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09/22/99 11:12:05 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: JJ: motion to instruct

On 9/23, the House will vote on Rep. Zoe Lofgren's motion to instruct the juvenile justice conferees. Here's the text of Rep. Lofgren's statement:

REMARKS OF CONGRESSWOMAN ZOE LOFGREN
IN SUPPORT OF HER MOTION TO INSTRUCT CONFEREES
September 22, 1999

Mr. Speaker, I offer a motion to instruct conferees on the bill (H.R. 1501).

(The Clerk Will Read the Motion)

Mr. Speaker, I yield myself as much time as I may consume.

Mr. Speaker, 13 children a day are being killed by gun violence. Perhaps we've repeated this statistic so frequently, we don't feel it any more, that these are our children. And that's a shame.

I ask the members here in this chamber and listening to this discussion in their offices how we can possibly ignore any legislative measure that would protect our children.

I ask the members on all sides of this issue to agree with me, that whatever else we do, we agree we shall not pretend we're making our children safe at the same time we are building into our legislation weasel worded modifiers and exceptions that make the promised protections meaningless.

After I gave notice of this motion to instruct the conferees last night, the Associated Press was told there was a compromise being circulated by the Chairman of the Judiciary Committee. And I wish to make that AP article a part of this record.

Since this AP article was received in my office this afternoon, I've asked the Chairman for a copy of his proposal so I can determine for myself whether it is indeed a compromise I could embrace. I'm waiting for the Chairman's response.

I have had members of the press call my office about this proposed compromise. And I'm all the more concerned that we not offer some proposal that is riddled with loopholes.

So that's why I thought it was necessary to propose this motion to instruct.

Since there's been no joint meeting of the conference or staff since early August, and I have had to read the AP wire to learn what's going on, even as a conferee, I ask the members of this body to instruct the conference:

(1) not to include loopholes that favor the wrong people getting guns, those who've been arrested, those who have restraining orders, and those who have been adjudicated mentally defective,

(2) not to weaken current gun safety law, and

(3) not to compromise the ability of law enforcement officers to find those criminals who use guns in the crimes they commit.

First, you may ask what loopholes I'm concerned about.

I'm concerned that we are going to define gun shows or gun vendors in such a way as to make the Lautenberg gun show provision ineffective if not meaningless.

I'm concerned that we're going to define background checks in such a way as to exclude some persons we really should be concerned about.

Second, you may wonder how we could weaken current gun safety law.

Would anyone in this chamber want to permit the interstate shipment of firearms by mail again? Do we want to repeal the Lee Harvey Oswald gun provision?

Third, you may wonder what could compromise law enforcement's ability to find those criminals who use guns in the crimes they commit.

Well, suppose the records to run the gun check on the purchaser were destroyed immediately after the check was run and suppose you didn't have to retain the serial number of the gun. How would law enforcement follow the trail to the bad actor who bought that gun?

There are those who prefer that this House do nothing.

The NRA's Chief Lobbyist says "Nothing is better than anything."

That's what this House did only a few months ago. The House Majority Whip, Tom DeLay has made his position crystal clear. He reportedly said that killing the House gun safety bill was a "great personal victory."

Does the Majority Whip really want this House to do nothing when it comes to the safety of our children?

Does the Majority prefer to release its proposals to the press rather than to the conferees?

In other words, does the Majority really prefer to have a news story than a legislative solution?

I ask that you support this motion to instruct as a further guarantee that this Congress does something, that it do something meaningful, and that it do something soon.

I yield back.

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09/23/99 09:01:09 AM

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Subject: RE: motion to instruct

Rep. McCarthy will be offering a second motion to instruct today that includes the following text:

Ms. McCarthy moves that the managers on the part of the House at the conference on the disagreeing votes of the two Houses on the Senate amendment to the bill, H.R. 1501, be instructed to insist that--

- 1) the committee of conference should this week have its first substantive meeting to offer amendments and motions, including gun safety amendments and motions; and
- 2) the committee of conference should meet every weekday in public session until the committee of conference agrees to recommend a substitute.

> -----

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> juvenile justice conferees. Here's the text of Rep. Lofgren's statement:
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> REMARKS OF CONGRESSWOMAN ZOE LOFGREN
> IN SUPPORT OF HER MOTION TO INSTRUCT CONFEREES
> September 22, 1999



Liz Ryan <lryan@childrensdefense.org>

09/23/99 09:09:18 AM

Record Type: Record

To: See the distribution list at the bottom of this message

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Subject: JJ: 2 house votes today

2 votes today on House motions to instruct jj conferees

Today, the House will vote on two motions to instruct the juvenile justice conferees. The House will vote on the motion, offered by Rep. Lofgren (D-CA) that was debated last night, and vote on the motion, offered by Rep. Carolyn McCarthy (D-NY) that says the conference committee should have a substantive meeting this week to offer amendments and motions, including gun safety amendments and motions, and the conference committee should meet every weekday in public session until an agreement is reached.

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Rec JJLil

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to provide you and the other conferees with the Administration's views regarding various provisions of S. 254 and H.R. 1501. As our children begin returning to school later this month, the conference should seize the opportunity to make our schools and communities safer by taking common-sense steps to keep guns out of the wrong hands, prevent youth violence, and steer young people away from crime. We look forward to working with you to reconcile the two bills and produce a balanced and bipartisan juvenile crime bill – with the Senate-passed gun provisions – that effectively addresses juvenile crime including the devastating impact of gun violence on our young people.

As the Administration's past juvenile crime proposals have demonstrated, we believe that juvenile justice requires a balanced approach – one that couples tough sanctions that hold juveniles accountable for their conduct with effective delinquency prevention and early intervention measures. We must not lose sight of the fact that the overwhelming majority of our Nation's young people do not engage in crime or delinquency. Most of them are wonderful, hopeful children who not only want to succeed, but also to live in and support safe and livable communities. Indeed, it is critical to remember that in the approximately 20 years since this Nation began collecting the relevant data, the percentage of America's youth ages 10-17 arrested for a violent crime has never exceeded one-half of one percent. Therefore, we need to punish appropriately that small portion of violent offenders. At the same time, we must help communities and families provide effective, comprehensive support for the many millions of young Americans who may be at risk for delinquency, but who can be helped to become productive and law-abiding citizens.

Just last week, the Centers for Disease Control and Prevention (CDC) reported that violent activity by America's teens dropped significantly between 1991 and 1997. The percentage of teens who reported carrying guns and other weapons fell from 26 percent to 21 percent, while the percentage of teens who reported fighting fell from 43 percent to 37 percent. Even more dramatic is the significant drop in juvenile arrest rates for violent crimes. The arrest rate in 1997 was a full 23 percent lower than in the peak year of 1994.

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Among the reasons for these dramatic declines in youth violence is the infusion of community police officers into cities and towns across the nation – law enforcement personnel who have worked in close partnership with prosecutors, parents, school officials, and youth workers, as well as with concerned government officials, practitioners, and citizen volunteers – to help America's communities get their young people back on track. The 106th Congress can promote continued declines in youth crime by embracing a comprehensive approach to community safety that includes support for law enforcement and for America's youth.

We stand at a pivotal moment in our ongoing effort to reduce gun-related crime and violence, especially as they affect our children. Although the number of violent crimes committed with firearms has fallen by 27 percent since 1992, 13 young people in America die every day due to gun violence. In fact, the firearm homicide rate for children under 15 years of age is 12 times higher in the United States than in 25 other industrialized countries combined. The Columbine High School murders, the workplace shooting in Atlanta, and this week's shooting spree at the North Valley Jewish Community Center in Los Angeles underscore this shocking statistic and provide a grim reminder of how much more we must do to reduce firearms violence. We can – indeed we must – build upon the successes of existing state and federal laws to provide greater protections for our children and all of our citizens, and make it more difficult for young people and criminals to get their hands on guns in the first place.

Our specific views, detailed in the accompanying document, reflect our overall approach to protecting public safety by strengthening law enforcement efforts, enhancing support for children through effective prevention measures, and keeping guns out of the hands of criminals and children. It will take common-sense measures like the Senate gun provisions to make our strategy a reality.

① First, the federal government must support the comprehensive efforts of state and local governments that handle the vast majority of issues concerning children, families, and communities, including the crime and delinquency that can result when any of those begin to falter. Consequently, the Administration believes it is a critical federal responsibility to provide adequate funds to states and communities, supporting the spectrum of necessary activities in a way that ensures both necessary flexibility and the fundamental protection of juveniles. ?

② Second, although we provide direct federal investigative and prosecutorial resources in a relatively small number of juvenile cases, we need to have strong laws in place for those occasions. Notably, since the majority of these cases arise in Indian country, we must pay particular attention to the needs of the tribes in the creation and execution of laws concerning juveniles in the federal system. ?

③ Third, in order to protect the safety and well-being of juveniles throughout the Nation, we

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simply must have sensible, effective measures to keep guns and explosives away from them, and from criminals who would harm them and the rest of us. In 1997, 74 percent of the homicides committed by 18- to 20-year-old offenders involved firearms. And from the mid-1980s to the early 1990s, youth homicide victimization rates doubled, increasing at a higher rate than any other violent crimes for which statistics are available. We urge the conferees to ensure that measures to restrict youth access to guns are included in the final bill.

Our detailed analysis and comments concerning H.R. 1501 and S. 254 are provided in the attached document. First, however, we would like to highlight several specific provisions that the Administration believes must be included in the final juvenile crime bill that is forwarded to the President for his signature.

- ① Close the gun show loophole. The Brady Law's background check requirement has worked to prevent more than 400,000 illegal, over-the-counter gun sales to felons, fugitives, and other prohibited persons. The Brady Law's requirement, however, does not apply to the many guns sold by unlicensed gun sellers at gun shows. In a bipartisan vote, the Senate passed a provision that would close this loophole in the Brady Law, and would also allow law enforcement to trace firearms sold at gun shows if those firearms were later used in crime. The Senate provision does this without weakening current law, creating any new bureaucracies, or intruding on the interests of law-abiding gun buyers and sellers. The Administration strongly supports the Senate's gun show provision and the instruction – approved overwhelmingly by the House – that the conferees produce a final bill that includes meaningful legislation to close the gun show loophole once and for all.
- ② Require safe storage devices to be sold with every handgun. Safety locks and gun lockboxes can prevent some crime and many accidental shootings. Every gun sold in the United States by a licensed firearms dealer should have such a device with it. The Administration supports the Senate's provision requiring such devices to be sold with every handgun.
- ③ Keep guns out of the hands of persons who have committed serious juvenile offenses. Our federal gun laws recognize that persons who commit serious violent criminal offenses should not be allowed to possess firearms. However, persons who commit serious drug or violent criminal offenses as juveniles are not prevented from owning firearms once they reach the age of majority. This is simply wrong. Although the Senate passed a measure designed to address this problem, the provision contains language that could delay its implementation indefinitely. The Administration looks forward to working with the conferees on this important provision.
- ④ Ban the importation of large-capacity ammunition clips. The 1994 Assault Weapons Ban was passed to limit the general public's access to assault weapons and magazines with a capacity of more than 10 rounds. The 1994 law, however, contained a provision to allow possession and

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importation of existing large capacity ammunition clips. This has led to an influx of imported large capacity clips. The Senate passed a provision – which the Administration fully supports – to close this loophole.

- ④ Prohibit youth from possessing assault weapons. As noted earlier, youth gun access remains an especially serious problem. S. 254 includes a provision prohibiting anyone less than 18 years of age from possessing a semiautomatic assault weapon. The Administration supports this sensible prohibition, but believes that it does not go far enough. Congress should adopt the Administration's proposal to prohibit anyone less than 21 years of age from possessing assault weapons and handguns. *Get!*

- ⑤ Provide effective firearms enforcement. Over the past several years, the Justice and Treasury Departments have supported several innovative and effective firearms enforcement programs around the country, including Project Exile in Richmond, Virginia and Operation Ceasefire in Boston, Massachusetts, among others. Every one of these programs has been developed collaboratively by state and local – as well as federal – officials and tailored to address the gun violence problem specific to the locale by enforcing the toughest laws available. *Good prosecution states* (These partnerships have resulted in a significant increase in the overall number of firearms prosecutions in this country) Since 1992, the combined number of federal and state firearms convictions is up sharply, and about 22 percent more criminals were incarcerated for state and federal weapons offenses in 1996 than in 1992. The number of federal gun cases in which the offender gets five or more years in prison is also up by more than 25 percent. We support giving our United States Attorneys and the Bureau of Alcohol, Tobacco and Firearms the resources they need to work with state and local authorities in developing and expanding individualized firearms violence reduction programs in their jurisdictions. *interesting* However, the Senate and House Bills include provisions that would diminish the effectiveness of these programs by mandating the wholesale federalization of crimes even when state or local laws provide more stringent penalties, and would prevent states from implementing their own intensive firearms prosecution programs. These provisions should be dropped. *How?*

- ⑥ Strengthen firearms and explosives laws. We strongly support provisions in the Senate and House Bills to strengthen our federal firearms and explosive laws. For example, we support strengthening the crime gun tracing system and increasing the penalties on "straw purchasers" and others who facilitate illegal gun trafficking; prohibiting juvenile possession of explosives; and extending background checks and permit requirements to the purchase and possession of explosives by adults.

- ⑦ Prevent juvenile crime before it starts. We appreciate the inclusion this year of significant funding provisions that reflect the Congress' commitment to fund juvenile crime prevention. We urge the conferees to adopt the Senate Bill's 25 percent carve-out for prevention from the

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Juvenile Accountability Block Grant, and to ensure adequate, targeted funds for primary prevention.

⑧ Reform the federal juvenile justice system. As stated above, the federal government plays a small but vital role in investigating and prosecuting juvenile cases. Federal prosecutors need certain additional tools to bring their cases in a just and efficient way, and in a manner that does not unduly burden victims, witnesses, or the resources of the courts. However, these additional tools need not compromise unfairly the rights or interests of juveniles. We urge the conferees to adopt an appropriate balance, as described in the accompanying views letter.

Prosecutorial discretion?

⑨ Preserve the "core requirements." States need flexibility to develop and implement their own juvenile justice policies. However, there are certain fundamental areas in which we know – from documented, tragic experience – that federal baselines save lives. The four "core requirements" that serve as funding conditions in the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, have protected thousands of juveniles in state juvenile justice systems from serious physical and emotional harm, and have addressed the critical issue of racial disparity in the juvenile justice system. The Administration commends the House and Senate for the substantial steps they have taken to protect these requirements. We are disappointed, however, with the Senate's virtual elimination of the requirement relating to Disproportionate Minority Confinement, and we urge the conferees to retain that requirement as the House has done. Additional recommendations concerning these requirements are detailed in the accompanying views letter.

Senate removed Disproportionate Minority Confinement

⑩ Break the link between mental health problems and crime. We must take seriously the relationship between mental illness and delinquency. Too often, children with mental health problems end up in the juvenile justice system having never been treated for their problems, and then, once in the system, still do not get the care they need. We commend both houses for adding provisions to their bills this year that begin to address mental health needs in the juvenile justice system.

Article 1

⑪ Ensure juvenile justice resources for Indian tribes. While juvenile crime has fallen on average nationwide, it is rising in Indian country. The Administration urges the conferees to make Indian tribal governments directly eligible for all of its juvenile justice funding streams. Eliminating the state "pass-through" gives appropriate deference to tribal sovereignty and streamlines the process for getting funds to tribal communities. In addition, we strongly advise the conferees to include section 1626 of the Senate Bill, which provides much-needed amendments to the federal criminal code to address crime in Indian country, in the final bill.

We note that this letter and the accompanying document incorporate the analysis of the Department of the Treasury on the firearms provisions, and that the Department of Education will separately communicate the Administration's views concerning certain provisions under its

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jurisdiction.

We hope that the conferees will ensure that the final bill includes the major provisions we have described above, as well as the comments included in our accompanying views letter. We are sending similar letters to Chairman Hatch and Chairman Goodling. Of course, we are ready to work with the conferees and their staff, as needed, to accomplish these goals.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Detailed Comments

H.R. 1501 and S. 254

106th Congress, 1st Session

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INTRODUCTION

This document contains the detailed views of the United States Department of Justice, including the views of the Department of the Treasury with respect to the firearms and explosives provisions, on H.R. 1501, "Juvenile Justice Reform Act of 1999" and its companion bill, S. 254, "Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999," which was the basis for the Senate amendment to H.R. 1501.

Part I of this document addresses S. 254 and provisions of the House-passed version of H.R. 1501 that correspond to it, where those correspondences exist. Remaining provisions of the House-passed version of H.R. 1501 are addressed in Part II.

Page numbers in parentheses throughout this document refer to the Senate and House versions of S. 254 and H.R. 1501, respectively. For S. 254, they refer to the GPO version of the bill as it was engrossed in the Senate. For H.R. 1501, they refer to the GPO version of the bill that was placed on the Senate calendar (number 165) on June 23, 1999. Unless otherwise indicated, references to "the Department" are to the Department of Justice.

PART I – S. 254 AND EQUIVALENT PROVISIONS OF H.R. 1501

Title I – Juvenile Justice Reform

Title I of S. 254 and Title II of H.R. 1501 concern chapter 403 of title 18, United States Code. One of the most prominent features of both titles is substantial reform of the means by which federal prosecutors may proceed against juveniles as adults.

At present, the decision whether to charge a juvenile as an adult is, in all cases, made by the federal court. Except where transfer is mandatory (in the case of certain recidivists), the government has the burden of persuading the court that prosecution as an adult is in the interest of justice. Under H.R. 1501, the court would be removed altogether from the process of determining whether to charge a juvenile as an adult; that decision would be made by the prosecutor, with no judicial review. Indeed, in some circumstances under H.R. 1501, the federal prosecutor would be required to proceed against a juvenile as an adult, unless he or she certified that it was in the interest of justice to proceed otherwise. Under S. 254, the court would continue to have a role in the decision whether to prosecute a juvenile as an adult, except with respect to juveniles 16 years of age or older charged with the most serious violent or drug offenses. In all other instances, the court, upon the defendant's motion, would review the prosecutor's decision to seek adult prosecution, but the burden of persuasion would be on the juvenile to convince the court that juvenile, rather than adult, proceedings were in the interest of justice.

*He 1501 -
removes all
judicial review!
S. 254 is
a little
better!*

In place of either of the above measures, the Department would prefer a scheme that essentially leaves the current system intact, whereby the prosecutor must apply to the court for an order transferring the juvenile for adult prosecution. The only exception would be for juveniles 16 or older charged with one of the most serious crimes – namely murder, voluntary manslaughter, assault with intent to commit murder, aggravated sexual abuse, robbery, carjacking, and certain serious drug trafficking offenses, or an attempt or conspiracy to commit any of these offenses. In those cases, the determination to prosecute a juvenile as an adult would lie solely in the hands of the federal prosecutor. In addition, in all other cases, where the prosecutor applied to the court, there would be two measures designed to speed proceedings in light of the interests of victims and witnesses: expedited judicial review of the prosecutor's application, and elimination of the juvenile's right of interlocutory appeal. The Department believes that this scheme both protects the fundamental interests of juveniles and permits prosecutors to proceed with appropriate dispatch. We urge the conferees to adopt this approach and are prepared to work with staff on appropriate language to accomplish this purpose.

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Closely related to the question of by what means federal prosecutors may try juveniles as adults is the question of for which crimes federal prosecutors may try juveniles as adults. S. 254.

permits adult prosecution for any felony. H.R. 1501 would permit adult prosecution for an enumerated list of felonies and misdemeanors. In our view, the predicate offenses permitting a transfer for adult prosecution need not and ought not be expanded to the extent proposed in either the Senate or House bills, but should retain the scope of current law, except for the addition of conspiracies to commit drug trafficking violations, so as to enable adult prosecution of the leaders of drug gangs. (The conferees may also want to consider the additional "misdemeanor" of possession of a gun in the schoolyard; see discussion below, page 9.)

What is current law?

In addition, the House and Senate bills take several important steps in the area of federal juvenile justice reform. Each would alter present law so that federal juvenile delinquency proceedings are presumptively open, rather than closed, to the public. This measure, which follows the lead of many states in this area, is important in order to preserve the continuing confidence of the public in the juvenile justice system. Second, both bills extend the possibility of confinement upon adjudication as a delinquent until age 26, and permit the imposition of other sanctions such as fines and supervised release. Under both bills, records of federal juvenile delinquency adjudications would be kept and maintained in a more appropriate fashion and will be better available for law enforcement and other purposes. And finally, each bill would continue the authority of Indian tribes to determine whether to allow the prosecution as adults of younger Indian juveniles for acts committed in Indian country (though H.R. 1501 applies this "opt-in" provision only to 13 year olds rather than, as we recommend, 13 and 14 year olds).

What does that mean?

Does that mean it has younger provisions?

records

Although we prefer the approach described above over either of the two bills, as between S. 254 and H.R. 1501, the Department of Justice favors the approach in S. 254, because it maintains a greater role for the court in the determination whether to bring adult charges against a juvenile, and is closer to the Department's position. In addition, the Senate bill takes important steps to prohibit the commingling of juveniles and adults in federal custody, whereas H.R. 1501 does not.

Unlike H.R. 1501, however, which is generally well drafted to accomplish its purposes, S. 254 contains several flaws which, unless corrected, would render it unacceptable or even (in one instance) unenforceable. The following identifies the main problems in S. 254.

