

CATO HANDBOOK FOR CONGRESS

POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS

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Washington, D.C.

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19. Guns and Federalism

Congress should

- defund Project Safe Neighborhoods and
- reject efforts to bar municipal lawsuits against gun manufacturers.

Members of Congress who support gun rights are currently engaged in a dubious tradeoff: to save the Second Amendment, they've decided to undermine the Tenth. For two years running, Congress has appropriated funds for President Bush's key crime-fighting program, Project Safe Neighborhoods, which is designed to ward off calls for additional gun control by ramping up enforcement of the gun laws already on the books. But the program illegitimately federalizes the prosecution of gun possession crimes ordinarily left to the states. Meanwhile, members of Congress who support gun rights want to use federal power to reform state tort law. They're pushing legislation that would shield firearms manufacturers and sellers from ongoing municipal lawsuits over gun violence. Both of those efforts rely on an expansive interpretation of federal authority that has no constitutional basis; the 108th Congress should abandon both.

Defund Project Safe Neighborhoods

Project Safe Neighborhoods is the public-policy embodiment of the National Rifle Association sound bite "we don't need any new gun control laws; we need to enforce the gun laws on the books." The program funds more than 800 new prosecutors (around 200 federal, 600 state level) who will do nothing but pursue gun-law violations full time.

The federal prosecutors hired under PSN focus on a narrow section of the federal criminal code that duplicates state criminal statutes relating to gun possession. Those provisions prohibit things that are already illegal in all 50 states, such as possession of a handgun by a convicted felon or

a drug user or an illegal alien. The problem with federal enforcement of those laws is that most of them ought not to be on the books in the first place. They're based on an overbroad interpretation of Congress's power to regulate commerce among the states. The Commerce Clause was designed to create the original North American free-trade zone by promoting and regularizing commerce among the states. It was never intended to give the federal government general police powers. Indeed, by enumerating only three federal crimes, treason, piracy, and counterfeiting, the Constitution makes it clear that the federal role in criminal law enforcement is narrow. As Alexander Hamilton put it in *Federalist* no. 17, "the ordinary administration of criminal justice" belongs to the states.

PSN takes over the ordinary administration of criminal justice from the states by increasing federalization of crime and dictating state prosecutorial priorities. And if the federal government has the power to prosecute local handgun crimes, it's hard to see why it doesn't also have the power to punish ordinary assault, drunk driving, traffic violations, or anything else we've traditionally left to the states.

More disturbing still is the prospect that PSN will lead to a mindless "zero tolerance" policy for technical infractions of gun laws. Federal prosecutors already operate under an incentive structure that George Washington University Law School professor Jonathan Turley compares with "the body count approach in Vietnam. . . . They feel a need to produce a body count to Congress to justify past appropriations and secure future increases."

This "body count" mentality may help explain the fact that recent federal firearms prosecutions have included Katica Crippen, a Colorado woman who was convicted under the felon-in-possession statutes for posing nude on the Internet with a gun, and Dane Yirkovsky, an Iowa man who was sent to federal prison for 15 years for possession of a single .22-caliber bullet.

We can expect more of the same as PSN ramps up firearms prosecutions because, unlike that of a regular prosecutor, a PSN prosecutor's full-time job is pursuing gun offenders. A PSN prosecutor will not be able to turn to other areas of the criminal code after the worst gun-law violators have been prosecuted. Add to that the fact that a job as a full-time gun prosecutor is likely to appeal disproportionately to attorneys with an ideological hostility toward gun ownership, and PSN begins to sound like something dreamed up by Sarah Brady herself.

Moreover, the program threatens to open a Pandora's box leading to the further politicization of criminal justice. The model set up by PSN

practically invites special interest groups to drive prosecutorial priorities via federal funding. What are PSN supporters in Congress going to say when demands are made for federal dollars for local, full-time domestic violence prosecutors or hate crime prosecutors? So long as Congress continues to fund PSN, it will be hard-pressed to say that local crime is not a federal issue.

Leave Tort Reform to the States

Led by the city of Chicago, a number of municipalities have filed suit against gun manufacturers for damages incurred due to the misuse of guns by criminals. Some of the suits allege “negligent marketing”—charging that gun manufacturers flood the suburbs with more guns than legitimate customers will buy, knowing that dealers will sell the excess supply illegally to criminals from the inner city. Others assert that guns are defective and unreasonably dangerous products because manufacturers design their guns without safety features that are purportedly easy and economical to install. At bottom, both legal theories rest on the outlandish proposition that gun makers are responsible for the criminal misconduct of certain of their customers.

