Pa. 1977); *Mayesh* v. *Schultz*, 58 F.R.D. 537 (S.D. Ill. 1973); *Rich* v. *United States*, 383 F. Supp. 797 (S.D. Ohio, 1974). Section 103(d) is accordingly a codification of current practices and not a change in law.

*Section 104.* Section 104 of S. 1030 effects several important changes to 18 U.S.C. 924, the general penalty and forfeiture section of the Gun Control Act.

First, 103(a) inserts the word "willfully" into the general penalty clause contained in 18 U.S.C. 924(a). The purpose is to require that penalties be imposed only for willful violations—those intentionally undertaken in violation of a known legal duty. *United States* v. *Bishop*, 412 U.S. 346 (1973); *Pomponio* v. *United States*, 429 U.S. 10 (1976). Existing law for the most part requires at best a general intent, so that even inadvertent violations, and those made in the best of faith, may be the subject of prosecution. Improper prosecutions under such conditions—even, in one case, for acts which the director of the enforcing agency had stated were completely legal—were documented in hearings before the Committee, and in earlier hearings before its Subcommittee on the Constitution and the Senate Committee on Appropriations. This subsection is designed to guarantee against such practices. It is moreover designed to provide enforcing agents, prosecutors and courts with a clear delineation of the type of offenders against whom the law is directed. It removes the tendency of statutes permitting conviction for inadvertent violations to "ease the prosecutor's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morisette* v. *United States*, 342 U.S. 246, 263 (1952)

Second, section 104(b) amends 18 U.S.C. 924(c), which establishes additional penalties for use or carrying of a firearm during certain federal offenses. These changes are intended to significantly increase the penalties for criminal use of firearms. Existing law imposes additional penalties for criminal use of firearms. Existing law imposes additional penalties for such use, but does not rule out probation except upon a second conviction, and fails to rule out parole or furlough releases even for these repeat offenders. As reported out by the Committee, S. 1030 retains the additional penalty for unlawful carrying of a firearm during a federal felony. For actual use in a federal felony committed against the person of another, the sentence is additional and release on probation, parole, work furlough or any other form of prison release is forbidden. "Use", in this sense, should be construed to include any employment as a tool to advance the underlying crime, whether by threat, physical striking or discharge. The existing additional sentence for "use" has been held to apply where the offender was captured, with firearm still concealed, outside an institution he intended to rob, and it is intended that this application be continued under section 104(b). *United States* v. *Moore*, 580 F. 2d 360 (9th Cir.). It is also intended that the penalties for "use" be applicable to all violent and threatening use in crimes, including those crimes of which

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that, to support a license revocation, a violation of law must be willful. Since the existing Gun Control Act requires license issuance and renewal unless, inter alia, the licensee has "willful violated any of the provisions of this chapter," 18 U.S.C. 923(d)(1)(C), courts have universally held that willfulness must be shown to revoke a firearms license under existing law. *See Shyda* v. *Director, B.A.T.F.*, 448 F. Supp. 409 (M.D. Pa. 1977); *Mayesh* v. *Schultz*, 58 F.R.D. 537 (S.D. Ill. 1973); *Rich* v. *United States*, 383 F. Supp. 797 (S.D. Ohio, 1974). Section 103(d) is accordingly a codification of current practices and not a change in law.

*Section 104.* Section 104 of S. 1030 effects several important changes to 18 U.S.C. 924, the general penalty and forfeiture section of the Gun Control Act.

First, 103(a) inserts the word "willfully" into the general penalty clause contained in 18 U.S.C. 924(a). The purpose is to require that penalties be imposed only for willful violations—those intentionally undertaken in violation of a known legal duty. *United States* v. *Bishop*, 412 U.S. 346 (1973); *Pomponio* v. *United States*, 429 U.S. 10 (1976). Existing law for the most part requires at best a general intent, so that even inadvertent violations, and those made in the best of faith, may be the subject of prosecution. Improper prosecutions under such conditions—even, in one case, for acts which the director of the enforcing agency had stated were completely legal—were documented in hearings before the Committee, and in earlier hearings before its Subcommittee on the Constitution and the Senate Committee on Appropriations. This subsection is designed to guarantee against such practices. It is moreover designed to provide enforcing agents, prosecutors and courts with a clear delineation of the type of offenders against whom the law is directed. It removes the tendency of statutes permitting conviction for inadvertent violations to "ease the prosecutor's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morisette* v. *United States*, 342 U.S. 246, 263 (1952)