"Senate bill technically not as strict as H.R. 1501"

Choice of Federal or State Prosecution.

over-federalization?

In response to valid concerns about the over-federalization of juvenile crime in earlier drafts of the bill, S. 254 corrects that imbalance. Indeed, it now goes so far in the other direction that the Department is concerned that S. 254 as written could jeopardize all federal prosecutions of juveniles.

S. 254 § 102, amending 18 U.S.C. § 5032(a)(2)(B) (pages 15-16), would require federal prosecutors to "exercise a presumption" in favor of referral to a state or Indian tribe that has penal provisions criminalizing the conduct at issue and that has jurisdiction over the juvenile, unless the prosecutor certifies that the state or tribe declines or will decline to assume jurisdiction "and" that there is a substantial federal interest in the case. This is – as to those predicate crimes for which there is now the ability to independently assert federal jurisdiction over acts of juvenile delinquency upon a certificate of substantial federal interest (essentially violent felonies, certain

What are they?

drug felonies, and misdemeanor violations of the Youth Handgun Safety Act (see the first paragraph of 18 U.S.C. § 5032) – contrary to present law and would create extremely serious obstacles to appropriate federal prosecutions

H.R. 1501 continues current law by using “or” rather than “and”. See H.R. 1501 § 201. We hope that the conferees will adopt the House approach to this issue.

The Department is also concerned about the ambiguity of the phrase “exercise a presumption.” It is not clear to us what this phrase is intended to mean. If “exercise a presumption” means that the prosecutor must refer the case to a state or tribe in the circumstances described (note that the word “presume” alone would not carry this meaning, but “exercise” a presumption may well mean that the prosecutor must honor the presumption by making the referral), then the use of “and” will effectively preclude a federal role in juvenile proceedings and prosecutions, except in the rare case where the prosecutor can certify that the state or tribe has declined or will decline jurisdiction. Thus, no matter how strong the interest is in proceeding federally with the case, federal prosecutors would be prevented from going forward. For example, many Indian tribes have criminal codes that include even the most serious violent offenses such as murder, even though they are limited in meting out punishment to a maximum of one year in prison. The great majority of juveniles prosecuted federally are Indians who are subject to the concurrent jurisdiction of tribal courts; however, there is also an overriding federal interest in these cases in part because of the inadequacy of potential punishment by the tribal authorities. But under S. 254, however, unless the tribe indicated it would not prosecute, the United States could not try the individual. This would have devastating consequences for public safety, which the Department wants to avoid

On the other hand, the phrase “exercise a presumption” could be construed merely to create a presumption that the prosecutor can ignore for good cause. Such a construction would give rise to other concerns. The bill neither sets forth a standard for overcoming the presumption, nor provides for a certificate addressing this possibility. Thus, the Department is concerned that, at the very least, if a prosecutor went forward with a federal proceeding, the government would be forced to litigate over whether it had properly decided to honor the “presumption” in favor of referral to the state or tribe. Nothing in the bill makes this a non-litigable issue.

In short, either interpretation of this phrase presents serious difficulties and is at odds with both current law and sound policy. Indeed, this problem is so serious as to potentially render all of Title I unenforceable, and unless this problem is corrected, the remaining issues with Title I, discussed below, may be irrelevant. The Department is hopeful that the drafters did not intend this result, and that this provision can be adjusted in conference to preserve the structure of current law, i.e., so that as to felonies (and misdemeanors under the Youth Handgun Safety Act, as well as the Gun-Free School Zones Act, as discussed below), federal cognizance over the juvenile can be obtained upon certification of a substantial federal interest alone. One way to accomplish this is to amend S. 254 § 102, amending 18 U.S.C. 5032(a)(2)(B) (pages 15-16), by striking “and” between clauses (i) and (ii) and inserting “or”, and by inserting at the

beginning of clause (ii) the following: "in the case of a felony offense or an offense under section 924(a)(4) or (6) of this title".

Adult Prosecution May Retreat from Current Law

S. 254 § 102, amending 18 U.S.C. § 5032(a)(1)(B) (page 14), would require prosecution as an adult (i.e. criminal prosecution) of any person over age 14 charged in federal court with certain felonies. Under current law, violations of 18 U.S.C. § 922(x) (juvenile in possession of a handgun), a misdemeanor, can also result in adult prosecution. In order to carry forward this ability under S. 254, the Department urges the conferees to add a reference to 18 U.S.C. § 922(x) (or to its penalty provision, 18 U.S.C. § 924(a)(6)) if that offense is not elevated under the bill to felony status. The equivalent House provision is found in H.R. 1501 § 201, amending 18 U.S.C. § 5032(b)(4) (page 65). Under S. 254 § 601, amending 18 U.S.C. § 924(a) (page 362), the basic possession offense is left as a misdemeanor (see page 362), but under S. 254 § 851, amending 18 U.S.C. § 924(a) (page 390), it is made a five-year felony. If S. 254 § 601 prevails, 18 U.S.C. § 922(x) should be added to 18 U.S.C. § 5032 as a predicate for adult prosecution notwithstanding its misdemeanor status. (The Department also notes a technical flaw in § 851 of S. 254 in that, on page 390, line 14, the reference to 922(x)(2) should be to subsection (x)(3), as this is the possession offense (see page 393), whereas subsection (x)(2) is the transfer offense. Also, on page 394, line 7, "temporary" should be inserted before "possession," just as that word appears on line 4, to clarify that the possession for the specified exempted activities is temporary.)

Another potentially troublesome omission in S. 254 (also one mirrored in current law) with respect to adult prosecution is the Gun-Free School Zones Act, 18 U.S.C. § 922(q) (see P.L. 101-647 § 1702(a)). This offense, notwithstanding its five-year maximum prison term, contains the unusual language, set forth in the penalty provision, 18 U.S.C. § 924(a)(4), that it must be considered as a misdemeanor "for the purpose of any other law." Unless this language is changed, no adult prosecution under the proposed revisions to 18 U.S.C. § 5032 will lie for a § 922(q) violation, nor could a fingerprint-supported record for this offense be kept under proposed 18 U.S.C. § 5038 relating to an adjudication of delinquency. S. 254 § 108, amending 18 U.S.C. § 5038 (page 40). Although state and local authorities will handle the vast majority of these cases – as is appropriate, removing the misdemeanor language from the penalty provision of the Gun-Free School Zones Act would allow for federal prosecution as an adult under the amended § 5032 for certain serious violations of 18 U.S.C. § 922(q). Absent amending the penalty for 922(q), listing the statute as a predicate for adult prosecution remedies the bar to an adult prosecution but not the record keeping problem. For these reasons, the Department supports the language in H.R. 1501 that lists 18 U.S.C. § 924(a)(4) as a predicate for adult prosecution (H.R. 1501 § 201, amending 18 U.S.C. § 5032 (page 65)).

*Reviewability of Certification

The Department is concerned about some of the provisions related to certifications for federal prosecution because of the possibility that they could be construed to provide for inappropriate court review of prosecutorial decisions. S. 254 § 102, amending 18 U.S.C. § 5032(a)(1)(B) (page 14), states that a juvenile may be prosecuted in federal court "upon certification by the Attorney General (which certification shall not be subject to review in or by any court, except as provided in subsection (d)(2))." Subsection (d)(2) on page 17 however, permits the juvenile to move the court to order that the juvenile be proceeded against as a delinquent. The Senate bill does not on its face permit the court to review the government's certification that a state has declined jurisdiction or that a substantial federal interest exists. The latter addresses a very different issue from the one posed by the juvenile's motion. The motion asks the court to consider whether a delinquency proceeding – rather than an adult prosecution – is in the public interest; the prosecutor's certification is that a federal proceeding, rather than deferral to a state or tribe, is appropriate. Yet by including the "except as provided in subsection (d)(2)" phrase in section 5032(a)(1)(A) and (B), the bill creates an ambiguity and will likely give rise to claims that the certification is

indeed reviewable in the subsection (d)(2) process.

Currently, six of the seven courts of appeals that have addressed this question have determined that a prosecutor's certification of the existence of a "substantial federal interest" under 18 U.S.C. § 5032 is not subject to review, but rather "is an unreviewable act of prosecutorial discretion". United States v. Smith, 178 F.3d 22 (1st Cir. 1999) (so holding and collecting the cases). Indeed, as many of these courts have noted, to hold otherwise might violate the constitutional separation of powers, because the decision whether to bring a federal prosecution is committed exclusively to the Executive Branch.

To the extent that provisions of S. 254 may intend or require that courts be permitted to review these prosecutorial decisions, the Department strongly opposes them. Courts are not equipped to make or review such determinations – which are quintessential prosecutorial judgments – and it would be extremely difficult, if not impossible, to develop objective standards by which courts could carry out such a review function. Indeed, for similar reasons, courts have no role in reviewing prosecutors' decisions whether to institute adult prosecutions (or to defer to state jurisdiction) or in reviewing whether the "public interest" (the applicable statutory standard, 18 U.S.C. § 6003(b)) requires that a person be offered immunity.

Accordingly, the Department strongly recommends that the conferees delete the "except" phrase on page 14, lines 1-2 and 14-15 of S. 254 § 102, amending 18 U.S.C. § 5032 (page 14).

The House bill does not contain this problem because, as previously noted, it eliminates any court involvement in the decision to prosecute a juvenile as an adult, and it includes an express statement of the judicial nonreviewability of the certification of a substantial federal interest.

Expedited Decision

One of the principal difficulties under current law is the potential for delay in courts making transfer decisions. S. 254 § 102, amending 18 U.S.C. § 5032(d)(4) (page 19), allows the juvenile 30 days (instead of 20, as we would prefer because it is consistent with current law) to make a reverse waiver motion. (There is no comparable provision in H.R. 1501.) For this reason, the Department urges the conferees to insert language in proposed § 5032(d)(4) to encourage the court to deal with the motion expeditiously, as is done for an appeal under subsection (d)(5) on page 19.

Mandatory Adult Prosecution

S. 254 § 102, amending 18 U.S.C. § 5032(a)(1)(C), requires adult prosecution if a juvenile was previously federally convicted as an adult. The Department is concerned about the policy implications of this provision, especially since S. 254 broadens the predicates for adult prosecution to include all felonies and enhances the discretionary power of prosecutors to seek adult prosecution. The practical effect of a mandatory adult prosecution feature may be to cause federal prosecutors, when they do not wish to proceed against a juvenile as an adult, to refer the case to State or tribal authorities, even though there is a substantial interest in proceeding federally against the juvenile as a delinquent. The Department recommends that the conferees delete this potentially counterproductive provision. If the conference were to decide to retain the provision in some form, it should be redrafted to treat prior state convictions in the

same manner as prior federal prosecutions, as is the case with current law, which contains a mandatory adult prosecution feature for recidivists, and treats both federal and state prior convictions identically for this purpose. See the final sentence of the fourth undesignated paragraph of 18 U.S.C. § 5032.

H.R. 1501 contains no mandatory adult prosecution feature, although for the most serious acts, it in effect includes a presumption of adult prosecution by making it necessary, in order to avoid such prosecution, for the United States Attorney to certify that "the interests of public safety are best served by proceeding against the juvenile as a juvenile." See H.R. 1501 § 201, amending 18 U.S.C. § 5032(b)(2). We oppose placing this onus on the United States Attorney.

Definition of "Adult Inmate"

The Department notes a technical difficulty in the definition of "adult inmate." In S. 254 § 103, modifying 18 U.S.C. § 5031 (page 28), the definition of "adult inmate" should be changed by adding "charges of" after "awaiting trial on" and by striking "criminal charges" and inserting "an offense."

Even if this technical correction is made by the conferees, the Department also notes a much more serious substantive concern. The interaction between the definitions of "juvenile" and "adult inmate" in S. 254 § 103 creates a major problem with respect to the provisions in the bill governing the housing of detained juveniles prior to disposition under 18 U.S.C. § 5035 (pages 33-34). The prohibition (on page 34, lines 5-8) against detaining any "juvenile" in an institution where the juvenile has physical contact with "adult inmates," and the definition of "juvenile" to include certain individuals who are between 18 and 21 for purposes of juvenile delinquency proceedings combine to mean that such persons cannot be housed with anyone, even including other persons between the ages of 18 and 21 awaiting juvenile trial (even a co-defendant of the same age). This is so because the definition of "adult inmate" overlaps with the definition of "juvenile" and includes persons over 18 who are awaiting trial on charges of juvenile delinquency, the very same class of persons covered by the definition of "juvenile" in § 5031(2)(B). To correct this anomaly, the Department recommends that the conferees eliminate the overlap in definitions by restricting the category of juveniles prohibited from pre-disposition physical contact with adult inmates to those juveniles who are under 18. This result can be accomplished by inserting after "A juvenile" on line 5, either "(as defined in 18 U.S.C. § 5031(2)(A))" or "under 18 years of age".

Judicial Officers; Offenses Committed While on Release

The Department recommends that in S. 254 § 105, amending 18 U.S.C. § 5034 (beginning on page 31), all references to "magistrate" be changed to "judicial officer," as is accomplished in H.R. 1501. See H.R. 1501 § 208, amending 18 U.S.C. § 5034 (page 76).

In addition, the Department recommends amending S. 254 § 105, amending 18 U.S.C. § 5034(d)(1) (page 32), to refer only to misdemeanors. As regards any felony committed by the juvenile while on release, S. 254 § 102, amending 18 U.S.C. § 5032 (page 14), already permits adult prosecution on the proper certification. Thus, the proposed § 5034(d)(1) only makes sense if it is intended to permit adult prosecution for a misdemeanor committed by the juvenile while on release. We do not object to such authority. The bill can be perfected by striking "Federal criminal offense" on page 33, line 1, and inserting "Federal misdemeanor offense" (or just "Federal misdemeanor"). H.R. 1501 contains no comparable provision permitting adult prosecution of a juvenile who commits a federal misdemeanor while on release from federal charges.

Speedy Trial

The Department supports S. 254 § 106 and H.R. 1501 § 205, both of which would extend the amount of time available for adjudications of juvenile delinquency cases. However, we recommend that the conferees adopt the Senate's 70-day provision, which is the same amount of time available for adult

criminal adjudications.

Restitution

With respect to S. 254 § 107, amending 18 U.S.C. § 5037 (page 36), the Department recommends that the reference on line 18 to an order of restitution under "section 3663" be amended to read "section 3556." (H.R. 1501 includes the correct reference in § 206.) The former reference is limited and does not include other restitution provisions such as those in § 3663A. 18 U.S.C. § 3556 incorporates all restitution statutes.

Records of Gun-related Misdemeanors

The Department recommends that S. 254 § 108, amending 18 U.S.C. § 5038(b)(2) (page 39), be amended to include both the Youth Handgun Safety Act and the Gun-Free School Zones Act (18 U.S.C. § 924(a)(4) and (a)(6)), unless these offenses, presently misdemeanors, are elevated to felony status. Otherwise, the Department is concerned that no adequate record relating to juvenile adjudications will be maintained. H.R. 1501 § 207, amending 18 U.S.C. § 5038(c) (page 75), includes § 924(a)(6) but not (a)(4). Also, the Department recommends that on page 40 of S. 254, lines 7-8, "aggravated sexual abuse" (18 U.S.C. § 2241) and "sexual abuse" (18 U.S.C. § 2242) replace "rape" in the list of offenses for which records are to be maintained. "Aggravated sexual abuse" and "sexual abuse" are the terms now used under federal law. Also, the Department recommends adding "assault with a dangerous weapon" to the short list of offenses on page 40 that the FBI is required to disseminate in the same manner as adult criminal history records.

Juvenile Records and Expungement

The Department supports much of S. 254 § 108, amending 18 U.S.C. § 5038 (beginning page 37), making juvenile records available to victims for the specified purposes. A similar provision appears in H.R. 1501 § 207, amending 18 U.S.C. § 5038 (page 42), and allows release of juvenile records to victims, which we similarly endorse.

However, the Department is concerned about this provision's amendment to 18 U.S.C. § 5038(c) (page 42), providing for a petition to have a juvenile record expunged "after a period of 5 years." The Department takes the position that records of juvenile adjudications are historical facts and should not be removed from the FBI database merely because a court concludes that a juvenile is no longer dangerous. In any event, such records would still exist in the court and would be required to be considered in sentencing. Moreover, the provision fails to define the time from which the five-year period is to be measured. At a minimum, the provision should state that the period commences only after all aspects of the sentence have been satisfied (including fines and restitution); however, the Department would prefer to strike § 5038(c) in its entirety. H.R. 1501 contains no expungement of juvenile records provision.

Placement of Adjudicated Delinquents over Age 18 in Adult Facilities

The Department has serious constitutional concerns with the provisions in Title II of H.R. 1501 that would permit, or even require, juveniles adjudicated delinquent to be incarcerated with, and on the same terms as, adults. Provisions in Title I of S. 254 would appear to mandate that, in certain cases, juveniles adjudicated delinquent be incarcerated with, and on the same terms as, adults after they reach their eighteenth birthday. These provisions would raise serious constitutional concerns with respect to other important procedural aspects of the juvenile justice system — in particular, the fact that juvenile delinquency is subject to non-jury adjudication.

Section 201 of H.R. 1501 would amend 18 U.S.C. § 5032 to establish, in § 5032(a)(2) (page 61), expanded authority for a juvenile to be "proceeded against as a juvenile in a court of the United States" in

many circumstances, including where the Attorney General certifies to the court that "there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction" (proposed § 5032(a)(2)(B)(ii) (page 62)). Section 206 of H.R. 1501 in turn would, *inter alia*, amend 18 U.S.C. § 5037(c) (page 71) to provide that:

[t]he term for which official detention may be ordered for a juvenile found to be a juvenile delinquent [under § 5032] may not extend beyond the lesser of —

- (1) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult;
- (2) ten years; or
- (3) the date when the juvenile becomes twenty-six years old.

The Senate bill, while not identical, contains similar provisions. Section 102(a) of S.254 would amend 18 U.S.C. § 5032(a)(1)(D) (pages 14-15) to provide that a juvenile alleged to have committed a federal offense shall, except in specified circumstances (*see, e.g.,* proposed §§ 5032(a)(1)(A)-(C), 5032(a)(2) (pages 13-16)), be tried in federal court "as a juvenile." Section 107(3) of S.154 would amend 18 U.S.C. § 5037(c) (page 37) to provide:

(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend beyond the earlier of the 26th birthday of the juvenile or the termination date of the maximum term of imprisonment, exclusive of any term of supervised release, that would be authorized if the juvenile had been tried and convicted as an adult. No juvenile sentenced to a term of imprisonment shall be released from custody simply because the juvenile attains the age of 18 years.

Under current law, by contrast, a juvenile adjudicated delinquent can be detained past his or her twenty-first birthday only in certain cases where the juvenile was between eighteen and twenty-one years old when adjudicated delinquent. *See* 18 U.S.C. § 5037(c)(2). Both the House and Senate bills would, therefore, expand significantly the numbers of juveniles who could be detained beyond their twenty-first birthday as a result of an adjudication of delinquency.

While these proposed provisions may not, standing alone, raise constitutional concerns, their inclusion in the bill, in conjunction with 18 U.S.C. § 5039 (discussed below), would increase the likelihood that courts will conclude that other important aspects of the juvenile justice system are unconstitutional. In particular, under federal law there is no right to a trial by jury in juvenile delinquency proceedings. *See, e.g., United States v. Cuomo*, 525 F.2d 1285, 1292-93 (5th Cir. 1976). There is a serious risk that enactment of provisions such as those described above would threaten the constitutionality of delinquency proceedings conducted without affording the juvenile a right to a trial by jury.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Supreme Court indicated that the more closely the consequences of an adjudication of delinquency resemble the consequences of a criminal conviction, the more likely it is that the Constitution would require such adjudications to be conducted with the procedural protections that the Constitution prescribes for trials of adults, such as the right to be tried by a jury. In *McKeiver* itself, the Court held that a juvenile was not constitutionally entitled to a jury trial under the state's juvenile justice system. The *McKeiver* plurality made clear, however, that it would have reached a different result had it been

convinced that the juvenile system ultimately did not differ in purpose and effect from the adult criminal system, explaining that those who equated the juvenile and adult systems had chosen "to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile courts system contemplates." Id. at 545.

The state system at issue in McKeiver did not permit adjudicated delinquents to be incarcerated with adult convicts. That would not, however, necessarily be true of adjudicated delinquents in the federal system with respect to terms of detention between their twenty-first and twenty-sixth birthdays, in light of certain provisions in 18 U.S.C. § 5039.

Section 5039 currently provides that "[n]o juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges," and further provides that "[w]henever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community." These directives only apply, however, to a person while he remains a "juvenile," which is defined in 18 U.S.C. § 5031 (for the purpose of proceedings and disposition for an alleged act of juvenile delinquency) as a person who has not attained his twenty-first birthday. The House bill would not amend § 5039. Section 109(a) of the Senate bill, however, would amend § 5039 to provide (in § 5039(d)(1)) that juveniles committed for incarceration pursuant to an adjudication of delinquency could not, until the age of eighteen, "be placed or retained in any jail or correctional institution in which the juvenile has prohibited physical contact with adult inmate[s] or can engage in sustained oral communication with adult inmates"; and it would further amend § 5039(a) to provide that "otherwise," the sentence for such a juvenile "shall be carried out in the same manner as for an adult defendant."