A broad coalition of gun-rights supporters in Congress wants to quash those suits with federal tort reform. Two bills moving through the House and Senate provide that gun manufacturers and distributors cannot be sued for damages (or other relief) if someone is injured when a gun is used unlawfully.

It’s easy to understand the concerns that spurred those bills. Federal tort reform supporter Rep. Chris John (D-La.) is correct when he calls the gun lawsuits “frivolous” and warns that they “jeopardize a legitimate, legal business that is worth billions of dollars to our national economy.” But not every national problem is a federal problem. Advocates of gun rights who back federal tort reform have forgotten the Tenth Amendment’s admonition that powers not delegated to the federal government in the Constitution remain with the states or the people. The power to control frivolous lawsuits belongs to the states.

Where in the Constitution could the federal government find authority to ban state and local lawsuits against the gun industry? According to the tort reform bills pending in both the House and the Senate, the answer is the all-purpose Commerce Clause. As the bills’ supporters see it, the lawsuits interfere with interstate commerce, and therefore Congress has the authority to stop them.

But the Commerce Clause, properly interpreted, does not give Congress blanket authority to regulate any activity that might affect commerce. Rather, the purpose of the Commerce Clause was functional: to secure the free flow of commerce among the states. That means Congress may act only when actual or imminent state regulations impede free trade among the states, or when it's clear that uniform national regulations are essential for that purpose. Even then, Congress's power ought properly extend no further than to the regulation of (1) channels and vehicles of interstate commerce (such as waterways, airways, and railroads); (2) discrimination by a state against out-of-state interests (for example, restrictions on imported goods); and (3) attempts by a state to exercise sovereignty beyond the state's borders (such as state rules governing national stock exchanges, telecommunications, banking, and broadcast or Internet advertising). Under no credible theory of the commerce power can Congress use that power to regulate noncommercial activities like lawsuits, which are designed to prevent and redress injuries, not to regulate interstate trade.

Yes, lawsuits against gun companies *affect* commerce. But so does just about any state regulation or any court decision. The Commerce Clause could not prevent California, for example, from requiring catalytic converters on cars sold in the state. The Commerce Clause would not permit the federal government to override state minimum wage laws, or state safety regulations on power plants or even on firearms. Yet all of those state rules *affect* interstate commerce.

Companies have a remedy when state courts permit phony lawsuits. They can stop doing business in a state that has an oppressive tort regime. And that remedy honors the federalist idea that the states serve as 50 experimental laboratories. For example, physicians and insurance companies are leaving Mississippi because outrageous damage awards have driven the price of malpractice insurance prohibitively high. Ultimately, the voters in oppressive states will have to choose between access to products and extortionate tort law. As more businesses leave, the choice will become obvious. Yes, there's an effect on commerce when out-of-state companies leave. But the effect is not related to the *interstate* aspect of commerce. There's a similar effect when in-state companies shut down. In Mississippi, in-state and out-of-state insurance companies, or gun companies for that matter, are all exposed to the same tort regime. That's why the Commerce Clause should not apply.

Those supporters of gun rights who would have it otherwise are asking for trouble. Ronald Reagan once noted that a government big enough to

give you everything you want is big enough to take it all away. A similar dynamic exists with constitutional interpretation: a Commerce Clause broad enough to solve every national problem is too broad not to be abused. When Congress's authority to regulate commerce is misused to impose federal rules that restrict state gun lawsuits, we should not be surprised that it will also be misused to impose federal rules that restrict gun possession and ownership.

Suggested Readings

Epstein, Richard A. "The Proper Scope of the Commerce Power." *Virginia Law Review* 73 (1987).

Healy, Gene. "There Goes the Neighborhood: The Bush-Ashcroft Plan to 'Help' Localities Fight Gun Crime." Cato Institute Policy Analysis no. 440, May 28, 2002.

Levy, Robert A. "Pistol Whipped: Baseless Lawsuits, Foolish Laws." Cato Institute Policy Analysis no. 400, May 9, 2001.

Reynolds, Glenn Harlan. "Kids, Guns and the Commerce Clause: Is the Court Ready for Constitutional Government?" Cato Institute Policy Analysis no. 216, October 10, 1994.

United States v. Lopez, 514 U.S. 549 (1995).

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