Second, section 104(b) amends 18 U.S.C. 924(c), which establishes additional penalties for use or carrying of a firearm during certain federal offenses. These changes are intended to significantly increase the penalties for criminal use of firearms. Existing law imposes additional penalties for criminal use of firearms. Existing law imposes additional penalties for such use, but does not rule out probation except upon a second conviction, and fails to rule out parole or furlough releases even for these repeat offenders. As reported out by the Committee, S. 1030 retains the additional penalty for unlawful carrying of a firearm during a federal felony. For actual use in a federal felony committed against the person of another, the sentence is additional and release on probation, parole, work furlough or any other form of prison release is forbidden. "Use", in this sense, should be construed to include any employment as a tool to advance the underlying crime, whether by threat, physical striking or discharge. The existing additional sentence for "use" has been held to apply where the offender was captured, with firearm still concealed, outside an institution he intended to rob, and it is intended that this application be continued under section 104(b). *United States* v. *Moore*, 580 F. 2d 360 (9th Cir.). It is also intended that the penalties for "use" be applicable to all violent and threatening use in crimes, including those crimes of which

being armed is an element, such as armed robbery of a federal or federally insured institution, to the maximum extent possible under the Double Jeopardy clause of the fifth amendment, notwithstanding decisions such as *Simpson* v. *United States*, 435 U.S. 6 (1978).

Section 104(b) of S. 1030 incorporates several changes from S. 1030 as originally drafted, intended to meet criticisms of the original bill. It had been argued that S. 1030 would have weakened existing law since it eliminated the existing additional sentence for unlawful carrying, as distinct from use, during a federal felony, and that S. 1030's sentence was mandatory but not additional to the underlying sentence. S. 1030 meets these criticisms by reinserting the penalty for unlawful carrying during a federal felony and by providing that the penalty for use be both mandatory and additional to any other sentence. Committee amendments moreover double the minimum sentence to two years on first offense. Accordingly, these criticisms are inapplicable to S. 1030 as reported out by the Committee.

A third major change is accomplished by section 104(c), which amends 18 U.S.C. 924(d), governing forfeiture of firearms involved in a violation of federal law. The Committee during its hearings received considerable evidence of misuse of existing overly general powers to confiscate and forfeit firearms. In cases where a collector or dealer was alleged to have sold a small number of firearms improperly—often without illicit intent—enforcing agents confiscated entire collections or inventories on occasion such collections were withheld despite the owner's acquittal of all charges, or, in the total absence of criminal charges, for over two years after the seizure. Owners who secured the return of such firearms often did so only at considerable legal expense to themselves. Section 104(c) addresses these problems at several levels.

First, it limits forfeitures to firearms used or involved in a willful violation. The "intended to be used" basis for forfeiture is removed to prevent improper seizure of an entire collection or inventory based on the most vague evidence of intent.

Second, section 104(c) institutes several procedural safeguards against improper seizure or undue retention of seized property. Upon acquittal of the owner or dismissal of charges against him, seized firearms shall be returned unless the return would place the owner in violation of law. In any event, an action for forfeiture must be commenced, if at all, within 120 days of seizure. Beyond this point, the statutory power to forfeit is lost. Finally, only those firearms particularly and individually identified as used, involved in or intended to be used may be seized or forfeited. This is intended both to prevent the issuance of general warrants, leaving it to the executing agents to decide which firearms meet general criteria of use or involvement, and also to prevent wholesale forfeiture of collections or inventories upon a claim of general intent to so use. These are protections recognized for all citizens by the fourth amendment; they are measures which the judiciary has begun to accept as necessary; they are appropriate for recognition by our constitutional system. *See generally United States* v. *1,992 Assorted Firearms*, *supra; United States* v. *One Assortment of 89 Firearms*, — F.2d — (4th Cir., Jan. 26, 1982).

Finally, section 104(c) provides, as an enforcement measure, the requirement that attorney's fees be awarded a successful claimant to the

firearms. If an individual has in fact been deprived of his property unjustly, and establishes such in court, these is little reason to put the burden of costs upon the just claimant rather than those who have unjustly taken his possessions. Such an award is likewise to be made in any other action, civil or criminal, under this chapter, where the court finds it was undertaken without foundation or from specified bad motives.