Accordingly, section 106 of the House bill, when read in conjunction with current § 5039, would permit the government to detain beyond their twenty-first birthday persons who were adjudged delinquent as a juvenile in a non-jury proceeding, and would appear to permit the transfer of such a person, after his or her twenty-first birthday, to "an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges." 18 U.S.C. § 5039. Sections 107 and 109 of the Senate bill, read together, would appear to go further – to require, not simply permit, that juveniles adjudicated delinquent be treated the same as adults, and to require the transfer of such persons, after they turn eighteen years old, to secure correctional facilities for adults.

There is a split in authority regarding whether juveniles may be adjudicated delinquent without the constitutional protections afforded adult defendants – in particular the right to a jury trial – if such adjudication may result in their being incarcerated with, and on the same terms as, adults. Shortly after McKeiver was decided, the United States Court of Appeals for the Second Circuit held that committing a fifteen-year-old delinquent to an adult facility on the basis of a

family court adjudication rather than a jury trial did not violate the juvenile's right to due process. United States ex rel. Murray v. Owens, 465 F.2d 289 (2d Cir. 1972). However, more recently, as the states have begun revising their own juvenile justice systems to allow delinquents to be held longer and in adult facilities, some state courts have questioned whether the revised statutes are consistent with McKeiver and whether it remains permissible to deny jury trials (and other constitutional procedural protections) to juveniles who potentially face incarceration with adults. Just last year, the highest courts of Wisconsin and Louisiana held that non-jury adjudications under revised state laws that resulted in delinquents being subject to incarceration with adults amounted to criminal prosecutions, and therefore violated the juveniles' constitutional right to a jury trial. See In re C.B., 708 So.2d 391, 397-400 (La. 1998) (ruling as a matter of state law, but "adopt[ing]" the Supreme Court's analysis in McKeiver); In re Hezzie R., 580 N.W.2d 660, 673-74 (Wis. 1998) (federal constitutional ruling), cert. denied, 119 S. Ct. 1051 (1999); see also Matter of O.H., 504 S.W.2d 269, 271-73 (Mo. App. 1973) (surveying cases; expressing constitutional concern with the holding in Murray; and granting relief to a juvenile on statutory grounds); but see Monroe v. Soliz, 939 P.2d 205, 208-09 (Wash. 1997) (finding transfer of juveniles to adult facility constitutionally permissible because transferred juveniles were required to be segregated from adult convicts and "[t]he nature of incarceration remain[ed] juvenile regardless of the custody venue"). Indeed, the Wisconsin court held in Hezzie R. that, even if there was no certainty that an adjudicated delinquent might eventually be transferred to an adult facility, the mere risk of such eventual treatment sufficiently transformed the delinquency adjudication into a criminal prosecution, so as to require a trial by jury.

Thus, Title I of S.254 and Title II of H.R.1501 would raise serious constitutional concerns because they (in conjunction with existing law) would permit a person adjudicated delinquent in a non-jury proceeding to be incarcerated on the same terms as adult convicts in a secure adult prison after the age of twenty-one (House bill), or require such a result when the person turns eighteen (Senate bill). This constitutional problem could be avoided, however, if the bills were to amend § 5039 to provide that the protections currently prescribed in that section (specifically including the prohibition on incarceration in a secure facility with adults who have been convicted by a jury) shall apply to any person committed to the custody of the Attorney General pursuant to an adjudication of delinquency, during the entire term of such person's detention in a secure facility (including any part of such detention that extends beyond the person's eighteenth or twenty-first birthday).

To avoid the constitutional problem, we recommend that 18 U.S.C. §5039 be amended as follows:

In the first undesignated paragraph, by striking "No juvenile" through "the Attorney General" and inserting "No person committed to the custody of the Attorney General pursuant to an adjudication of delinquency, and no juvenile committed to the custody of the Attorney General pursuant to a conviction for an offense" and inserting before the period " , except that the Attorney General may place and retain a person 18 years of age or older and adjudicated delinquent under section 5032(a) in a community-based facility".

In the third undesignated paragraph, by striking "Whenever possible" and inserting "Whenever appropriate".

Placement of Juveniles in Juvenile Community-Based Facilities.

S. 254 § 109, amending 18 U.S.C. § 5039(d)(3) (page 45), authorizes the placement of juveniles (other than those convicted or adjudicated delinquent for a violent felony) in a community-based facility under certain circumstances. While the Department supports the general thrust of this provision, we recommend the following clarification.

We assume this provision refers to community-based facilities housing juveniles only. If it refers to any community-based facility, including those housing adults, we would recommend limiting the placement of juveniles in such facilities to those juveniles who have already turned 18, as described above.

H.R. 1501 includes no corresponding amendments to 18 U.S.C. § 5039.

Treatment of Juvenile Criminal History in Sentencing.

S. 254 § 102(h), amending 18 U.S.C. § 3553(h) (page 25), directs the Sentencing Commission to amend the criminal history scoring under the Sentencing Guidelines to treat most juvenile adjudications in the manner they would be treated had the underlying offense been committed by an adult. The directive further instructs the Commission to "assign criminal history points for juvenile adjudications based principally on the nature of the acts committed by the juvenile" and also requires the Commission to promulgate implementing guideline amendments within 90 days of the Act's passage.

As an initial matter, the Department is concerned that this provision may be internally inconsistent. Under the Sentencing Guidelines as currently written, criminal history points for adult convictions are not based principally on the nature of the acts committed but rather on the length of the sentence meted out. The directive asks the Commission to treat juvenile adjudications like adult convictions – which would thus necessarily be based principally on the length of sentence – but at the same time asks the Commission to assign criminal history points for the same adjudications based principally on the nature of the acts committed. The Department recommends deleting the requirement that the Commission assign criminal history points for juvenile adjudications based principally on the nature of the offense (i.e. strike page 27, lines 1-4). Alternatively, the bill could be altered to (1) require the Commission to consider assigning criminal history points for juvenile adjudications based principally on the nature of the acts committed by the juvenile, and (2) eliminate the directive to treat most juvenile adjudications similar to the way they would be treated had the underlying offense been committed by an adult, but require the Commission to consider whether there is a need for such similarity.

The Department is even more concerned about the requirement that the Commission promulgate Guideline amendments pursuant to this directive within 90 days of the Act's passage. The Guideline amendments mandated by this section for juvenile adjudications are significant, and developing them will be challenging. The directives will need both considerable thought and appropriate input by the Department of Justice and others. The Department is concerned that 90 days will be far too short a time to adequately develop and assess the Guideline amendments required by this section. Rather than prescribe a specific time frame, the Department recommends that the conferees simply require the promulgation of guidelines "as soon as practicable" (as is done on page 27, lines 10-11 of S. 254). Thus, the Department recommends that the conferees strike the subsequent language in that sentence beginning "and in any event not later than".

H.R. 1501 does not direct the Sentencing Commission to promulgate sentencing guidelines for juvenile adjudications. Rather, it merely requires the Commission to develop, in consultation with the

Attorney General, a "list of possible sanctions for juveniles adjudicated delinquent." See H.R. 1501 § 206, amending 18 U.S.C. § 5037(f) (pages 70-74), which includes the necessary phrase "and upon completion of". It further requires that the list must be comprehensive and encompass punishments of varying severity, including confinement, and must provide for escalation in severity for additional or subsequent misconduct. Presumably, the list of sanctions would be available to judges as guidance but would not have the force and effect of a guideline.

We prefer the approach in S. 254, since we believe the Commission should develop actual guidelines for juvenile offenders.

Miscellaneous Drafting Problems.

The Department notes a typographical error on page 12, line 10 of S. 254 § 101, amending 18 U.S.C. § 5001. The words "is been" should be "has been." Also, in S. 254 § 108, amending 18 U.S.C. § 5038(a) (page 38), line 2, the phrase "and upon completion of" must be inserted after "Throughout," as in current 18 U.S.C. § 5038(a). As drafted, this provision may carry the unintended implication that there are no restrictions upon disclosure of juvenile records once the juvenile proceeding has been completed. H.R. 1501 § 207, amending 18 U.S.C. § 5038(a) (page 74), includes the necessary phrase "and upon completion of".

S. 254 § 108, amending 18 U.S.C. § 5038(b)(2) (page 39), is unclear with respect to the circumstances under which a juvenile should be fingerprinted and photographed, specifically whether this should be a routine booking procedure or one performed only upon adjudication of delinquency. (The bill refers to the maintenance of a "fingerprint supported record" but does not state when the fingerprint and/or photograph are to be taken). Current law makes clear that fingerprinting and photographing are to be done only upon adjudication. H.R. 1501 § 207, amending 18 U.S.C. § 5038(b) (page 75), would leave the issue to Attorney General guidelines. We prefer the current law.

Title II – Juvenile Gangs

Title II of S. 254 and the similar provisions in Title VII of H.R. 1501 address juvenile gangs. The Department generally prefers the approach taken by the Senate bill to that taken by the House bill, but believes that Title II can be strengthened by including provisions from the Administration's proposed Crime Bill that amend the RICO statute, the primary federal statute for prosecuting gangs; by adding certain predicate firearms offenses typically committed by violent youth gangs, and provisions eliminating the statute of limitations for certain murders. The latter were included in S. 10 as reported by the Senate Judiciary Committee in the 105th Congress.

Explicit Inclusion of Indian Tribes

We are concerned about the omission of Indian tribes from certain provisions throughout S.254 and H.R. 1501, concerning assistance to communities. The first of these appears in S. 254 § 205, and our concern is about this section, as well as the other provisions of S. 254 and H.R. 1501 identified below.

Indian country has a severe juvenile crime problem. In fact, although juvenile crime is falling throughout the country, juvenile crime in Indian country is on the rise. It is vitally important that tribes have access to the federal resources they need to combat their juvenile crime problems. Although several of the allocations for Federal assistance in S. 254 do specifically make Indian tribal governments eligible for funding, several others do not, and should be amended to include tribes. In other instances, tribes can

only receive money from a "pass-through" to tribes from the states. Eliminating the need for a "pass-through" would offer appropriate deference to tribal sovereignty and streamline much-needed assistance to tribal communities. Thus, not only is it important to ensure that it is legally possible for tribes to receive funding, it is also important that tribes be able to apply for grants directly from the federal government.

We believe that the inconsistent treatment of tribes may have been an oversight, but it is critical that tribes also be made eligible (and directly eligible) for grant funds. *The final bill should include "tribes" in all relevant subsections, including those that refer to assistance to "States and units of local government."* We will submit to the conference committee a list of each section of S. 254 and H.R. 1501 that should be amended to include Indian tribes.

Sentencing Factors

Numerous provisions in both bills would establish new sentencing ranges for certain categories, or subsets, of existing criminal offenses. These sentencing provisions raise interpretative and potential constitutional questions in light of the Supreme Court's recent decision in Jones v. United States, 119 S. Ct. 1215 (1999).

The first of these appears in S. 254 § 201, and the discussion of sentencing factors addresses this section, as well as the other provisions of S. 254 and H.R. 1501 identified below. As a result of each of these provisions, the range of sentences to which defendants could be subjected would depend upon specified characteristics or consequences of the crime committed (other than recidivism). Other provisions in both bills would amend existing statutes that already contain similar graduated penalty provisions. And several other provisions in both bills would create new federal crimes that would, in like manner, provide for varying sentencing ranges, depending upon specified characteristics or consequences of the crime committed.

The Jones issue arises to the extent that these provisions — which we enumerate and briefly describe below — do not specify clearly whether the characteristics and consequences that give rise to the increased range of sentences are meant to be (i) elements of a separate offense (which must be charged in the indictment, submitted to a jury, and established beyond a reasonable doubt), or (ii) simply "aggravating" factors for sentencing (which need not be charged, and which a judge can find based on a lesser certainty of proof such as a preponderance of the evidence).

In Jones, the Supreme Court interpreted the sentencing provisions of the carjacking statute, 18 U.S.C. § 2119, which (at the time of the indictment at issue) provided as follows, in pertinent part:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be

fined under this title or imprisoned not more than 25 years, or both, and
(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Court held that, although the issue was a close one, § 2119 was properly construed as defining elements of three separate and distinct offenses of progressively greater severity, rather than as one offense with three separate sentencing provisions that can be applied by the court after the jury has found the defendant guilty of an “underlying” offense.

The Court’s interpretation of the statute was significantly influenced by the principle that statutory ambiguity should be resolved so as to avoid “grave and doubtful” constitutional questions. Jones, 119 S. Ct. at 1222; see generally id. at 1222-28. The Court concluded that it would raise “serious constitutional questions” if the carjacking statute were interpreted as defining a single offense with sentencing enhancements triggered by a fact that a court finds based on a preponderance of the evidence. Id. at 1228. More specifically, the Court understood its prior decisions to suggest – but not to establish – the principle that:

under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id. at 1224 n.6. The Court acknowledged that its “concern about the Government’s reading of the statute rises only to the level of doubt, not certainty.” Id. In other words, the Court did not resolve the question whether the statute would be unconstitutional if it permitted the maximum penalty to be increased based on facts that are not charged in the indictment and that are found by the court under a preponderance of the evidence standard, rather than by the jury beyond a reasonable doubt.

In light of Jones, the courts may be expected to presume, as a matter of statutory construction, that provisions such as those listed below create elements of distinct and separate offenses, unless Congress very plainly indicates that they are merely to establish penalty aggravators. Accordingly, if Congress intends that the factors in question are not to create distinct offenses, and are only to be factors that can result in an increase in the prescribed range of sentencing, we recommend that (where necessary) the provisions be amended to make that fact unambiguously clear. Although section and title headings can be helpful in this regard, they may be insufficient, by themselves, to make clear Congress’s intent. For maximum clarity, Congress may wish to consider, for example, splitting offense elements and sentencing factors into separate subsections with corresponding headings. See, e.g., 21 U.S.C. § 841(b).

Of course, Jones further suggests that if Congress does plainly provide that such facts are to be penalty aggravators that can result in an increase in the maximum sentence without being proven beyond a reasonable doubt, that would raise “serious” constitutional questions, id. at 1228, under the Fifth and Sixth Amendments. Therefore, if Congress wishes to avoid such

constitutional questions (and the possibility of reversal of numerous enhanced sentences if the constitutional question is resolved in favor of defendants), it should specify that the “additional” factors create distinct offenses, which would mean that such factors are to be charged in an indictment, presented to a jury, and proved beyond a reasonable doubt.

The following provisions create or enhance penalties:

Senate bill section 201(a); House bill section 801(a)

These provisions would create a new 18 U.S.C. § 522, which would prohibit recruitment of persons into a criminal street gang with the intent that such recruited persons participate in specified crimes. Proposed § 522(b)(1) would provide a higher range of sentences if the person recruited is a minor.

Senate bill section 203(a)

This provision would create a new 18 U.S.C. § 25, which would provide that persons who use a minor to commit specified Federal offenses shall be subject to higher maximum penalties than could otherwise be imposed.

Senate bill section 206(1)(C)

This provision would amend 18 U.S.C. § 1512, to create, in a new § 1512(a)(2), a revised prohibition on the use, or threatened use, of physical force to tamper with witnesses, victims or informants. Proposed § 1512(a)(3), in turn, would provide for a higher maximum sentence “in the case of” an attempt to murder or the use of physical force.

Senate bill sections 601(a)(2), 851(a); House bill sections 401, 402

These provisions each would amend 18 U.S.C. § 924(a)(6) to provide for varied sentencing ranges for violations of 18 U.S.C. § 922(x) (involving delivery of handguns to, and possession of handguns by, juveniles), depending on scienter – i.e., whether the defendant has a particular “intent” or “knowledge.”

Senate bill section 901(a); House bill section 605(a)

These provisions would amend 18 U.S.C. § 924(a) to provide for varied sentencing ranges for violations of 18 U.S.C. § 922(a)(6) (involving so-called “straw purchases” of firearms), depending on whether the firearm will be used in a violent felony and whether the procurement in question was for a juvenile.

Senate bill section 903(1)(B); House bill section 604(1)

These provisions would amend 18 U.S.C. § 924(c)(1)(A) to provide for an enhanced minimum sentence for crimes of violence and drug trafficking, depending on whether a firearm is used to injure another person.

Senate bill section 904; House bill section 702

These provisions would amend the sentencing provisions of 21 U.S.C. § 859 to increase the maximum sentence for violations of 21 U.S.C. § 841(a)(1) if a distribution of controlled substances is to a person under age twenty-one.

Senate bill section 905; House bill section 703

These provisions would amend the sentencing provisions of 21 U.S.C. §§ 860(a) and (b) by increasing the maximum sentences for a controlled substances offense under 21 U.S.C. § 841(a)(1) if the offense is committed in vicinity of certain specified locales.

Senate bill section 1635(e)

This provision would amend 18 U.S.C. § 924(a)(3) to establish different maximum sentences for false statements with respect to information that firearms licensees must keep, or for violations of 18 U.S.C. § 922(m), depending on whether such offense "is in relation" to certain offenses under 18 U.S.C. §§ 922(a), (b) and (d).

Senate bill section 1663(a)

This provision would create a new 18 U.S.C. § 931, which would prohibit certain advertising of unlawful firearms transactions. Proposed § 931(b), which would establish penalties, would provide for the penalty of death, or a life sentence, if the unlawful conduct results in the death of a juvenile.

House bill section 104(a)

This provision would create a new 18 U.S.C. § 3559(e). Proposed § 3559(e)(1) would provide for a mandatory life sentence, or the death penalty, if the victim of a specified sex offense is a minor, and if the defendant previously has been convicted of a sex offense with a minor victim.

House bill section 106(a)

This provision would create a new 18 U.S.C. § 1205, which would prohibit taking children as hostages to evade arrest or to obstruct justice. Proposed § 1205(b), which would establish penalties, would provide for an increased sentencing range if injury results to a seized or detained child, and for the penalty of death, or a life sentence, if the unlawful conduct results in the death of the child.

House bill section 601

This provision would amend 18 U.S.C. § 924(a)(4) to provide for a range of sentences for violations of 18 U.S.C. § 922(q)(3) (relating to discharging firearms in a school zone), depending on whether various types of injury or death result.

House bill section 704

This provision would amend 18 U.S.C. § 521 by amending subsections 521(b)-(d)(2) to require a sentencing increase of ten years if a person who commits any of a number of specified offenses participates in a criminal street gang (i) with knowledge that its members engage or have engaged in a continuing series of specified offenses or (ii) with the intent to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang.

Technical Corrections

The Department notes a technical error in S. 254 § 204, amending 18 U.S.C. § 521 (page 53)

(and H.R. 1501 § 704, amending 18 U.S.C. § 521 (page 119)). Subsection (a)(3)(C) purports to add new paragraphs (c)(3) through (7) to 18 U.S.C. § 521 but does not delete (as it should) existing paragraph (c)(3) which is encompassed within proposed (c)(7).

The Department also notes that in S. 254 § 206, amending 18 U.S.C. § 1512 (page 59), no penalty is set forth for the proposed new offense of threatening to use physical force against witnesses, victims or informants.

Increased Penalties for ITAR Violations

S. 254 § 209 amends 18 U.S.C. § 1952 (beginning page 64), the Interstate and foreign Travel or transportation in Aid of Racketeering enterprises (ITAR). Although we favor increasing the maximum penalties for ITAR violations and distinguishing in terms of severity between violent crimes in aid of racketeering and other acts, section 209 would also add several new offenses within ITAR's definition of "unlawful activity." We oppose the addition of burglary, assault with a deadly weapon, assault resulting in bodily injury, and shooting at an occupied dwelling or motor vehicle. The effect of these amendments would be to federalize crimes that are already adequately covered by the states (the new predicates would also be covered under RICO since ITAR is a RICO predicate). Moreover, while we strongly support the idea of expanding ITAR to cover interstate travel to obstruct state criminal proceedings, we believe the version of this offense in H.R. 1501 § 707, amending 18 U.S.C. § 1952 (page 126), is preferable to the Senate version in that it creates a separate subsection in ITAR for this purpose, rather than folding it into the definition of "unlawful activity."

The amendment also contains a technical drafting error. The amendment inadvertently omits a provision in current law that provides that investigations of violations of this section involving alcohol shall be conducted under the supervision of the Secretary of the Treasury. This provision should be reinstated. We would be happy to provide you assistance with the language for this technical correction.

Juvenile Drug Crimes as Predicate Offense for Armed Career Criminal Act

S. 254 § 210(a), amending 18 U.S.C. § 924(e)(2) (page 68), and H.R. 1501 § 613, amending 18 U.S.C. § 924(e)(2) (page 100), add juvenile adjudications for serious drug crimes (as defined in 18 U.S.C. § 924(e)) to the list of predicate offenses under the Armed Career Criminal Act (18 U.S.C. § 924(e)). We support the objective behind these measures, but we prefer the language of the House bill as a better drafting option.

We generally support making certain drug offenses predicate offenses for the Armed Career Criminal Act and look forward to working with the conferees to reconcile the Senate and House versions.

Increased Penalties for Transfer of a Firearm to a Juvenile

S. 254 § 210(b) amends 18 U.S.C. § 924(h) (page 68) to require a mandatory minimum sentence of three years for an individual who transfers a firearm to a person under the age of 18 knowing that the firearm will be used to commit a crime of violence or drug trafficking crime. Section 924(h) currently imposes a penalty of up to 10 years for transfers with knowledge that the firearms will be used to commit a crime of violence or drug trafficking crime, and does not specifically address transfers to juveniles. By adding a penalty for transfers to juveniles, this provision overlaps substantially – and is inconsistent with – two other provisions in the Senate bill: S. 254 § 601, amending 18 U.S.C. §§ 922(x) & 924(a) (page 361), and S. 254 § 851, amending 18 U.S.C. §§ 922(x) & 924(a) (page 389), involving transfer of certain firearms to a person under 18. Section 210(b) is also inconsistent with a similar provision in the House bill, H.R. 1501 § 402 (page 85).

Sections 601 and 851 of S. 254 amend both the penalty provisions of the Youth Handgun Safety

Act, which are found at 18 U.S.C. § 924, and the Youth Handgun Safety Act (18 U.S.C. § 922 (x)) itself. The Youth Handgun Safety Act governs both transfers of firearms to juveniles, 18 U.S.C. § 922 (x)(1), and possession of firearms by juveniles, 18 U.S.C. § 922(x)(2). We will address our comments in this section only to the penalty aspects for adult transferors. Our comments on the penalties for juveniles who violate 922(x), and the amendments to 922(x) itself, will be included in our discussion of Title VI of S. 254, infra.

Section 601(a) of S. 254 retains the current base offense maximum of one year for transfers by adults in violation of 18 U.S.C. § 922(x)(1), but raises the maximum sentence for adult offenders from 10 to 20 years if the transfer to the juvenile is with knowledge or reasonable cause to know that the firearm will be used in a violent felony, as that term is defined in 18 U.S.C. § 924(e)(2)(B).

Section 851(a) of S. 254 raises the base offense maximum sentence to 5 years. It also provides new mandatory minimums: 1 year for the base offense of transferring to a juvenile, and 10 years (with a 20 year maximum sentence) for transferring to a juvenile knowing or having reasonable cause to believe that the juvenile intended to carry, possess, discharge or use the firearm in the commission of a violent felony, as that term is defined in 18 U.S.C. § 924(e)(2)(B).

Section 402 of H.R. 1501 amends 18 U.S.C. § 924 by raising the base offense maximum sentence from one to five years. It also provides new mandatory minimums: 3 years (with a maximum of 20 years) for transferring firearms to a juvenile knowing that the juvenile will possess the firearm in a school zone, and 10 years (with a maximum of 20 years) for transfers made with knowledge that the juvenile will use the firearm to commit a serious violent felony, as that term is defined in 18 U.S.C. § 3559(c)(2)(F).

The Administration supports increasing the penalties for unlawful transfers of firearms to juveniles. As between the four provisions, we believe that an amendment raising the penalty for transferring a firearm to a person under age 18 is best keyed to a violation of 18 U.S.C. § 922(x) and therefore prefer the approach taken in sections 601 and 851 of the Senate bill, and section 402 of H.R. 1501, to the one taken in section 210(b) of S. 254. First, 18 U.S.C. § 922(x) specifically deals with the problem of guns falling into the hands of our youth. Second, at least one court has held that federal jurisdiction in a 18 U.S.C. § 924(h) offense must be predicated on a federal crime of violence. See United States v. McLemore, 28 F.3d 1160 (11th Cir. 1994). Even though 18 U.S.C. § 924(h) is broader than 18 U.S.C. § 922(x) in that it covers firearms other than handguns and assault weapons (which will now be covered by other amendments to the Youth Handgun Safety Act in S. 254 and H.R. 1501), an amendment to 18 U.S.C. § 924(h) could have inherent limitations not present in a similar amendment to 18 U.S.C. § 922(x), given that 18 U.S.C. § 922(x) has an independent basis for federal jurisdiction, i.e., the effect on interstate commerce caused by handguns. Moreover, notwithstanding the narrower class of firearms covered in 18 U.S.C. § 922(x), the majority of cases – those involving handguns (and, if the amendments to the 18 U.S.C. § 922(x) pass, assault weapons) – would be covered by the provision.

As to the severity of the penalties, the Administration believes that the base offense level should be increased to 5 years, and that the maximum penalties should be 10 years for transferors who know or have reasonable cause to know that the juvenile will possess or use the firearm on school property and 20 years for transferors who know or have reasonable cause to know that the juvenile will possess or use the firearm in the commission of a violent felony.

Title III – Juvenile Crime Control, Accountability, and Delinquency Prevention

In general, this Title and its counterpart in the House bill reflect attention to many of the concerns the Department has expressed over the last several years. Specifically,

they reflect a greater commitment to prevention spending than earlier versions of these bills, some greater protection of the core requirements, and welcome new provisions concerning mental health. The Department appreciates these improvements, and makes the following recommendations to further improve the bills.

Subtitle A: Reform of the Juvenile Justice and Delinquency Prevention Act of 1974

Juvenile Crime Control and Prevention

This subtitle renames the juvenile justice office and delineates several of its core functions. In addition, it defines the roles of the National Institute of Justice (NIJ) and the Bureau of Justice Statistics (BJS) in administering juvenile justice programs. In a different way, H.R. 1501 also addresses the relationship between the juvenile justice office and NIJ and BJS. We are concerned, however, that neither bill adequately addresses the appropriate relationship among these bureaus.

The OJP Bureaus

In the Fiscal Year 1999 Omnibus Appropriations Act, the Congress directed the Department to address all of the relationships in the Office of Justice Programs (OJP), the parent agency for all of these bureaus, where there has been overlap, duplication, and a lack of coordination, and to submit to the Congress a proposed restructuring plan. The report sent to Congress several months ago recommends a plan for restructuring OJP, developed through consultation with practitioners in the field as well as others. As expressed in that proposal, it is the Department's position that all research – whether related to juvenile justice or not – should be conducted by NIJ. We understand the concerns raised by some in the juvenile justice field about this proposal, but we believe that their interest in ensuring a continuing focus on juvenile justice research will be assured by the creation of an Institute for Juvenile Justice Research within NIJ, which the restructuring plan proposes. (We note that S. 254 likewise advances the creation of a dedicated Institute for Juvenile Justice within NIJ.) Similarly, it is our position that all statistics – whether related to juvenile justice or not – should be conducted by BJS. This reorganization will help streamline the work of OJP and ensure that communities looking for research-based or statistical information on crime can easily get it, no matter what age group is being considered.

While both the House and Senate bills articulate some reform of the current system neither bill creates the clear delineation of responsibility that the Department now urges. We are prepared to share with staff precise language to accomplish the purposes described above.

The Department's restructuring plan would also establish the OJP bureau head positions as political appointments made by the Attorney General. This proposal would improve OJP's ability to advance the federal assistance program with a comprehensive and integrated vision. We will provide staff with legislative language to achieve this goal as well.

Set-Asides for Program Supports

In addition, we have some concerns about the way the bills create set-asides for program supports. A common goal of each of the grant programs in the bills is to identify and support programs that work. Therefore, it is critical that set-asides be built in to provide for program-related research, evaluation, statistics, training and technical assistance, information dissemination, and demonstrations. S. 254 provides partial support for these activities by establishing set-asides in the Prevention Challenge Block Grant Program (1 percent for training

and technical assistance; the lesser of 5 percent or \$5M for research, statistics, and evaluation activities), Formula Grants Program (2 percent for training and technical assistance; 5 percent for research, evaluation, and statistics activities), Grants to Indian Tribes (1 percent for training and technical assistance), Gang-free Schools and Communities (15 percent for research, evaluation, and information dissemination), and Grants to Courts for State Juvenile Justice Systems (2 percent for administration and training and technical assistance). In addition, S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 223(b) (1974) (page 170), gives the Administrator the authority to use up to 10 percent of the Formula Grants funds appropriated to provide training and technical assistance; support the development, testing, and demonstration of new programs; conduct research and evaluation; and provide information dissemination in support of proposed sections 204 (OJJDP), 205 (Prevention Block Grant Program) and 221 (Formula Grants Program). H.R. 1501 falls short in providing these critical program support set-asides. Only the Juvenile Accountability Block Grant Program includes a set-aside, which amounts to 3 percent for research and evaluation activities and for program administration. No funds are provided for training and technical assistance.

In general, we appreciate the effort of the Senate in S. 254 to provide program support set-asides, but we propose that they be extended in conference to support each of the major funding streams in the bill, particularly the Juvenile Accountability Block Grant Program and the Mentoring Program, which currently lack any program supports. Further, inasmuch as they fall under the restructure plan, the research and evaluation function would be administered by NIJ, and the remaining functions would be administered by the Juvenile Justice Office, we recommend that these functions each be given a discrete funding allocation. To ensure adequate set-asides for each of these critical purposes, we recommend that every grant program authorized in the final bill provide at least 3 percent for research and evaluation and statistics consistent with the program; at least 2 percent for training and technical assistance consistent with the program; and at least 1 percent of the amount authorized, for administration of the program.

Mental Health

We are very pleased that both the House and Senate bills address the mental health needs of juveniles – both within and outside the juvenile justice system. Both bills require that state Formula grant plans include provisions for needed mental health services (S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) §§ 205(a)(1)(H) (page 116), 222(a)(7)(B)(iii) (page 170), and H.R. 1501 § 1310, amending Pub. L. No. 93-415 (42 U.S.C. § 223 (2)(H) (page 170)). They also allow Juvenile Delinquency Prevention Block Grant funds to be used for initial mental health intake screenings for all youth entering the system, for administering mental health services for juveniles with serious mental and emotional disturbances, for ensuring that juveniles receiving psychotropic medication be under the care of a licensed mental health professional, and for projects that provide mental health treatment programs for at-risk children. The Senate bill further allows states to use Juvenile Accountability Block Grant (JABG) funds to cross-train mental health and juvenile justice system personnel on appropriate mental health alternatives to juvenile justice placements, while the House bill allows JABG funds to be used for mental health and substance abuse treatment programs. Further, the House bill instructs the Juvenile Justice Office and the National Institute for Mental Health to collaborate on a comprehensive study of the mental health needs of youth in the juvenile justice system, as well as to survey services currently available. We applaud these efforts to ensure that young people with specific mental health problems receive the appropriate screening, intervention, and treatment they need.

Centralized Authority

Next, we have some specific concerns about the centralized authority proposed in the Senate bill. S. 254 § 302(a), amending Pub. L. No. 93-415 (42 U.S.C. § 5611 et seq.) § 204(b) (1974) (pages 108-11), would vest enhanced authority in the Administrator of the new Office of Juvenile Crime Control and Prevention to set overall Federal juvenile justice program objectives, priorities, plans, and policies. There is no question that program coordination is a laudable goal; indeed, agencies have made substantial progress in this area, using such forums as the Coordinating Council on Juvenile Justice and Delinquency Prevention. However, we have a concern about the intent of the subsection. Paragraph (3) in subsection 204(b) directs the Administrator to "serve as a single point of contact for states, local units of government, and private entities" seeking to participate in Federal juvenile justice grant programs. We believe that a single point of contact for information on available Federal juvenile justice grant programs is appropriate, and the OJP restructure plan provides for a single point of contact, as well as for maintenance of established contacts to work through established channels. However, a single point of contact for "participation" in all such programs would be unworkable. Thus, we suggest that in lieu of the phrase "to apply for and coordinate the use of and access to" in paragraph (3), the words "for purposes of providing information relating to federal juvenile delinquency programs..." be inserted. In addition, following the phrase "accountability programs," we recommend that the words "or for referral to other agencies or departments that operate such programs;" be inserted. These changes would provide the coordination and information roles of the Administrator, while clarifying that responsibility for the implementation and administration of Federal juvenile justice programs remains with the funding agency.

Coordinating Council

Neither bill reauthorizes the Coordinating Council on Juvenile Justice and Delinquency Prevention (Coordinating Council). We are surprised by this, given the Congress's expressed desire to have agencies work better together to provide assistance to communities. We urge the conferees to revisit this issue and reauthorize the Council.

The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP Act) established the Coordinating Council as an independent body within the Executive Branch of the Federal Government. Its primary functions are to coordinate all Federal juvenile delinquency prevention programs, all programs and activities that detain or care for unaccompanied juveniles, and all programs relating to missing and exploited children. Under the 1992 amendments to the JJDP Act, the Coordinating Council has been chaired by the Attorney General and includes four other cabinet secretaries, the Director of the Office of National Drug Control Policy (ONDCP), and three sub-Cabinet officials. Nine non-Federal juvenile justice practitioners appointed by the President, the President of the Senate, and the Speaker of the House also sit on the Council. Since being restructured in 1992, the Council has developed and widely disseminated the *National Juvenile Justice Action Plan*, a comprehensive plan that supports state and local efforts to address juvenile justice system needs. The Action Plan is regularly used by Federal agencies and states in shaping their programmatic responses to juvenile delinquency and violence.

In addition, in an ambitious effort to coordinate one of the Federal government's most valuable contributions to community safety – research about what works – the Council facilitated joint funding by several agencies for "Early Alliance," a research study designed to promote positive development and reduce risk for adverse outcomes in children attending schools located in at-risk neighborhoods. Other interdepartmental collaborations spurred by the Coordinating Council are addressing such critical efforts as nurse home visitation programs; career enrichment for inner city youth; mental health needs of at-risk youth; treatment for children with learning disabilities;

drug awareness, education, and prevention; a national replication of the Child Development - Community Policing program; the multiple needs of families with substance abuse problems; and international child abduction.

In February 1999, following the approach advocated by the Council, the Administration announced a major new collaboration by the Departments of Education (through its Safe and Drug-Free Schools Program), Health and Human Services (through its Center for Mental Health Services), and Justice (through OJJDP and the COPS Office) to commit at least \$100 million dollars to the *Safe Schools/Healthy Students Initiative*. Accessed through a consolidated application process, this grant program will provide students with enhanced comprehensive, mental health, law enforcement, and, as appropriate, juvenile justice system services designed to reduce drug use and violent behavior and to ensure the creation of safe, disciplined, and drug-free schools. Awards for up to three years are being made to successful applicants in 50 sites with grants ranging from up to \$3 million annually for urban school districts, \$2 million for suburban districts, and \$1 million for rural districts and tribal schools designated as local education agencies. Importantly, the agencies are collaborating on both funding and oversight, in order to ensure continued cooperative management of this unprecedented multi-agency initiative.

We urge Congress to retain the Council as a statutorily established entity. The Coordinating Council has served us well for the last 25 years and we are confident that, if reauthorized, it will continue to play an essential role in the effective coordination of a broad-based and comprehensive Federal juvenile justice strategy.

In lieu of its repeal, we urge the following language:

"Section 2702. Continuation of Coordinating Council on Juvenile Justice and Delinquency Prevention.

(a) Council -- The Juvenile Justice and Delinquency Prevention Act of 1974, as amended, established the Coordinating Council on Juvenile Justice and Delinquency Prevention. The Council shall continue in existence and operate under the terms of that Act except as herein specified. Members of the Council as of the date of the enactment of this Act shall continue to serve on the Council in accord with the terms of their appointment.

(b) Functions. Notwithstanding the functions set forth in 42 U.S.C. 5616, the functions of the Council shall be to coordinate all Federal juvenile delinquency programs (in cooperation with state and local juvenile justice programs), all Federal programs and activities that detain or care for unaccompanied juveniles, and all Federal programs relating to missing and exploited children. The Council shall examine how the separate programs can be coordinated among Federal, state, and local governments to better serve at-risk children and juveniles, shall make recommendations to the President and to the Congress, at least annually, with respect to the coordination of overall policy and development of objectives and priorities for all Federal juvenile delinquency programs and activities and all Federal programs and activities that detain or care for unaccompanied juveniles. The Council shall review the programs and practices of Federal agencies and report on the degree to which Federal agency funds are used for purposes which are consistent or inconsistent with the requirements of section 2804(b) of this title.

The Council shall review, and make recommendations with respect to, any joint funding proposal undertaken by the Office of Juvenile Justice and Delinquency Prevention and any agency represented on the Council. The Council shall review the reasons why Federal agencies take juveniles into custody and shall make recommendations regarding how to improve Federal practices and facilities for holding juveniles in custody.”

Prevention Block Grant

S. 254 § 301, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 201 (1974) (page 100), as well as H.R. 1501 §§ 114, 1311, amending Pub. L. No. 93-415 (42 U.S.C. § 5611 et seq.) § 299 (J) (1974) (page 168), authorizes a Prevention Block Grants program under which funds would be distributed to states to support activities to prevent juvenile delinquency. We applaud Congress for creating a dedicated prevention program, and for dedicating a large portion of this program to “primary” prevention, meaning for activities for juveniles not in the juvenile justice system. We are concerned, however, that as written, the provisions do not quite accomplish their aims, and we urge the conferees to amend them accordingly.

Primary Prevention Allocation

S. 254 § 302(a), amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 205 (1974) (page 115), contains a provision that not less than 80 percent of funds shall be used for the purposes designated in paragraphs (1) through (18), and that not less than 20 percent shall be used for the purposes designated in paragraphs (19) through (22). We commend the bill's effort to commit 80 percent of these funds to “primary” prevention. (The House bill provides for no such commitment.) However, it appears that only 10 of the first 18 activities described in section 302(a) are exclusively for primary prevention (namely 3, 8, 10-12, 14-18). Five of the 18 activities are for both primary prevention and early intervention for system-involved juveniles (1, 2, 5, 7, 9); and three of the 18 activities are exclusively for juveniles in the justice system, e.g. incarcerated offenders (4, 6, 13). Therefore, despite the apparent intent of the House and Senate to reserve a pool for primary prevention, a state could still use funds from the 80 percent primary prevention allocation for programs targeting juveniles already in the justice system – the same population on whom juvenile “accountability” funds, and formula funds, are already being spent. This would disrupt the balance the Congress has sought to advance in its authorizing structure, and would seriously undermine the commitment to primary prevention. Accordingly, we recommend that S. 254 § 302(a), amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 205(b)(1)(G) (1974) (page 125), be modified to require that “not less than 80 percent of each State's Prevention Block Grant Program funds be used for primary prevention activities that target juveniles not in the juvenile justice system.” Phrasing the allocation in this way will ensure sufficient support for the many at-risk juveniles who can yet be kept out of the juvenile justice system.

Coordination with the Juvenile Court Docket

We oppose the requirement in S. 254, § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 205(b)(1)(F) (1974) (page 125), that states provide an assurance that “projects or activities funded by a grant under subsection (a) shall be carried out through or in coordination with a court with a juvenile crime or delinquency docket.” Such a requirement is unnecessary, and potentially burdensome in instances where the program's target audience is juveniles who are not in the system. Therefore, we recommend that the language be amended to require an assurance that “projects or activities funded by grants under subsection (a) that are related to court-involved juveniles shall be carried out through or in coordination with a court with a juvenile crime or delinquency docket.” This amendment would ensure that prevention programs can be provided to

juveniles outside of the juvenile court system.

There is no similar provision in H.R. 1501.

Allocation Mechanism

The Department is concerned about the method of allocating funds to support local prevention programs proposed in both bills. We ask that the method be changed to allow for awards to be granted directly to units of local government. In both S. 254 and H.R. 1501, funds are allocated to states for the purpose of providing financial assistance to carry out prevention projects. The state then makes grants to eligible entities that apply to the state for funding. H.R. 1501 §1311, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 245 (1974) (page 178), defines an eligible entity as a unit of local government, acting jointly with not fewer than two private nonprofit agencies, organizations, and institutions that have experience in dealing with juveniles. S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 205(d) (1974) (page 129), defines eligible entity as a community-based organization, local juvenile justice system official, local education authority, local recreation agency, nonprofit private organization, unit of local government, social service provider, or other entity with demonstrated history of involvement in the prevention of juvenile delinquency (page 130).

We recommend that the S. 254 § 302 Prevention Block Grant Program provide for direct state awards to units of local government that would, in turn, either provide the services or contract with eligible service providers to carry out authorized prevention and early intervention activities. A provision for direct state awards to local service providers is cumbersome and costly. It is unlikely that the 5 percent administrative set aside in both bills for state administration, evaluation, and technical assistance would be sufficient to oversee the award and administration of large numbers of grants to individual service providers. Moreover, units of local government are in a better position to know local needs and coordinate and monitor local service providers.

Grants to Youth Organizations

S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 206 (1974) (page 133), establishes a Grants to Youth Organizations program for the purposes of providing constructive activities to youth during after school hours, weekends, and school vacations; providing supervised activities in safe environments to youth in those areas; and providing anti-alcohol and other drug education to prevent alcohol and other drug abuse among youth. Indian tribes and national, statewide, or community-based nonprofit organizations in crime prone areas are eligible to apply to the Administrator, who then makes awards to applicants, with 20 percent of funds going to national or statewide organizations, and 80 percent to community-based nonprofit organizations. We support the concept of funding community-based nonprofit organizations to carry out the types of activities in this section, and note that these are organizations that would not otherwise have the opportunity to apply for direct federal funding. However, we would prefer for this to be accomplished as a set-aside to either the Prevention or Formula Grants programs, rather than as a separate discretionary grant program. Integrating the Grants to Youth Organizations program with the Prevention or Formula Grants program will ensure better coordination of these funds with the other funding streams.