*Section 105.* Section 105 of S. 1030 amends 18 U.S.C. section 925, which prescribes certain administrative procedures peculiar to the Gun Control Act. 18 U.S.C. section 925(c) presently empowers the Secretary of the Treasury to grant, upon proper application and investigation, a relief from the disability to purchase or possess firearms incurred by persons convicted of a felony. This relief is to be granted if the applicant demonstrates that the conviction and his record and reputation indicate he is unlikely to act in a manner that would endanger the public safety. This is intended to provide a "safety valve" whereby persons whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness, may obtain relief.

Present law restricts relief to a relatively narrow category of persons convicted of felonies (thus excluding other prohibited classes, which may in fact be more trustworthy) other than violations of the Gun Control Act (thus excluding those convicted of technical and unintentional violations). Section 105(a) amends this to make any person prohibited from firearm possession, receipt or transportation eligible to apply. In light of evidence before the Committee that Gun Control Act charges have been abused in the past with resultant convictions of persons not inclined to any criminal activity, making liberal relief available to such persons is essential. Section 105(a) moreover establishes the right of appeal to the district court from any denial of such relief, and further empowers the court to consider additional evidence in making its finding where a failure to do so might yield a miscarriage of justice. In such a case, the court might in its discretion request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his findings in light of the additional evidence, then proceed forward in the event the evidence does not alter his determination.

Section 105(b) amends 18 U.S.C. section 925(d), governing importation of firearms. Under 925(d), the Secretary may authorize such importation of firearms which are, inter alia, generally recognized as particularly suitable for sporting purposes. 105(d) amends this to require authorization in the event the firearm is shown to be suitable for sporting purposes. It is anticipated that in the vast majority of cases this will not result in any change in current practices.

*Section 106.* Section 106 of S. 1030 amends 18 U.S.C. section 926, which deals with promulgation of rules and regulations. 106(a) redesignates existing section 926 as subsection (a) of that section. 106 (b) and (c) provide that the Secretary shall promulgate only such regulations as are necessary to carry out the provisions of the Gun Control Act. It also specifically forbids the promulgation of any rules, after the effective date of the act, which would centralize or record records maintained under the act at any government-owned or government-controlled facility, or that would establish any system of firearm, firearm owner, or firearm transaction registration. Procedures

established prior to the act's effective date are excepted in order that 106(d) not be taken to preclude existing procedures for storage of records of out-of-business dealers, nor existing procedures for consulting such records to trace firearms used in crime, nor existing requirements for reporting of multiple handgun transfers. It is not intended that this exemption from section 106(d)'s ban be taken as indicating approval of the asserted need for such procedures nor their appropriateness under other requirements of law.

Section 106(e) creates a new 18 U.S.C. section 926(b), requiring ninety days' notice of any new regulations, and 106(f) creates a new 18 U.S.C. section 926(c), ruling out requirement of affidavits for black powder transactions permitted under other provisions of law.

*Section 107.* Section 107 amends 18 U.S.C. section 927 to add a provision nullifying state and local laws which have the effect of prohibiting transportation of a firearm through such state when the firearm is unloaded and not readily accessible. This is intended to prevent such local laws, which may ban or restrict firearm ownership, possession or transportation, from being used to harrass interstate commerce and travellers. It is anticipated that the firearms being transported will be made inaccessible in a way consistent with the mode of transportation —in trunk or locked glove compartment in vehicles which have such containers, or in a case or similar container in vehicles which do not.

*Section 108.* Section 108 sets the effective date of this act as 180 days after its enactment.

*Section 201.* Section 201 repeals 18 U.S.C. sections 1201–03, the provisions of which have been incorporated into the Gun Control Act proper by the provisions of this act.

## VI. Changes in Existing Law

In compliance with paragraph 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill S. 1030, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

## TITLE 18—CRIMES AND CRIMINAL PROCEDURE

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### CHAPTER 44—FIREARMS

Sec.
921. Definitions.
922. Unlawful acts.
923. Licensing.
924. Penalties.
925. Exceptions: Relief from disabilities.
926. Rules and regulations.
927. Effect on State law.
928. Separability clause.

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**§ 921. Definitions**

(a) As used in this chapter—

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(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of