Grants to Indian Tribes Program

We commend and endorse S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 207 (1974) (page 136), providing direct grants to Indian tribes, but have the following three concerns. First, we recommend that the bill permit a waiver of the match requirement in appropriate circumstances. We propose incorporating the following language from § 299D(c) of the Juvenile

Justice and Delinquency Prevention Act of 1974: "If the Administrator determines that the tribe does not have sufficient funds available to meet the local share of any program or activity to be funded under the grant, the Administrator may increase the federal share of the cost thereof to the extent the Administrator deems necessary." Second, we recommend that technical assistance funding in S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 207(g) (1974) (page 140), be increased to "up to 5 percent" of the amount reserved under S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 208(b) (1974) (page 141), (versus the 1 percent provided, page 136). Third, as previously indicated, with respect to tribal programs, we strongly urge you to consider direct funding in all relevant grant programs to Indian tribal governments in their own right, rather than as "units of local government," as defined in S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 103(36) (1974) (page 98).

Formula Grants Program:

The current Part B Formula Grants program, first established in 1974, is critical to successful juvenile justice system improvement at the state and local levels and to certain delinquency prevention efforts. However, several important features of the current program, which states have successfully implemented, would be compromised by certain provisions in the bills.

Core Requirements

Three of the four "core requirements" or "fundamental protections" established in the Juvenile Justice and Delinquency Prevention Act – deinstitutionalization of status offenders, separation of juveniles from adult offenders, and removal of juveniles from jails and lock-ups – are substantially preserved in both bills, with minor modifications made to enhance state and local flexibility. We commend the House and Senate for continuing these provisions, but have the following concerns.

Separation

First, while we prefer the Senate version of the separation requirement, we are concerned that a misplaced comma in the bill may have unfortunate results. S. 254 § 301, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 103(27) (1974) (page 94), would permit physical contact between juveniles and adults in secure institutions that is "brief and inadvertent, or accidental in secure areas of a facility that are not dedicated to use by juvenile offenders and that are nonresidential, which may include dining, recreational, educational, vocational, health care, entry areas, and passages"(page 94). It is the Department's understanding that the Senate's intent here was to copy the Administration's regulation in this area. However, the Senate text inserted a lone comma after the word "inadvertent," which could permit the interpretation that contact that is accidental -- regardless of length -- is permissible. Therefore, we recommend that the comma be removed, and the phrase be modified to read "brief and either inadvertent or accidental."

Second, we recommend that the phrase " , provided that such juveniles do not have prohibited physical contact or sustained oral communication with adult inmates" be inserted in subparagraph (13)(A), after the words "6 hours". This will explicitly provide for separation during 6-hour holds on the same basis as a 48-hour hold in a rural jurisdiction under subparagraph (13)(B).

Jail Removal

While both bills retain the requirement that juveniles be removed from adult jails and lockups, with an exception that would permit a juvenile to be housed there if a parent gives consent, the House bill limits this exception to make such consent valid only for 20 days, and requires that the juvenile be present at the court's subsequent review of the juvenile's housing situation. We support the inclusion of these two provisions in the final bill.

Disproportionate Minority Confinement

Our much more fundamental concern with the core requirements is the virtual elimination of the fourth core requirement, Disproportionate Minority Confinement (DMC) in S. 254. The 1988 and 1992 amendments to the JJDP Act required states participating in the Formula Grants program to address any disproportionate confinement of minority juveniles in secure facilities, assess the reasons for its existence, and design and implement strategies to reduce disproportionate minority over-representation in secure facilities. As a result of this core requirement, states have been successfully developing prevention and early intervention programs, alternatives to pre-adjudication confinement, and non-secure community correctional programs and services that address DMC while continuing to protect the public. (Indeed, many of the programs put in place to satisfy the DMC requirement are resulting in more appropriate placements for all juveniles, not just minority juveniles.) *It is not the time to abandon this very successful rule.* As of 1997, racial and ethnic minority juveniles represented 32 percent of the juvenile population age 10-17, yet accounted for 65 percent of all juveniles in secure detention and confinement facilities. While such a gap is not per se evidence of disproportionate treatment, neither is it license to abandon the main provision intended to monitor this disparity and take appropriate steps to address it.

The Senate's substitution for DMC is very disappointing. S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 222(a)(27) (1974) (page 166), directs that states shall, "to the extent that segments of the juvenile population are shown to be detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups to a greater extent than the proportion of these groups in the general population, address prevention efforts designed to reduce such disproportionate confinement, without requiring the release or the failure to detain any individual." (Emphasis added.) We understand that the motivation for this substitution may have been a belief that the current DMC requirement, while well-intentioned, is unconstitutional, perhaps because of its reference to minority juveniles. It is the Department's view that DMC presents no constitutional problems, and we oppose the substitute Senate provision as it could substantially dilute the effectiveness of present law. (Indeed, it might lead some states to needlessly explore such matters as why there are more boys than girls in confinement.)

The House bill preserves DMC, and we strongly urge the conferees to adopt the House provision. H.R. 1501 § 1310(1)(P), amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 223(1)(a)(23) (1974) (page 164), directs that states shall "address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system." (We note that even here, it would be helpful to clarify that this provision applies to juveniles at every stage of the juvenile justice system, from arrest and court referral to detention and corrections.)

Reduction for Noncompliance

In both bills, states would be eligible to receive 50 percent of their formula grants allocation without regard to compliance with the core requirements and receive an additional percentage for each core requirement with which they are in compliance. S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 222(c) (1974) (page 169), provides that states receive 10 percent of their allocation for compliance with each of the 5 core requirements; H.R. 1501 § 1310(1)(T) (page 167), provides that states receive 12.5 percent for compliance with each of the 4 core requirements. The reductions for noncompliance in the Senate and House bills, 10 percent and 12.5 percent of their allocation for each core requirement, respectively, are insufficient to provide a fiscal incentive to states to continue to meet the core requirements. Moreover, there is no requirement that the state, if out of compliance, use its remaining funds to achieve compliance. Consequently, we recommend that the bill require a 50 percent reduction of a state's allocation for noncompliance with any one or more of the current four core requirements and that the state, if not in compliance, be required to spend remaining funds to bring the state back into compliance.

This provides for the receipt of at least half of the funds without regard to compliance while giving states an incentive to fully participate in the program and provide juveniles with fundamental protections.

State Advisory Groups

Though both bills would retain State Advisory Groups and give them a consulting role in development and review of state juvenile justice plans and the opportunity to review and comment on all juvenile justice grant applications submitted to the state, the bills would remove their supervisory or policy role. See S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 222 (1974) (page 169); H.R. 1501 § 1310(1)(T), amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 222 (1974) (page 166). We are concerned that this shift from supervision by juvenile justice system policy makers and practitioners to a state agency that may have an operational interest in the funds would harm the long-term effectiveness of the program and diminish its capacity to ensure a balanced approach to juvenile justice programming. Therefore, we recommend that State Advisory Groups retain supervisory policy and program responsibilities.

As a technical matter, S. 254 has two overlapping and seemingly duplicating sections related to the provision of technical and financial assistance to an organization composed of member representatives of the State Advisory Groups. S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 204(b)(9) (1974) (page 110), directs the Administrator to provide technical and financial assistance to an organization composed of member representatives of the State Advisory groups so that it may conduct an annual conference of such member groups; disseminate information, data, standards, advanced techniques, and program models; and advise the Administrator with respect to particular functions or aspects of the work of the office. S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) § 204(b)(10) (1974) (page 111), directs the Administrator to do the same. We recommend clarifying the intended differences between the two provisions or, if no differences were intended, eliminating the second section to avoid duplication.

Gang-free Schools and Communities

S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611 *et seq.*) §§ 251-54 (1974) (pages 189-203), proposes to continue the Gang-free Schools and Communities/Community-based Gang Intervention Program; H.R. 1501 does not. We recommend that the Senate gang-free program be retained in the conference bill with the following modifications. First, the program should place a greater emphasis on multidisciplinary programs that focus on prevention, intervention, and suppression; on services to families of gang-involved youth; and on educating parents of youth at high risk of gang involvement. Second, there should be an increase in the upper age limit under these provisions to age 25, because gang recruitment and membership of youth does not stop at age 22. Data indicate that most gang violence generally occurs with youth ages 15-24. We find that youth ages 19-24 are particularly influential in the gang and need to be dealt with through intervention and/or suppression before we can effectively intervene with the younger youth.

Developing, Testing, and Demonstrating New Programs/Grants for Training and Technical Assistance

We commend the inclusion of programs to provide for the development, testing, and demonstration of new programs; and for the provision of technical assistance. S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) §§ 261-64 (1974) (pages 203-05); H.R. 1501 § 1313, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) §§ 261-64 (1974) (pages 186-88). The provisions are identical in both bills, except that the House authorizes "such sums as may be necessary" for the program, and the Senate bill authorizes \$20 million, to be shared with the bill's

two gang programs (Gang-free Schools and Communities, and Community-based Gang Intervention). We urge the conferees to ensure that an adequate level of funds is authorized to support these important functions. (Currently, the OJJDP Gang Program is appropriated at \$12 million, which under this scheme would leave only \$8 million to fund demonstration, training, and technical assistance programs. This amount is insufficient to support the office's national program demonstration and support activities, and we suspect it would result in deep cuts to ongoing programs, including ones to prevent child abuse and neglect.)

Mentoring Program

S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611) §§ 271-80 (1974) (pages 205-15), establishes four grant programs to support the use of mentors for at-risk youth: (1) Local Educational Grants for local education agencies and nonprofit organizations (S. 254 § 302, amending Pub. L. No. 93-415 (18 U.S.C. § 5611) § 273(a) (1974) (page 206); (2) Family-to-Family Mentoring Grants that match volunteer families with at-risk families, allowing parents to directly work with parents and children to work directly with children S. 254 § 302, amending Pub. L. No. 93-415 (18 U.S.C. § 5611) § 273(b) (1974) (page 207)); (3) Family Mentoring Program grants that match college age or young adult mentors directly with at-risk youth and use retirement-age couples to work with the parents and siblings of at-risk youth (S. 254 § 302, amending Pub. L. No. 93-415 (18 U.S.C. § 5611) § 279 (1974) (page 212-114)); and (4) Capacity Building funding to a national organization for the purpose of expanding and replicating capacity building programs to reduce the incidence of juvenile crime and delinquency among at-risk youth (S. 254 § 302, amending Pub. L. No. 93-415 (18 U.S.C. § 5611) § 280 (1974) (pages 214-15)). A total of \$20 million dollars is authorized each year to carry out these programs (S. 254 § 302, amending Pub. L. No. 93-415 (18 U.S.C. § 5611) § 291 (1974) (pages 215-17)). The House bill does not establish any dedicated mentoring programs. Rather, mentoring activities are incorporated into the authorized purpose areas of the Formula Grants and Prevention Block Grant Programs. We laud the Senate's inclusion of a dedicated mentoring program and recommend that it be included in the conference bill.

Religiously Affiliated Organizations

Both the House and Senate bills include provisions specifying that religiously affiliated organizations should be allowed to participate, generally on the same basis as other private organizations, in programs in which nongovernmental organizations use government funds to provide certain services or benefits to individual beneficiaries of the law. Section 302 of the Senate bill would significantly amend Title II of the Juvenile Justice and Delinquency Prevention Act of 1974 ("JJDPA"), 42 U.S.C. § 5611, et seq., to create several different programs in which federal grants are provided, through states and localities, to private organizations to perform various social services. A new § 292(a) of the JJDPA would provide that "[t]he provisions of section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (42 U.S.C. § 604a) § 104 (1996), shall apply to a State or local government exercising its authority to distribute grants to applicants under this title." S. 254 § 302, amending Pub. L. No. 93-415 (42 U.S.C. § 5611 et seq.) § 292 (1974) (beginning page 217). Section 114 of the House bill similarly would add a new § 299J to the JJDPA, which also would expressly incorporate subsections (b) through (k) of § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. § 604a(b)-(k), for grant programs under Title II of the JJDPA. Incorporation of these provisions of § 104 of the PRWORA would permit religious organizations to receive funds for the purpose of assisting needy families.

Incorporation of PRWORA § 104 into Title II of the JJDPA apparently would reflect "Congress' considered judgment that religious organizations can help solve the problems" to which the proposed statute is addressed. Bowen v. Kendrick, 487 U.S. 589, 606-07 (1988). The Administration believes that

religious institutions can play an important and constructive role in providing social services. But of course this provision of public funds must be consistent with the requirements of the establishment clause. As the Supreme Court observed in Kendrick institutions with religious affiliations generally may participate equally in a neutral government financial aid program that benefits both religious and nonreligious entities, as long as government funds are not provided directly to “pervasively sectarian institutions.” See id. at 608-11. We believe that § 302 of S. 254 and § 114 of H.R. 1501 can and should be applied in a manner consistent with this requirement.

Runaway and Homeless Youth

The Administration strongly supports provisions in both bills to reauthorize the Runaway and homeless Youth Act. For over 25 years, the emergency shelter, street outreach, transitional living and related services provided by this Act have ensured the safety of tens of thousands of vulnerable young people and have helped to guide them on a path toward productive, self-sufficient adulthood. We urge the conferees to reauthorize these programs for 5 years, as included in S. 254.

We are concerned that sufficient resources and adequate time be provided should conferees include the new study requirements included in H.R. 1501.

Subtitle B: Accountability for Juvenile Offenders and Public Protection Incentive Grants

Block grant program

Both S. 254 and H.R. 1501 authorize a version of the Juvenile Accountability Incentive Block Grants (JAIBG) program, a program that has been appropriated, but not authorized, for the last two years.

Each bill amends the current program slightly differently, both renaming it the Juvenile Accountability Block Grants (JABG) program. Overall, the Department strongly supports the Senate's version, because the Senate JABG not only adds delinquency prevention to the list of permissible purposes, but also requires that 25 percent of state and local funds be spent on those prevention activities. The Department enthusiastically supports both of these amendments to the current program and urges the conferees to include both in the final bill.

Apart from that very significant change, we recommend maintaining the current program in substantially the same form. Both the House and Senate bills change the current program by establishing different funding eligibility requirements for states and units of local government, providing different formulas for the allocation of funds, and creating different mechanisms to accomplish a waiver of the local pass-through. Most notably, the Senate bill divides the JAIBG purposes into separate grant programs, including ones to assist state and local juvenile courts and to support the integration of juvenile records into criminal records database systems. (S. 254 also expands the Community-based Justice Grants for Prosecutors program in the Violent Crime Control and Law Enforcement Act of 1974 (42 U.S.C. § 13862) to allow the hiring of additional prosecutors; assist prosecutors to address drug, gang, and youth violence more effectively; and provide technology, equipment, and training for prosecutors; among other purposes.) While we enthusiastically support the Senate's prevention set-aside, we object to this splintering of these programs, and therefore urge the conferees to adopt the House's approach to the JABG, with the additional prevention purposes and the 25 percent carveout in S. 254. Working from the House bill, therefore, we recommend the following changes.

Grant Making Authority

Throughout the House bill, authorization is given to “make grants to and contracts with” various

entities. We urge the inclusion of an express authorization to make "cooperative agreements" as well. This is routine practice for OJJDP now (and for other OJP bureaus), and the authorization should be reflected throughout, as it is for BJS and NIJ in the Omnibus Crime Control and Safe Streets Act (see §§ 202 and 302).

Authorized Activities

In H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1861(b)(1) (1968) (page 6), we recommend inserting after the word "offenders" the following phrase: "including programs to enable juvenile courts and juvenile probation officers to be more effective and efficient in holding juvenile offenders accountable and reduce recidivism." We are puzzled as to why these purposes would be omitted from the current program, when we know that certain innovative court programs, including Operation Nightlight in Boston, and gun courts generally, have shown such promising results in reducing juvenile crime. Also, in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1801(b)(7) (1968) (page 7), insert after the word "crime" the following phrase: "including the training of detention or correctional personnel."

Rule Requirement

H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1801(a) (1968) (page 12), provides that states shall submit applications to the Attorney General of the United States containing such assurances and information as the Attorney General may require by "rule." Adding this rule-making requirement to the application process would cause unnecessary delays in getting funds out to the states and units of local government. We suggest using "guidelines," rather than a rule. To accomplish this change, in line 7, after "by" strike "rule" and insert "guidelines." Also, on line 16 of H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1804(a) (1968) (page 21), strike "regulations" and insert "guidelines". On line 21 of H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1804(b) (1968) (page 21), after "The" strike "regulations" and insert "guidelines."

Case Specific Reporting

We do not believe that case-specific reporting by courts that are not mandated to impose escalating sanctions in all cases is justified. Courts should be able to provide a certification that appropriate sanctions were applied in all cases. Therefore, we recommend that the following change be made in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1802(d)(2)(A)(ii) (1968) (page 14): beginning in line 24, after "in" strike "each such case" and insert "all cases."

Definition of Graduated Sanctions

The language in the last sentence of H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1802(e)(2) (1968) (pages 15-16), should be modified to provide that "A sanction may include, but is not limited to, ..." in order not to imply the exclusion of other sanctions.

Allocation of Funds

The allocation of 0.25 percent of program dollars to each state per H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(a)(1)(A) (1968) (page 16), would, at the current \$250 million appropriation, result in a loss of up to 50 percent of funding for smaller states because the current base under the JAIBG program (and that proposed by S. 254) is 0.5 percent. To accomplish this change, on line 9 of H.R. 1501 § 102, amending Pub. L. No. 90-351 (42

U.S.C. § 3796 et seq.) § 1803(a)(1)(A) (1968) (page 16), strike "0.25" and insert "0.50."

Waiver of Pass-Through Requirement

H.R. 1510 makes no provision for waiver of the 75 percent pass-through where the state bears the "primary" burden of funding for the administration of juvenile justice. Currently under the JAIBG program, 19 states have received waivers ranging from 50 percent to 100 percent, with seven bearing 100 percent of the burden. Other waiver requests are pending. A waiver provision should be included in the bill as a matter of fundamental fairness. It appears, however, that language tantamount to a waiver was added to the bill in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(a)(3)(A) (1968) (page 17). This language would establish a new pass-through percentage for states that demonstrate and certify that their law enforcement expenditures exceed a certain threshold, as calculated by a formula provided in the statute. It is unclear whether, in actuality, this formula provides the type of relief to states that the current waiver language provides. Moreover, it is unclear to what provision the citation "(1)(A)" refers: section 1803(a)(1)(A) (page 16) or section 1803(b)(1)(A) (page 18). The reference must be to the latter if the goal of the language is to change the pass-through percentage.

We recommend the following modification so that the bill provides for an effective waiver. In H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(a)(3) (1968) (page 17), line 1, after "(3)" strike "INCREASE FOR STATE RESERVE" and insert "WAIVER OF LOCAL PASS THROUGH." On line 4, strike "that" through the end and insert the following: "the State bears the primary financial burden (more than 50 percent) for the administration of juvenile justice within that state, the Administrator may waive the 75 percent pass through requirement in S. 254 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(b)(1) (1968) (pages 17-18), and substitute a lower pass through requirement in an amount that reflects the relative financial burden for the administration of juvenile justice that is borne by the State."

Consultation with Local Units

H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(a)(3)(B) (1968) (page 17), requires the Attorney General of the United States, in instances where the law enforcement expenditures of a state exceed 50 percent of the aggregate amount described in the preceding subsection to consult with as many units of local government as practicable regarding the state's proposed use of funds. We object to this provision. The heads of state agencies responsible for program administration should be tasked with consulting with units of local governments in their states.

To accomplish this change, we recommend the following modification. In H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(a)(3)(B) (1968) (page 17), lines 14-15, after (B) strike "LAW ENFORCEMENT EXPENDITURES OVER 50 PERCENT" and insert "CONSULTATION REQUIREMENT". On lines 15-18, strike "If" through "consult" and insert the following: "In submitting a waiver request under 1803(3)(B), the State shall demonstrate that it has consulted". On line 20, before "as" insert the following: "or organizations representing such units". On line 20, after "States" insert "waiver and".

Expenditure Data

H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(b)(1)(A)(i)(II) (1968) (page 18), requires law enforcement expenditure data for the three most recent calendar years. However, this expenditure data is census data that is only collected every five years, not every calendar year. The most recent law enforcement expenditure data that is available electronically is from 1992. Expenditure data from previous years is not available electronically

and, thus, is not usable for the purposes of this provision. Consequently, we recommend use of data for the most recent calendar year. To accomplish this change, we recommend the following modification. In line 12 of H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(b)(1)(A)(i)(II) (1968) (page 18), strike "three." On line 13, strike "years" and insert "year" and strike "such" and insert "complete."

Advisory Board

We recommend that the council have a planning responsibility, rather than just an advisory role. Therefore, we recommend that in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1804(b) (1968) (page 21), the section titled "ADVISORY BOARD" be replaced with the section titled "PLANNING BOARD" (line 21). In line 24, strike "an advisory board" and insert "a planning board". Strike "review the proposed uses" and insert "establish a coordinated enforcement plan for the use".

Modification of Payment Requirements

H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1805(b) (1968) (pages 22-23), provides that states or units of local government shall repay, within 27 months, funds that are not expended. We recommend that language be inserted that provides the Administrator with the authority to grant extensions when appropriate. To accomplish this change, we recommend that in line 13, after "Attorney General," the following phrase be inserted: ", unless either such time periods are extended by the Administrator for good cause." At the end of H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1805(c) (1968) (page 23), after the word "costs" insert the following: ", except that the Federal share in relation to cost of constructing juvenile detention or correctional facilities shall be limited to 50 percent of approved cost."

Use of Funds

H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1807(a)(2) (1968) (page 24), is in potential conflict with H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1805(b)(1) (1968) (pages 22- 23), in that the former requires states to use the trust fund amounts during a period not to exceed two years from the date of the "first grant payment" to the state or specially qualified unit, whereas the latter requires states to repay within 27 months of the "receipt of funds." These terms ("first grant payment" and "receipt of funds") should be made consistent to any avoid potential conflict. To accomplish this change, we recommend the following modification. After the word "date" strike "the first grant payment is made to" and insert "funds are initially received by".

Definition of Unit of Local Government

The definition of unit of local government in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1808(1) (1968) (page 25), should address Louisiana's unique parish system of government. To achieve this change, we recommend the following modification. Replace the language in "(B)" with "any law enforcement district or judicial enforcement district that (i) is established under applicable state law; and (ii) has the authority to, in a manner independent of other state entities, establishes a budget and raise revenues; and." Re-designate the current "(B)" as a new section "(C)".

Administration

Currently, the Juvenile Accountability Incentive Block Grant Program has a three percent

set-aside for research/evaluation/demonstration and a two percent set-aside for training and technical assistance. We believe that these set-asides should be continued by incorporation into the bill. These funds provide critical support services of benefit to the states and the thousands of units of local government receiving funds under this program.

H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1809 (1968) (page 27), provides for not more than three percent to be used for all of the core functions: research, evaluation, demonstration, training/technical assistance, and administration. This funding level would be insufficient to carry out these functions. Instead, we recommend that the bill mirror the existing implementation of this program. Further, inasmuch as under the restructure plan the research and evaluation function would be administered by the National Institute of Justice, and the remaining functions by the Juvenile Justice Office, we recommend that these functions each be given a discrete funding allocation. Thus at line 12 it should say, " .. to the Attorney General for research and evaluation consistent for this program. Not more than two percent of such amount shall be available for training and technical assistance, and not more than one percent of the amount authorized shall be available for administration of the program."

Construction Match

The 50/50 match for construction should be retained in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) (1968). To accomplish this change, the following language should be inserted: "The Federal share limitation shall be 50 percent in relation to the costs of constructing a permanent juvenile corrections facility."

Funding Condition

With regard to the 10 percent reduction in funds for states not having in place a policy that requires the drivers license of a juvenile found to illegally possess a firearm or use a firearm in the commission of a crime or act of delinquency to be suspended until age 21, we note the following concern. (This provision appears in H.R. 1501 § 102, amending Pub. L. No. 90-351 (42 U.S.C. § 3796 et seq.) § 1803(f) (1968) (page 20).) Although we have inquired, we have been unable to identify any state that has such a provision in place. Therefore, if the Congress intends for states to change their laws in order to be eligible for full funding, it may be appropriate to include an effective date that extends an appropriate amount of time into the future.

Reimbursement of States for Cost of Incarcerating Juvenile Aliens

S. 254 § 325(a), amending Pub. L. No. 99-603 (8 U.S.C. § 1365) § 501 (1986) (pages 302-25), states that this provision will serve to amend § 501 of the Immigration Reform and Control Act of 1986. However, if § 325 seeks to add juveniles to the population currently targeted by the State Criminal Alien Assistance Program (SCAAP), this is an incorrect reference. It should be § 20301 (Incarceration of Undocumented Criminal Aliens) of The Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. No. 104-208 § 241), codified at § 241 of the Immigration and Nationality Act (8 U.S.C. § 1251(i)) or (8 U.S.C.A. 1231(i)(West Supp. 1998)). Note that § 501 Immigration Reform and Control Act of 1986 are also referenced in subsection (c)(3).

While we are not unsympathetic to those states and localities that incarcerate juvenile aliens, we would like to point out that having SCAAP reimburse applicants for the costs of incarcerating juvenile aliens may diffuse the effectiveness of the program. Not only will it add to the number of claims paid for with the same pot of money, but it could also mean that more payments are made without firm verification of alien status. That is, compared to adults, it is less likely that juveniles will have come into contact with the Immigration and Naturalization Service, so their names will not be in the INS database and their alien status will not be confirmed

when checked against records submitted by applicants from state and local correctional facilities. However, applicants are given credit for a fairly high percentage of inmates they have identified as aliens whether or not a match to the INS file occurs.

Subtitle D: Parenting as Prevention

We support this subtitle, which authorizes the Department of Health and Human Services, in conjunction with the Departments of Justice, Education, Housing and Urban Development, and Defense, to establish a parenting support and education program. The program would have three major components: a National Parenting Support and Education Commission; a state and local parenting support and education program; and a grant program addressing the problem of violence-related stress to parents and children.

Title IV – Voluntary Media Agreements for Children's Protection

Antitrust Exemption for Agreements to Develop and Engage in Procedures to Ensure Compliance by Retailers with Limitations on Dissemination of Particular Materials to Children

Subtitle A of Title IV of S.254, entitled the "Children's Protection Act of 1999," would codify two exemptions to the federal antitrust laws. We believe that the second of these exemptions — which would be created by S. 254 § 405(a) — would raise difficult constitutional questions and would be vulnerable to constitutional challenge.

Section 404 of S. 254 would recognize an exemption to the federal antitrust laws, providing that those laws shall not apply to "any joint discussion, consideration, review, action, or agreement by or among persons in the entertainment industry for the purpose of developing and disseminating voluntary guidelines" that are designed, *inter alia*, to "promote telecast material that is educational, informational, or otherwise beneficial to the development of children." See section 404(a)(2).

Section 405(a)(1) of S. 254 would establish another antitrust exemption, which would affect the conduct not just of the persons in the entertainment industry, but also of persons outside that industry who are in the business of renting, selling and exhibiting speech products. It would exempt from the antitrust laws:

any discussion, consideration, review, action, or agreement between and among persons in the motion picture, recording, or video game industry for the purpose of and limited to the development or enforcement of voluntary guidelines, procedures, and mechanisms designed to ensure compliance by [specified] persons and entities . . . with ratings and labeling systems to identify and limit dissemination of sexual, violent, or other indecent material to children.

Section 405(a)(2), in turn, would identify the "persons and entities" whose "compliance" with the labeling and ratings systems could be the subject of the "guidelines, procedures, and mechanisms" that would be permitted under the exempted industry-wide agreements — namely, persons engaged in retail sales of motion pictures, recordings, or video games, theater owners and operators, and video game arcade owners and operators.

Section 405, in other words, would permit persons in certain entertainment industries not only to reach agreements among themselves to create "rating and labeling systems" for their products, but also to

combine with one another to establish “procedures” and “mechanisms” for ensuring that retailers “comply” with such rating and labeling systems. It would appear that these enforcement “mechanisms” could include what would otherwise be unlawful economic sanctions, such as concerted refusals, by the consortium, to sell products to retailers who fail to comply with agreed-upon standards for the “dissemination” of certain materials to children. For example, it would appear that the distributors of motion pictures could jointly impose conditions on the exhibition of their films — such as by collectively agreeing not to distribute films to theaters that fail to exclude minors from admission to films with certain ratings.

Although the jointly agreed-upon restrictions on retailers would be “develop[ed]” and “enforce[d]” by private entities rather than by the government, we believe there is a significant risk of a constitutional challenge to the statutory antitrust exemption itself. It is impossible to predict the likelihood that such a challenge would succeed. We believe, however, that the bill should be modified in order to eliminate an ambiguity that significantly increases its vulnerability to constitutional challenge.

Given the broad standing rules that apply in the First Amendment context and the economic injuries retailers might sustain under the proposed antitrust exemption, we think that, at a minimum, retailers would have standing to challenge the law on First Amendment grounds. See Virginia v. American Booksellers Ass’n, 484 U.S. 383, 392-93 & n.6 (1988). We also believe that such a constitutional challenge would not be foreclosed by the state action doctrine. Ordinarily, private enforcement of privately developed guidelines and procedures would not be considered state action, and therefore would not implicate the First Amendment. See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (plurality opinion) (“We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech.”). In Denver Area itself, however, all members of an otherwise divided Court accepted the notion that First Amendment analysis should be applied to enactment of a federal statute itself — which is, of course, state action — where that legislative enactment alters the legal relations between private entities in a way that empowers one category of private entities to control or suppress the speech of other private entities. See id. at 737-39 (plurality opinion); id. at 782 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The antitrust exemption in section 405 of S. 254 would, like certain of the statutory provisions at issue in Denver Area, be a content-based exemption that could “alter[] legal relations between persons, including the selective withdrawal from one group of legal protections against private acts.” Id. at 782 (Kennedy, concurring in part, concurring in the judgment in part, and dissenting in part). Specifically, the exemption might allow producers and distributors of certain entertainment products to exercise a kind of monopoly power over retailers that the producers and distributors of other products do not enjoy, and to do so in a manner that may restrict retailers’ ability to make available to minors certain kinds of movies, videos, and recordings. This alteration in the legal relations and “speech rights” of distributors and retailers, moreover, would be with respect, and limited, to a particular category of product content.

Therefore, it is very possible that section 405(a) would be subject to constitutional challenge based on arguments similar to those the Court considered in Denver Area. It is hazardous to predict, however, how the Court would resolve such a challenge in this context, because the plurality in Denver Area expressly limited its holding to the particular context before it and declined to decide how the case fit within traditional First Amendment categories. Id. at 741-42 (“no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes”); see also id. at 775-78 (Souter, J., concurring).

In Denver Area, the Court invalidated a provision of the Cable Television Consumer Protection and Competition Act of 1992 that permitted cable operators to prohibit “sexually explicit” programming on “public, educational, or governmental channels” (channels that local governments have historically required cable operators to set aside for public purposes). Although there was no opinion of the Court for this portion of the decision, the plurality concluded that the statute

could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract. In doing so, it would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear.

Id. at 766 (plurality opinion). Thus, the plurality concluded that the Government had not sustained its burden of showing that the statute was “necessary to protect children or that it is appropriately tailored to secure that end.” Id. At the same time, the Court upheld a similar provision that permitted cable operators to prohibit “patently offensive” programming on “leased channels,” which federal law requires to be reserved for commercial lease by unaffiliated third-party “programmers,” and over which cable operators were prohibited by federal law since 1984 from exercising any editorial control. In finding this provision constitutional, the plurality emphasized the cable operators’ First Amendment interests in being restored a degree of editorial control that Congress had removed eight years before. Id. at 743-44, 747.

In this case, as in Denver Area, there is a “complex balance of interests” to consider. Id. at 747 (plurality opinion). But the balance here would be quite different in several respects than in Denver Area itself, because the background legal regime established by the antitrust laws is significantly different than that created by cable access laws; and the preexisting legal relationships among the manufacturers, distributors, and retailers of entertainment products are likely to be quite different from the relationships between cable operators, television programmers, local community and nonprofit supervising boards, and access managers at issue in Denver Area.

The exemption established by section 405 would, to be sure, share certain of the characteristics of the statute that the Court struck down in Denver Area, and would in certain

respects be more problematic than the statute the Court upheld. For instance, the exemption would not “significantly restore” to the exempted entities a degree of editorial control that they had once had, see id. at 761, 766 (plurality opinion); instead, it would cede to such parties a new license to engage in conduct that has long been considered a violation of antitrust laws. Furthermore, the types of speech to which the exemption would apply (“sexual, violent, or other indecent material”) is potentially broader than the narrow category of sexually indecent materials that the cable operators were empowered to restrict in Denver Area. See id. at 751-53 (plurality opinion).

Nevertheless, there is one significant consideration that would appear to make the exemption here much less constitutionally troublesome than the provision that the Court invalidated in Denver Area. In Denver Area, the statute empowered entities that were “conduits” for the speech of others (the cable operators), see id. at 793 (Kennedy, concurring in part, concurring in the judgment in part, and dissenting in part), to impose conditions on programming created and distributed by other persons and entities (the programmers). In this case, the antitrust exemption would be provided to the entities that produce and distribute the entertainment products in the first instance, and (potentially) would adversely affect the power of speech “conduits” – the retailers – to further distribute the speech to third parties (minors). The balance of speech interests between the empowered and the disfavored parties, in other words, appears to be quite different than was present in Denver Area, and this difference might well render the section 405(a) exemption much less constitutionally problematic than the provision the Court invalidated in Denver Area.

It is important to emphasize, however, that the constitutionality of section 405(a) would depend, in large part, on the breadth of the exemption that that provision would establish, and, in particular, on resolution of a certain ambiguity raised by section 405(a). Although the question is far from clear, section 405(a) could be construed to permit a consortium of industry members, not only to combine to refuse to sell their own products to retailers who do not agree to enforce the consortium’s dissemination restrictions (the scenario discussed above), but also, to refuse to sell or lease their products to retailers who market the products of other manufacturers and distributors that are not part of the consortium and that do not abide by the consortium’s rating and labeling systems. The latter sort of concerted refusal obviously would have a much greater impact on the speech rights of the retailers, and would, moreover, restrict the ability of producers and distributors outside the consortium to distribute their own movies, videos, and recordings. Such an additional shifting of power to the cooperating entertainment producers and distributors, and away from the retailers and from noncooperating producers, likely would make the exemption significantly more difficult to defend against a First Amendment challenge, because it “would greatly increase the risk that certain categories of programming [and other entertainment products] (say, borderline offensive programs) will not appear” at all in the marketplace. Denver Area, 518 U.S. at 766 (plurality opinion). Accordingly, we recommend that Congress clarify that section 405(a)’s exemption is not intended to provide cooperating entities with a power of this scope.

Title V – General Firearms Provisions

S. 254 §§ 501-504 (pages 340-61) were expressly rendered null and void, and superseded in their entirety, by S. 254 § 1635 (pages 536-51). See discussion of § 1635, *infra*. We strongly support § 1635 in its entirety and its repeal of §§ 501-04. The repealed sections weakened current law regulating the sale of guns at gun shows by proposing a complicated scheme for background checks at gun shows and opening up new loopholes in the law by giving law enforcement less time to complete background checks; exempting pawnbrokers from conducting background checks on people who redeem pawned guns, even though they are, according to one study, five times more likely to be prohibited; and upsetting more than 30 years of settled law regulating the ability of licensees to sell guns at out-of-state gun shows.

Title VI – Restricting Juvenile Access to Certain Firearms

Both the Senate and House bills amend existing law by restricting juvenile access to firearms and increasing penalties for both juveniles who unlawfully possess certain firearms and adults who transfer prohibited firearms to juveniles. S. 254 §§ 601 & 851 (pages 361 & 389), and H.R. 1501 §§ 401-02 (pages 83-86), amend the Youth Handgun Safety Act, 18 U.S.C. § 922(x), and provide enhanced penalties for possession and transfer violations. The enhanced penalties for adults who transfer firearms unlawfully to juveniles are addressed in the discussion of section 210(b) of S. 254, *supra*. This section will discuss the proposals to broaden the scope of coverage of the Youth Handgun Safety Act and increase the penalties for juvenile violators.

Scope of Coverage

S. 254 and H.R. 1501 both seek to expand the Youth Handgun Safety Act's ban on firearms possession by juveniles to include semiautomatic assault weapons and large capacity ammunition clips, regardless of their date of manufacture. S. 254 § 601(b) amends 18 U.S.C. § 922(x) (page 364), to prohibit the transfer to and possession by juveniles of semiautomatic assault weapons and large capacity ammunition clips. S. 254 § 851(b) also amends 18 U.S.C. § 922(x) (page 393), to add semiautomatic assault weapons, but omits large capacity ammunition clips. Both § 851 and H.R. 1501 § 401 contain significant drafting errors. Section 851(b) adds a definition of juvenile, which is unnecessary, and results in an internal referencing error discussed below. H.R. 1501 § 401 fails to prohibit the transfer to or possession by juveniles of semiautomatic assault weapons and large capacity ammunition clips, although it provides penalties for violations involving possession and use of such items.

Sections 601 and 851 of the Senate bill also provide exceptions for the transfer to and possession by juveniles of semiautomatic assault weapons and large capacity ammunition clips. These include exceptions for semiautomatic assault weapons possessed and used by a juvenile in the military; in the course of employment, farming, ranching, or hunting activities; or for target practice. Other than allowing juveniles between the ages of 18 and 21 who are in the military to possess such weapons, we do not believe that there is any reason or justification for providing exceptions to the transfer or possession of semiautomatic assault weapons and large capacity ammunition clips. And with respect to juveniles in the military, there is no need for an exemption in this provision specifically authorizing the possession of semiautomatic assault weapons by individuals in the military. Pursuant to 18 U.S.C. § 925(a), the prohibitions of the Gun Control Act generally do not apply to the possession of firearms for official use by governmental entities. Accordingly, the possession of semiautomatic assault weapons by juveniles for

official use in the military or a law enforcement agency would already be exempt from the prohibitions of 18 U.S.C. § 922(x). Therefore, we oppose the inclusion in this section of any exceptions for the transfer or possession of semiautomatic assault weapons or large capacity ammunition clips and urge that they be stricken.

We also note that neither the Senate bill nor the House bill contains the important provision in the Administration Bill to raise the age of eligibility to possess a handgun or a semiautomatic assault weapon from 18 to 21, and increase the penalties for possession or transfer of such firearms by or to persons under the age of 21. This omission is significant, because youth gun access is an especially serious problem. Studies have shown that when guns replace fists or knives to settle a dispute or commit a robbery, the chance of a fatality is many times greater. In fact, youth homicide victimization rates doubled from the mid-1980s to the early 1990s, increasing at a higher rate than any other violent crimes for which statistics are available. This rise in youth homicide is due entirely to guns. Between 1990 and 1996, there were an average of over 3,200 gun homicides among young people ages 19 and under.

We feel strongly that, in light of these facts, the Youth Handgun Safety Act should be strengthened to prohibit handgun possession by youths under 21 years of age, while retaining the appropriate exceptions for the possession of a handgun by someone under the age of 21 in specific circumstances. We look forward to working with the conferees to reconcile the differences between the Senate and House versions and to strengthen this important proposal by improving on the drafting of the provisions and expanding their coverage.

Increased Penalties for Juvenile Violators

The Senate bill contains two inconsistent penalty provisions for juveniles who violate the Youth Handgun Safety Act: Sections 601 and 851 (pages 361 & 389). The House bill contains a provision to change the penalties for juveniles who violate the Youth Handgun Safety Act in Section 401 (page 83).

Section 601(a) of S. 254 retains the current base offense maximum of one year, and retains probation as a mandatory sentence for certain juvenile offenders. It adds a maximum 20-year sentence for juvenile offenders whose 922(x) offenses are also violations of the Gun Free Schools Zones Act if the juvenile had the intent to carry, possess, discharge or use the weapon in the commission of a violent felony.

Section 851(a) of S. 254 eliminates mandatory probation as the sentence for first-time juvenile offenders, and raises the base offense maximum sentence to 5 years. It raises the maximum sentence to 20 years if the 922(x)(2) offense is also a violation of the Gun Free Schools Zones Act and the juvenile had the intent to carry, possess, discharge or use the firearm in the commission of a violent felony. Section 851's unnecessary addition of a definition of juvenile at 922(x)(1) causes the transfer and possession offenses to become (x)(2) and (x)(3), respectively, and accordingly, as drafted, § 851 references the wrong substantive provisions in its amendment to the penalty provisions. In addition, one of the provisions in S. 254 § 851 omits reference to large capacity ammunition clips.

H.R. 1501 § 401 (page 83), removes the mandatory probation provision for juvenile possession while retaining the one-year maximum sentence for the base offense. Section 401 of the House bill contains proposals to increase the maximum penalties for unlawful possession of firearms by juveniles with no prior record, with the intent to possess on school grounds (or knowing that another juvenile intends to possess on school grounds), or with the intent to use the firearm in the commission of a serious violent felony.

We support the elimination of mandatory probation for juvenile violators of the Youth Handgun Safety Act. In addition, the Administration supports legislation that is not included either in the Senate or House bill to impose a maximum five-year sentence if the offense is a second or subsequent violation or if it is a first violation and the juvenile has a prior conviction or adjudication of delinquency for a serious violent felony, as defined in 18 U.S.C. § 3559(c).

Although the Administration generally supports legislation to increase the maximum sentence if the possession offense also involved the intent to violate the Gun Free School Zones Act, 18 U.S.C. § 922(q), or the intent to commit a serious violent felony, we do not support these provisions in the Senate or House provisions as drafted. Enforcement problems may exist with the Senate's proposal regarding Gun Free School Zones Act violations, and the House provisions are confusing and ambiguous. We look forward to working with the conferees to reconcile the two bills and produce legislation that increases the maximum sentence for firearms possession offenses that implicate the Gun Free School Zones Act, and eliminates the ambiguities and flaws in the Senate and House proposals.

Title VII – Assault Weapons

Ban on Importing Large Capacity Ammunition Feeding Devices

S. 254 § 702 amends 18 U.S.C. § 922(w) (pages 370-71) to prohibit the importation of large capacity ammunition feeding devices, regardless of their date of manufacture. We support this provision and note that the Senate adopted an instruction to its conferees that this provision be included in the conference report.

We note that S. 254 § 704 (page 371) would appear to delay the effective date of the provision by 180 days from the date of enactment. However, the text of § 704 actually exempts the substantive provisions from the delayed effective date and applies only to the short title. Thus, the ban becomes effective immediately as presently drafted. The Administration supports an immediate effective date for this section.

Due to a loophole in existing law foreign large capacity ammunition feeding devices that were manufactured prior to September 13, 1994, may still be imported into the United States today. Section 702 of the Senate bill would close this loophole to prohibit the importation of any large capacity ammunition feeding device, regardless of its date of manufacture.

The Administration supports the reinstatement of this provision into the conference bill. Given the vast worldwide supply of magazines with a capacity of more than 10 rounds, the amendment is necessary to limit the commercial sale of these devices. It is also consistent with the original congressional intent to limit access to such magazines by the general public. We would note, however, that the provision as currently drafted would prohibit the possession of large capacity ammunition feeding devices that were lawfully imported between September 13, 1994, and the effective date of this section. We recommend that the conferees add a new "grandfather" provision to clarify that such devices may continue to be lawfully possessed and transferred. We look forward to working with the conferees to provide language on this technical correction.

Title VIII – Effective Gun Law Enforcement

Criminal Use of Firearms by Felons

S. 254 § 803 (pages 375-77), and H.R. 1501 § 301 (pages 77-79), both contain provisions designed to increase the number of federal firearms prosecutions by requiring the Department of Justice

to establish agreements with local authorities for the referral of gun cases to the Bureau of Alcohol, Tobacco, and Firearms and the U.S. Attorneys. The Senate bill calls its program "CUFF" (Criminal Use of Firearms by Felons), while the House bill calls its program the "Armed Criminal Apprehension Program." The programs "provide for the establishment of agreements with State and local law enforcement officials for the referral" of persons arrested for firearms violations to federal officials for prosecution. Under section 301(b)(5) of the House bill and section 803(b)(5) of the Senate bill, the program "shall . . . ensure that each person referred to the United States Attorney" by state or local officials "be charged with a violation of the most serious Federal firearm offense consistent with the act committed." (Emphasis added.)

These provisions appear designed to impose mandatory duties on the Executive Branch with respect to prosecutorial charging decisions. Once a state or local official refers a case for prosecution, the provisions appear to require the Executive Branch to charge "the most serious Federal firearm offense consistent with the act committed." They appear to do so, moreover, despite any competing law enforcement considerations, such as whether other prosecutions might be advanced by granting the defendant some form of immunity in order to compel his or her testimony, or whether the state has established its own intensive firearms prosecutions program. Because either provision may be interpreted to require federal prosecutors to prosecute all gun violations that occur in their respective federal districts, rather than sharing responsibility for bringing such prosecutions with state and local prosecutors, these provisions raise serious concerns for the Administration.

(Prosecutor)
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The Administration fully supports the goal of enhanced prosecution of those who violate our Nation's gun laws. Earlier this year, the President directed the Attorney General and the Secretary of the Treasury to develop a national integrated firearms violence reduction strategy that includes elements to increase the investigation and prosecution of significant firearms violations, including illegal possession, use, and trafficking. As we have recognized time and again, every federal government effort to reduce violent crime, including gun crime, must be rooted in collaboration or partnership with state and local authorities. As Attorney General Thornburgh's memorandum implementing the Bush Administration's firearms enforcement effort, called "Project Triggerlock," put it: "Since violent crime is essentially 'street crime,' it is usually investigated and prosecuted at the state or local level. Project Triggerlock is not intended to compete with or supplant the traditional local response to violent crime. Rather, it is intended to assist state and local authorities in this area of enforcement by providing for complementary federal prosecutions under U.S. firearms statutes of the most dangerous violent offenders in each community."

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In contrast, both the Senate bill's CUFF provision and the House bill's Armed Criminal Apprehension Program, as drafted, would interfere with the established relationships between federal, state and local law enforcement, and would create a situation in which federal programs attempt to compete with or supplant the state and local gun crime efforts, with serious negative effects on our Nation's collective ability to reduce and control crime. For instance, mandating federal charges without consideration of local factors might actually result in lesser sanctions being imposed on those who commit gun crimes. In many states, the state gun charge arising from facts that could also give rise to a federal gun charge will actually carry a higher penalty than the federal penalty. And in some states, federal prosecution of gun charges would lead to double jeopardy problems for the state prosecution of a rape, robbery, or murder stemming from the same incident.

Most state systems have a significantly greater volume of resources available to detect, investigate, and prosecute gun crimes, and when those states are able and willing effectively to prosecute gun crimes, a compelling federal interest in wholesale federalization is absent. On the other hand, mandating federal charges would impose significant fiscal burdens on the scarce federal resources needed to investigate, prosecute, and imprison gun criminals, and would require the diversion of such federal resources to the detriment of other important priorities, such as drug and other violent crime.

In addition to these significant policy concerns, the provisions would appear to violate constitutional separation of powers. Article II of the Constitution places the power to enforce the laws solely in the Executive Branch of government. The decision to charge a particular offense is a core Executive function. As the Supreme Court has observed, "the Executive Branch has the exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), cert. denied, 389 U.S. 841 (1967); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 381-82 (2d Cir. 1973). The proposed provisions, however, would appear to diminish the ability of the Executive Branch to determine how best to enforce the law. Indeed, by requiring the institution of particular prosecutions for particular offenses whenever state or local officials make a referral, the provisions appear to transfer to the those officials the authority to determine for the Executive Branch how the criminal law should be enforced. Because Congress may not unduly interfere with the meaningful Executive control of the administration of the laws, the provisions would appear to violate separation of powers. See Nathan v. Smith, 737 F.2d 1069, 1077 (D.C. Cir. 1984) (Bork, J., concurring) (Congress's attempt to control law enforcement decisions by authorizing a writ of mandamus or a private right of action to compel investigation or prosecution "would raise serious constitutional questions relating to the separation of powers."); cf. Printz v. United States, 521 U.S. 898, 923 (1997).

We would urge that section 301(b)(5) of the House bill and section 803(b)(5) of the Senate bill be deleted or amended to specify that the United States Attorney or the Attorney General retain the discretion to decide whether to charge a particular Federal violation once state or local officials refer a case for prosecution.

Redrafting the provisions in this way would be entirely consistent with the approach already in place in jurisdictions with intensive firearms prosecution programs. As the U.S. Attorney for the Eastern District of Virginia, Helen Fahey explained her district's creation and implementation of "Project Exile" in Richmond, but not in northern Virginia, in testimony before a Senate Judiciary Committee subcommittee: "We are not doing it in Northern Virginia because we have sufficient police resources, prosecution resources, and court resources to deal with the problems; whereas, I think when we started in Richmond, the local police, prosecutors, and courts were absolutely overwhelmed by the number of very, very serious cases." Review of Department of Justice Firearm Prosecutions: Hearings Before the Subcomm. On Criminal Justice

Oversight of the Senate Comm. on Judiciary, 106th Cong. (Mar. 22, 1999).

The Administration supports a firearms enforcement policy that encourages jurisdictions to distribute firearms prosecutions between federal and local prosecutors in a way that maximizes prosecutions and punishment and efficiently uses scarce investigative and prosecutive resources. As such, the Administration prefers the amendment offered by Representative George Gekas (R-PA) that was submitted to the House Rules Committee but was not considered by the full House, to either the Senate or the House bill. The amendment would assure that, in making charging decisions for federal firearms prosecutions, a U.S. Attorney, in coordination with state and local law enforcement officials, would assess the available penalties, the possible effect that a federal prosecution would have on related state or federal prosecutions, the available investigative and prosecutorial resources at the federal, state, and local levels, and the likelihood of conviction in either a federal or state prosecution. We would be happy to work with the conferees to develop language that assures enhanced prosecution of firearms crime without unduly interfering with state and local violent crime reduction efforts.

We offer the following additional more technical comments on the Senate and House bills. S. 254 § 803(b)(2) (page 376), and H.R. 1501 § 301(b)(2) (page 78), require that the intensive firearms prosecution programs be based on agreements with state and local law enforcement officials providing for the referral by state and local law enforcement officials to the ATF and the U.S. Attorney of persons arrested for violations of various federal firearms statutes. If this provision is interpreted literally, it would have little impact, since state and local law enforcement officials rarely arrest persons on federal charges. However, if this provision were interpreted more broadly, it could require state and local officials to refer all persons arrested on state charges that constitute possible federal law violations to federal officials for investigation and prosecution. We would suggest clarifying this referral provision to indicate that state and local law enforcement should be encouraged to refer firearms cases for federal prosecution in appropriate circumstances.

Section 803(b)(4), of the Senate bill and § 301(b)(4), of the House bill provide for the hiring of ATF agents to investigate violations of firearms laws. The language should be clarified to indicate that the Department of the Treasury, and not a U.S. Attorney or the Department of Justice, is responsible for the hiring of ATF agents.

S. 254 § 803(b)(5) (page 376), and H.R. 1501 § 301(b)(5) (page 78), require the United States Attorney's office to "ensure that each person referred to the U.S. Attorney [for a gun violation] be charged with a violation of the most serious Federal firearm offense consistent with the act committed." This language could be construed to require federal charges to be filed for all referrals, even when there are evidentiary problems, or when it makes more sense for other reasons for the case to be handled at the local level.

The House bill includes a broader range of gun crimes in this program (all of chapter 44 of Title 18), compared to the Senate bill, which specifies certain gun statutes (§§ 922(a)(6), 922(g)(1) through (3), 922(j), 922(q), 922(k), and 924(c) of Title 18, and §§ 5861 (d) and (h) of

the Internal Revenue Code). The Senate bill would apply this requirement in 25 jurisdictions based on FBI crime statistics, while the House bill would apply this requirement to all gun violations nationwide. The Senate bill requires that the 25 jurisdictions to be included in this program would be the 10 jurisdictions with the highest total number of violent crimes according to the FBI Uniform Crime Report for 1998, and the 15 jurisdictions with the highest per capita rate of violent crime. Neither the Senate formula, nor the House bill, take into account many of the important factors listed above that are necessary for a successful firearms prosecution program. Local factors or the circumstances surrounding an individual case often will be important for determining whether federal firearms prosecutions are appropriate.

H.R. 1501 § 310(d) (page 79), provides authority for the Attorney General to grant waivers of the program requirements of § 301(b) with respect to a particular U.S. Attorney pursuant to guidelines to be established by the Attorney General. The Senate bill does not include such waiver authority. The guidelines are required to take into consideration the number of Assistant U.S. Attorneys in the office making the request and the level of violent youth crime committed in the judicial district. We believe that a waiver provision is essential if Congress chooses to mandate the establishment of an intensive federal firearms prosecution program, as described in either the Senate bill or the House bill. However, in order to take into account all the relevant considerations, the waiver guidelines should include all the factors included by the Gekas amendment.

Finally, we recommend that S. 254 § 803(c)(2) (page 377), and H.R. 1501 § 301(c)(2) (page 79), should be revised to "encourage law-abiding citizens to report the illegal possession of firearms to authorities" rather than to "encourage law-abiding citizens to report the possession of illegal firearms to authorities," to make clear that illegal possession, not just possession of illegal weapons, should be reported.

Apprehension and Treatment of Armed Violent Criminals

We strongly support S. 254 § 811, amending Pub. L. No. 93-619 (18 U.S.C. § 3156(a)(4)) (1974) (pages 380-81), and H.R. 1501 § 602, amending Pub. L. No. 93-619 (18 U.S.C. § 3156(a)(4)) (1974) (pages 93-94), which amends the Bail Reform Act to add the felon-in-possession offenses for firearms and explosives within the Act's definition of "crime of violence." This will mean that the courts may, on a proper showing of dangerousness, impose pretrial detention on individuals charged with these offenses, consistent with the existing (but sparse) case law.

Section 811 also contains a prohibition on the imposition of probation for a violation of 18 U.S.C. § 924(a)(2) if the defendant has a previous conviction for a violent felony or a serious drug offense. Violations of (a)(2) (which proscribe a "knowing" violation of any of a series of enumerated firearms statutes, including the felon-in-possession and machine gun provisions) carry a ten-year maximum prison term. The provision is of limited practical effect because the guideline sentence, even for a person with no criminal history, would not call for probation. Nevertheless, the Administration does not oppose it.

Youth Crime Gun Interdiction Initiative (YCGII)

S. 254 § 821 (pages 381-83) and H.R. 1501 § 109 (page 40-42) provide for the expansion of the Youth Crime Gun Interdiction Initiative (YCGII), an enforcement program of the Bureau of Alcohol, Tobacco and Firearms to investigate and arrest illegal suppliers of guns to juveniles and youth and

maximize the development of information to support investigations of youth gun violence. The Senate bill authorizes YCGII to be expanded to 75 cities by FY2000, 150 cities by FY2002, and 250 cities by FY2003, provides for information sharing, and mandates new grant awards to participating entities. The House bill authorizes the expansion of YCGII to 75 cities, provides for information sharing, requires certain reports to Congress, and authorizes an appropriation. The Administration supports the authorization of YCGII, prefers the House version as more consistent with the existing program and commensurate with funding requirements, and looks forward to working with the conferees to reconcile the two versions.

Gun Prosecution Data

S. 254 § 831 (pages 383-86) and H.R. 1501 § 302 (page 80) impose reporting requirements on the Department of Justice regarding gun prosecutions. While we acknowledge the importance of reporting to Congress concerning the activities of the Department of Justice, these requirements are more burdensome than necessary. Section 831(a) of the Senate bill would require the Attorney General to submit annual reports to designated congressional committees respecting certain "cases" — namely, those described in section 831(b) as those "presented to the Department of Justice for review or prosecution, in which the objective facts of the case provide probable cause to believe that there has been a violation of [18 U.S.C. § 922]." The provision would require (in subsections 831(c)(1)-(2)) that the annual report include, inter alia, "information indicating . . . whether in any such case, a decision has been made not to charge an individual with a violation of [§ 922] or any other violation of Federal criminal law; [and] the reason for such failure to seek or obtain a charge." It also would require (in subsection 831(c)(7)) that, where a charge under § 922 is brought, but where the government enters into a plea agreement that does not result in a conviction under § 922, that the annual report include "information indicating . . . the reason for the failure to seek or obtain a conviction under [§ 922]."

Section 831 might be construed to require the Department to disclose charging decisions in pending investigations before the fact of such decisions would otherwise be made available to the public (including to the persons who might be charged). Such a requirement would impermissibly infringe upon the Executive's constitutional authority to protect the confidentiality and integrity of ongoing criminal investigations. It might also be read to require the Department to identify individuals who have been investigated but not charged. However, the provision could be read alternatively to permit the Attorney General to file a report that identifies cases in a way that does not reveal confidential information about an ongoing investigation. In order to avoid the constitutional concerns that otherwise would be raised, we would construe the provision in this fashion.

Section 302 of the House bill provides for a more reasonable annual reporting requirement, although paragraph (4) provides for the collection of the number of individuals held without bond (in anticipation of prosecution under the firearms program), which is data that the Department of Justice does not collect and would be more appropriately collected from the courts. We believe that there are much better ways that the Department can communicate with the Congress about its enforcement efforts than through the reporting requirements as drafted, and we look forward to working with the conferees to ensure that any new reporting requirements are not so burdensome as to interfere with law enforcement activities.

Firearms Possession by Violent Juvenile Offenders

S. 254 § 841, amending 18 U.S.C. § 921(a)(20) (pages 386-89), and S. 254 § 1601, amending 18 U.S.C. § 921(a)(20) (pages 466-469), are identical provisions relating to a gun ban for juveniles adjudicated delinquent for certain felonies. Although the House bill does not contain a parallel provision, the House, during consideration of H.R. 2122, did adopt an amendment, proposed by Representative Rogan, which the Administration prefers to the Senate version. The amendment, although adopted overwhelmingly by the full House, was defeated when the overall bill, H.R. 2122, was defeated.

The Administration strongly recommends that the Senate provision be amended in three ways. First, the effective date provisions of the Senate bill are unnecessary. These provisions state that the amendments will not be effective until 30 days after the Attorney General certifies that records of juvenile adjudications are routinely available in the National Instant Criminal Background Check System (NICS). There is absolutely no reason to make this category of prohibited persons contingent upon the availability of records in NICS. There are existing categories of prohibited persons, such as persons committed to mental institutions, for which records are not generally available to NICS. However, the records available to NICS may still be used to deny access to firearms to prohibited persons, and those prohibited persons who obtain access to firearms may still be prosecuted, notwithstanding the fact that NICS does not contain records regarding this firearms disability. There is absolutely no reason to delay the implementation of a provision that would ensure that the most dangerous juvenile offenders may not possess firearms.

Second, the Senate provisions are unduly narrow in their coverage. They impose the firearms ban only for juveniles adjudicated delinquent for offenses described in § 3559(c)(2)(F)(i). These comprise only a small fraction of the predicates for the so-called “three strikes” statute. Clause (F)(i) covers only certain enumerated violent offenses but does not cover other serious violent three-strikes predicates – such as assault with a deadly weapon – or any of the covered drug trafficking crimes. We strongly favor legislation that would result in a gun ban if the juvenile is adjudicated delinquent for any offense serious enough to be a three-strikes predicate.

Finally, to respond to a serious problem in the current definition of felonies, we recommend an amendment to modify the definition of “conviction” for purposes of the federal firearms laws. The current definition allows potentially dangerous individuals, who in fact have been convicted, to lawfully possess firearms, notwithstanding the prohibition in 18 U.S.C. § 922(g) on possession of firearms by convicted felons. The problem arises because the current definition of the term “crime punishable by imprisonment for a term exceeding one year” in 18 U.S.C. § 921(a)(20) gives effect to state laws that restore civil rights to convicted felons, including the right to possess firearms, regardless of whether the restoration of that right is based upon an individualized determination by an appropriate authority of the state that the individual is not dangerous to the public safety.¹ Under the Administration’s proposal, persons who were convicted of felonies or adjudicated delinquent as juveniles could have their firearms rights restored only after such an individualized determination by the state. We believe that the present law can be improved to ensure that an individualized determination is made before a prohibited person can lawfully possess a firearm.

Penalties for Firearms Violations Involving Juveniles

¹ Several states have laws that do not require an individualized determination before a felon’s right to possess a firearm is restored, but instead automatically restore firearms rights and other civil rights immediately upon completion of a felon’s sentence, or within a fixed time period thereafter. Moreover, many states have laws that permit even dangerous felons convicted of crimes of violence or drug offenses to have their firearms rights restored.

S. 254 § 851, amending 18 U.S.C. § 924(a) (pages 389-98), is addressed in the discussion of S. 254 § 601 (page 361), supra.

National Instant Criminal Background Check System Improvements

S. 254 § 861 (pages 398-401) authorizes appropriations of \$68 million to operate the FBI's National Instant Criminal Background Check System (NICS). These funds are necessary to support the FBI's NICS Operations Center, which performs NICS background checks for approximately one-half of the checks that are required under the Brady Handgun Violence Protection Act. The other half of the NICS checks are being performed by states that have agreed to perform background checks as points of contact for the system. With respect to the point-of-contact states, section 861 authorizes \$40 million in appropriations to reimburse the states that are performing NICS checks. Reimbursing the point of contact states for doing NICS checks could be critical to retaining their participation, because they have a strong disincentive to perform checks that the FBI is providing to gun dealers and buyers free of charge. We believe it is very important to retain point-of-contact states and increase their number, because states have access to state records that are not available to the FBI and states have the expertise to interpret their own records and local laws.

In addition, we have two technical comments. First, section 861(a)(1)(B) contains an apparent drafting error by stating that the Attorney General shall provide expedited access to funding so that states can "gain[] access to records in the National Instant Check System disclosing the disposition of state criminal cases." In fact, this funding is designed to assist the states to provide information about state records to the NICS so that NICS – and its users, including point-of-contact states – can have access to records disclosing the disposition of state criminal cases. Second, the proper name of the NICS is the "National Instant Criminal Background Check System", and we would urge that it be referred to as such throughout the section.

Title IX – Enhanced Penalties

Straw Purchases

S. 254 § 901, amending 18 U.S.C. § 924(a) (pages 402-03), and H.R. 1501 § 605, amending 18 U.S.C. § 924(a) (pages 96-97), would create higher penalties for certain offenses involving 18 U.S.C. § 922 (a)(6), which prohibits false statements in connection with firearms transfers. Under current law, 18 U.S.C. § 924(a)(2), the maximum penalty for a violation of this subsection is ten years. Section 901 would raise the sentence to not more than 15 years imprisonment if the violation was for the purpose of selling, delivering, or otherwise transferring a firearm, knowing or having reasonable cause to know that another person will carry or otherwise possess or discharge or otherwise use the firearm in the commission of a violent felony. The same offense involving procurement of the weapon for a juvenile would be subject to a mandatory minimum sentence of 10 years imprisonment and a maximum sentence of not more than 20 years. The House bill is identical to the Senate version, except that it applies to a narrower class of felonies – namely, "serious violent felonies" – as defined by 18 U.S.C. § 3559(c)(2)(F) rather than § 924(e)(2)(B). Although we generally support doubling the maximum available sentence under the above circumstances, we think these proposals go too far in creating 10-year mandatory minimum sentences in situations in which a firearm is not even transferred, let alone actually used in a crime of violence.

In addition, we recommend a clarifying amendment to section 18 U.S.C. § 924(h), which currently makes it unlawful for any person to transfer a firearm "knowing" that the firearm will be used to commit a crime of violence or drug trafficking crime. This section should be amended to include transfers in which the transferor "knows" or has "reasonable cause to believe" that the firearm would be used to commit a crime of violence or drug trafficking crime. There is no reason why section 924(h) should apply when the transferor has knowledge that a crime of violence or drug trafficking crime will be committed, but not when

the transferor has "reasonable cause to believe" that this is the case. Furthermore, this prohibition applies to transfers by unlicensed individuals, as well as transfers by licensed dealers, so amending it provides another tool to address straw purchases. We would be happy to work with the conferees to develop language for the final bill.

Stolen Firearms

S. 254 § 902, amending 18 U.S.C. § 924 (page 403), and the identical provision in H.R. 1501 § 603 (pages 94-95) raise the maximum sentence from 10 to 15 years imprisonment for various offenses involving stolen firearms and unlawful importation of firearms. The Administration does not object to these proposals.

Increase in Penalties for Crimes Involving Firearms

S. 254 § 903, amending 18 U.S.C. § 924 (page 404), and H.R. 1501 § 604, amending 18 U.S.C. § 924 (pages 95-96) increase the minimum sentence for discharging a firearm during or in relation to a crime of violence or drug trafficking offense (§ 924(c)(1)(A)) from 10 years to 12 years. The proposal also adds a mandatory minimum sentence of not less than 15 years if the firearm is used to injure another person. In addition, the bills would amend 18 U.S.C. § 924(h) to create a mandatory minimum sentence of five years for an individual who transfers a firearm to a person knowing that it will be used to commit a crime of violence, while retaining the 10-year maximum term of imprisonment. The Administration does not object to these proposals.

Title X – Child Handgun Safety

S. 254 § 1003, amending 18 U.S.C. § 922 (pages 406-10), requires licensed manufacturers, importers, and dealers to provide a secure gun storage or safety device with every handgun sold, delivered or transferred to an unlicensed individual. The Administration strongly supports a requirement that gun safety and storage locks be provided with any handgun that a licensee transfers to an unlicensed person. However, the Administration has several significant concerns with the Senate bill. First, section 1003 requires child safety devices to be provided only for transfers of handguns. There is no basis on which to exclude long guns from the requirement, given the purpose of the provision to protect children and other unauthorized users from gaining access to firearms and causing accidental injuries to themselves or others. The Administration urges the conferees to extend the requirements of § 1003 to long guns.

Second, the Senate bill provides prospective qualified civil liability for individuals who use a secure gun storage or safety device with the handgun. The Administration generally disfavors statutory immunities and does not believe that such immunity is necessary here, because individuals who use safety devices can assert their use in defense of tort claims.

Third, an uncodified provision of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 provides that evidence of compliance or noncompliance with the safety lock provisions is not admissible in any proceeding. This provision would be inconsistent with the amendment's express proposal to allow the introduction of evidence concerning noncompliance in an administrative license revocation or suspension proceeding. For the sake of clarity, we recommend that the uncodified provision be repealed.

We would be happy to provide the conferees with language to accomplish this technical correction.

Fourth, the Senate bill contains exceptions from the safety lock requirement for curio or relic firearms. There are millions of handguns that have been classified as "curios or relics." Indeed, every handgun over 50 years old, including all World War II era handguns, are classified as curios or relics. These handguns are every bit as lethal as handguns that are not curios or relics, and should be subject to the same safety lock requirement as other weapons. The Administration bill, unlike the Senate bill, would amend section 18 U.S.C. § 923(e) by eliminating this exception.

Finally, the Administration would urge the Congress to reconsider the penalty provisions in the Senate bill, which are substantially weaker than the penalty provisions in the Administration bill. For violations of the safety lock requirement, the Senate bill provides for suspension of the dealer's license for up to six months and a fine of not more than \$2500. In contrast, the Administration bill authorizes the Secretary to suspend a dealer's license indefinitely and impose a fine of not more than \$10,000. The Administration urges the Congress to increase the penalties for licensee violations to those enumerated in the Administration bill.

Although H.R. 1501 as passed does not include a comparable provision requiring gun storage and safety devices, the House considered an amendment – which was adopted as part of the overall gun bill, H.R. 2122, that was defeated – that would include this requirement. However, in response to concerns raised by a particular manufacturer of a safety device, the proposed amendment contained an overly broad definition of "gun safety device" which would have essentially obviated the requirement. In the amendment, a gun safety device is any part of the handgun that, if removed, renders the gun inoperable. Since all guns have parts that, if removed, render the gun inoperable, the amendment would have rendered meaningless the requirement. To the extent that the conferees consider the House version of the provision, the problem can be easily fixed, and we can work with the conferees to craft appropriate statutory language.

Title XI – School Safety and Violence Prevention

School Violence Research

Section 1105 of S. 254 (page 413) establishes the National Center for Rural Law Enforcement as a clearinghouse for school violence research. While we agree that the activities specified in the bill are needed, we object to the provision because it does not provide for a competitive selection process. Furthermore, the new National Institute for Juvenile Crime Control and Delinquency Prevention (within NIJ) is – in this bill – already designated as a central point for all juvenile violence-related research. Pursuant to a competitive grant award process, the Justice Department (through OJJDP) is now funding the Northwestern Regional Educational Laboratory, which provides research-based training and technical assistance on school safety issues through its National Safe Schools Resource Center. Pursuant to Congressional direction, OJJDP is also funding the Hamilton Fish National Institute on School and Community Violence, a consortium of eight universities, which focuses on school and community violence research. Further, both the current and proposed Juvenile Justice Office and the Education Department

manage information clearinghouses. The Center for Rural Law Enforcement has no particular expertise in school violence, especially urban or suburban violence; and the Center should not be rewarded for trying to receive direct funding from Congress without going through the regular process of competitively applying for a grant. See comments on S. 254 §§ 1674-76 and 1683-85 on this latter point. The House bill does not contain a similar provision, and we support eliminating it in the final bill.

National Commission on Character Development

S. 254 § 1107 (pages 417-21) would establish a National Commission on Character Development, which would study and make recommendations with respect to the impact of current cultural influences on the process of developing and instilling "the key aspects of character." The Commission would consist of 36 members. Section 1107(b)(2)(D) would require that six of those Commission members be "members of the clergy." This requirement is unconstitutional. Although clergy may, of course, be appointed to government commissions, the religion clauses of the First Amendment prohibit the government from conditioning employment, appointment, or benefit on satisfaction of any test of religious belief, conduct, or status, and the Religious Test Clause, Art. VI, cl. 3, provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." See Board of Educ. of Kiryas Joel School Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment); McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961).

The constitutional problem could be avoided if subsection 1107(b)(2)(D) were amended to replace "members of the clergy" with a phrase such as "persons experienced in positions of moral leadership (including, for example, members of the clergy)".

Drug Tests

S. 254 §§ 1110 and 1611, amending Pub. L. No. 89-10 (20 U.S.C. § 7116(b)) § 4116(b) (1965) (pages 425, 494), are substantially similar. Each would amend 20 U.S.C. § 7116(b) to authorize drug testing of students in certain circumstances, while § 1611 would also amend § 7116(b) to allow locker inspections. There is no provision in § 1611 that would nullify the provisions of § 1110, and therefore it is unclear which section is intended to take precedence. We look forward to working with the conferees to develop material for the establishment and operation of any such programs.

Title XII – Teacher Liability Protection Act

S. 254 §§ 1201-1207 (pages 426-35) and H.R. 1501 §§ 1501-1507 (pages 244-53) would create the "Teacher Liability Protection Act of 1999" ("TLPA"), which would place various limits on the liability of a teacher for harm caused by the teacher's acts on behalf of a school. For example, section 1204(a) of S.254 (§ 1504(a) of H.R.1501) would provide that no teacher shall be liable if the teacher was acting within the scope of employment; if the teacher's actions were consistent with local, state, or federal rules governing school discipline; if the teacher was properly licensed; if the harm was not caused by willful or criminal conduct, gross negligence, recklessness, or a conscious, flagrant indifference to the rights or safety of the person harmed; and if the harm was not caused by the teacher's operation of a car or other motor vehicle. section 1203(a) of S.254 (section 1503(a) of H.R.1501) would expressly preempt state law that is inconsistent with this liability limitation. Section 1203(b) of S.254 (section 1503(b) of H.R.1501) would, however, provide that the preemption rule shall not apply to any civil action in state court in which all parties are citizens of the state if that state,

after enactment of the TLPA, enacts a statute which, among other things, declares the election of the state that the TLPA shall not apply to such a civil action in the state, and contains no other provisions.

The TLPA does not specify its constitutional source of authority, and no such authority is obvious. In particular, the TLPA would not appear to be a proper exercise of Congress's power to regulate interstate commerce. The Act does not appear to regulate an economic activity (or to regulate "commerce," as such); it includes no jurisdictional limitation (or "element") limiting its effect to particular cases having a connection to interstate commerce; it contains no findings regarding the effect that teacher liability has on interstate commerce; and it expressly indicates (S.254 § 1202(b); H.R.1501 § 1502(b)) that the TLPA's regulation of teacher liability is for the purpose of improving the learning environment. In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court held that the Gun-Free School Zone Act of 1990, a federal statute prohibiting the possession of a firearm near a school, exceeded Congress's authority under the Commerce Clause. In so doing, the Court rejected the government's argument (and Justice Breyer's argument in dissent) that a meaningful interference in the educational process necessarily provides the requisite effect on interstate commerce to justify the exercise of congressional power. Id. at 564-68.

We thus have serious reservations about whether Congress has the power to enact the TLPA. Congress could accomplish the objectives of the TLPA, however, by reformulating the Act as an exercise of its Spending Clause authority. Congress could, for instance, make state enactment of the provisions in the TLPA a condition of a state's receipt of certain education-related federal funds. See New York v. United States, 505 U.S. 144, 167, 171-73 (1992); South Dakota v. Dole, 483 U.S. 203 (1987).

Title XIII – Violence Prevention Training for Early Childhood Educators

Title XIII of S. 254 (sections 1301-1308, p. 435-442), the "Violence Prevention Training for Early Childhood Educators Act," establishes a grant program to help institutions that train educators of young children to recognize and appropriately respond to violence in children's lives. Knowing the significant links between children's exposure to violence and the increased likelihood of future delinquency, we support the goals of this program, but we recommend instead that Congress enact the "Character Education Research, Dissemination, and Evaluation" provisions of the President's proposal to reauthorize the Elementary and Secondary Education Act.

Title XIV – Preventing Juvenile Delinquency Through Character Education

This title creates a \$25 million grant program, to be administered by the Department of Education, to support community-based programs that develop character education, defined as "an organized educational program that works to

reinforce core elements of character, including caring, civic virtue and citizenship, justice and fairness, respect, responsibility, and trustworthiness." The Department fully concurs in the value of character education, but believes the Congress should enact the character education program proposed by the President as part of the pending reauthorization of the Elementary and Secondary Education Act of 1965.

Title XV – Violent Offender DNA Identification Act of 1999

Title XV of S. 254 contains provisions to strengthen and extend the DNA identification system. The major elements of the proposal include: (1) authorizing assistance to the states to clear their backlogs of unanalyzed convicted offender DNA samples; (2) providing necessary assignments of responsibility and grants of authority to collect DNA samples from federal, military, and D.C. offenders convicted of specified crimes; and (3) authorization of appropriations to federal agencies for related costs. The House bill contains no corresponding provisions.

The Administration strongly supports the objectives of this title, which largely overlaps with proposals that the Administration has previously transmitted to Congress. However, we recommend some amendments to Title XV of S. 254 as discussed below.

The development of DNA identification technology is one of the most significant advances in criminal identification methods since the advent of fingerprinting. Recognizing the promise and importance of this new technology, Congress enacted provisions relating to DNA identification in subtitle C of Title XXI of the Violent Crime Control and Law Enforcement Act of 1994. These included provisions for the establishment of a national DNA identification index, the establishment of quality assurance standards and measures, and assistance to the states in creating effective DNA identification programs. Congress further encouraged state DNA identification efforts through the enactment of § 811(b) of the Antiterrorism and Effective Death Penalty Act of 1996, which authorized grant funding for states that require convicted sex offenders to provide DNA samples.

At the present time, all 50 states have enacted legislation to collect DNA samples from certain categories of offenders and to make this information available for criminal identification purposes. In § 811(a)(2) of the Antiterrorism and Effective Death Penalty Act of 1996, Congress sought to effect the same reform for federal and D.C. offenders, authorizing the expansion of the national DNA identification index to include information on such offenders.

Notwithstanding the rapid development of the DNA identification system over the past several years, there are serious impediments to the full implementation of the system that require legislative attention. The expansion of laboratory capacity for the analysis of DNA samples has not kept pace with the collection of such samples from convicted offenders, resulting in a

backlog of several hundred thousand DNA samples collected by the states which have not yet been analyzed. Until these samples are tested and the resulting DNA profiles are entered into the convicted offender databases, they are worthless for criminal identification purposes. Every day this situation continues is another day that serial rapists and other serious offenders who could have been identified through matching with DNA database information remain at large to commit further crimes.

In addition, there is a hole in the system for federal, D.C., and military offenders. As noted above, Congress authorized expanding the DNA identification index to include information on such offenders in 1996. However, it has not been possible to implement this decision, in the absence of statutory authority to collect DNA samples from these offenders.

Title XV of S. 254 contains provisions designed to address both of these problems, which are similar to previously transmitted Administration proposals. Our comments concerning the specific provisions in this title, and their relationship to the Administration's proposals, are as follows:

Backlog Reduction Assistance

The National Commission on the Future of DNA Evidence, charged by the Attorney General with the improvement of the use of DNA technology throughout the criminal justice system, has identified the elimination of the convicted offender DNA sample backlog as an urgent priority. In line with the Commission's recommendations, the Administration's budget request for fiscal year 2000 includes \$15 million supporting a two-year initiative to reduce the backlog of unanalyzed DNA samples that have been collected by the states. An additional \$15 million will be requested for the second year of the program in 2001. Section 1502 of S. 254 similarly authorizes \$15 million for each of fiscal years 2000 and 2001 for convicted offender backlog reduction assistance.

While the Administration's proposal and S. 254 are consistent in contemplated funding levels, they differ in the assignment of responsibility for the administration of the assistance program. S. 254 provides that the program is to be developed and administered by the FBI "in coordination with" the Office of Justice Programs, with consultation with representatives of state and local forensic laboratories in developing the program. In contrast, the Administration's budget requests the appropriation of these funds for the National Institute of Justice (NIJ), a component of the Office of Justice Programs which administers many grant programs and has specific expertise relating to DNA identification testing and the effective administration of grants to state and local agencies in this area.

To resolve the difference concerning responsibility for the design and implementation of the convicted offender backlog reduction program – FBI vs. NIJ – we recommend amending the proposal in S. 254 § 1502 to provide that the Attorney General is to develop and administer the program, with consultation with state and local representatives in the program's development. This will provide flexibility to utilize the capacities and resources of NIJ, the FBI, and other components most effectively to assist the states in backlog reduction.

Sample Collection from Federal, D.C., and Military Offenders

The Department of Justice has previously transmitted proposed legislation to Congress to provide the authorities and assignments of responsibility which are needed to collect DNA samples from federal, D.C., and military offenders. See FBI Laboratory Report to Congress: Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders Pursuant to P.L. 105-229, Appendix A (Dec. 1998) (hereafter, "FBI Report").

Section 1503 of S. 254 contains DNA sample collection provisions for federal, D.C., and military offenders that are generally similar to the Administration's proposal. Common features of the two proposals include: (1) specification of categories of offenders from whom DNA samples will be collected through FBI regulations; (2) collection of DNA samples by the Bureau of Prisons from federal and D.C. offenders in its custody; (3) collection of DNA samples from federal offenders released under supervision by the responsible supervision agencies (i.e., federal probation offices); (4) collection of DNA samples from D.C. offenders released under supervision by the Court Services and Offender Supervision Agency for the District of Columbia; and (5) establishment by the Department of Defense of a comparable DNA sample collection system for military offenders.

Certain features of S. 254 § 1503, however, are more limited or less clear than the corresponding provisions of the Administration's proposal. Our specific comments are as follows:

Samples voluntarily contributed by relatives of missing persons.

The Administration's proposal includes a provision that would authorize including in the DNA identification index analyses of DNA samples voluntarily contributed from relatives of missing persons. This is a non-controversial proposal that could make it possible to identify missing persons, or the remains of missing persons, that are unidentifiable by other means. This provision should be included in the proposal in S. 254.

Offense coverage.

The Administration's proposal would not impose any statutory limitation on the categories of federal, D.C., and military offenders from whom DNA samples will be collected. Rather, the pertinent categories would be specified in FBI regulations without pre-set limitations. Under this approach, the system could readily be modified in light of developing experience concerning the utility of collecting samples from particular types of offenders. This follows the approach of existing law – section 811(a)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 – which authorizes the FBI to expand the DNA identification system to include federal and D.C. offenders, with no pre-set limits on covered offense categories.

S. 254 § 1503 is restrictive in comparison with existing law and the Administration's proposal. It limits the categories of offenders from whom samples could be collected to felons and imposes a further restriction that samples could be collected from adjudicated delinquents only on the basis of their commission of a "crime of violence." See S. 254 § 1503(b)(3), proposing new 42 U.S.C. § 14132(d)(2)(B) (page 455).

The formulation of S. 254 on this issue may reflect a belief that the new restrictions it proposes would exclude only non-dangerous offenders who have committed relatively minor crimes. However, such an assumption would not be well-founded. Child molestation cases, for example, may be pleaded down to misdemeanors because the victim cannot bear the additional trauma of a trial. Moreover, in some sexual abuse cases, the offense is only a misdemeanor even if the offender is fully convicted for what he did. For example, in the absence of force or threats, a prison guard who makes female prisoners submit to sexual acts or contact by exploiting his authority over them may be prosecutable only for a misdemeanor. See 18 U.S.C. § 2243(b), 2244(a)(4) (misdemeanor to engage in sexual act or contact with ward); 18 U.S.C. § 2244(b)

(misdemeanor to engage in sexual contact without victim's permission). The desirability of collecting DNA samples from such offenders would hardly seem to be a controversial issue. Cf. FBI Report at 12 (some states collect samples based on misdemeanor sexual offenses). However, it would not be allowed under S. 254's restrictions.

In assessing the question of permitted offense coverage, it is important to understand that taking DNA samples and entering related information on offenders in the DNA identification index is not a punishment or penalty. It is a regulatory measure carried out for law enforcement identification purposes, comparable to fingerprinting or photographing. If an offender's records are included in the index, he is protected by the strict confidentiality rules in the DNA statutes (42 U.S.C. § 14132(b)(3), 14133(b)-(c)), which allow information in the index to be used for law enforcement identification purposes and virtually nothing else. Moreover, the genetic markers used for forensic DNA testing were purposely selected because they are not associated with any known physical or medical characteristics, providing further assurance against the use of convicted offender DNA profiles for purposes other than identification. An offender suffers no adverse effects later in life from the inclusion of information on him in the index – unless he commits more crimes, and DNA matching shows him to be the perpetrator. The potential benefits of DNA sample collection and indexing for public safety and law enforcement are great, and the imposition on the offender in obtaining and retaining this information is minor. There is no reason to stipulate in advance that this identification technology cannot be utilized outside of pre-set offense categories. In light of the strict confidentiality rules that govern information in the index, there is also no reason for a statutory rule setting more restrictive conditions for sample collection from adjudicated delinquents, as opposed to adult offenders.

It is also important to keep in mind that the perpetrators of violent crimes frequently have varied criminal histories, including both violent and nonviolent offenses. In many cases, the DNA sample which (for example) enables law enforcement to identify the perpetrator of a rape has not been collected in connection with an earlier rape conviction, but as a result of the perpetrator's prior conviction for some other type of crime that was not intrinsically violent. See FBI Report at 15. Hence, even if the identification of violent offenders is seen as the principal focus of the DNA identification system, achieving this objective effectively requires casting a broader net. The approach of existing law and the Administration's proposal, which does not impose pre-set statutory limits on covered offenses, is optimal from this standpoint. The proposal in S. 254 should be amended to conform to this approach.

Expungement.

S. 254 § 1503(b)(3), proposing 42 U.S.C. § 14132(d)(2)(ii)(III) (pages 454-55), requires that information on a juvenile adjudicated delinquent for a federal offense be removed from the DNA identification index if the underlying adjudication has been expunged. This requirement should be deleted because there is no existing provision for expungement of federal juvenile delinquency adjudications. Moreover, there is no reason in any event to remove information from the index. As discussed above, the index is subject to strict confidentiality rules which allow use of the information for law enforcement identification purposes and virtually nothing else. Both for adults and juveniles, the inclusion of information on an individual in the index has no adverse effect on him later in life, unless he commits a crime or crimes and DNA matching shows him to be the perpetrator. Regardless of the disposition of an underlying conviction or adjudication, retaining the information is harmless to the affected individual and potentially useful for law enforcement and public safety purposes. There is no reason to throw it away.

Collection of samples from military offenders who serve their sentences in federal prisons.

The Administration's proposal includes a provision which would allow the Secretary of Defense to arrange to have DNA samples collected by the Bureau of Prisons (BOP) or federal probation offices from military offenders who are under their custody or supervision. This reflects the fact that some military offenders are housed in BOP facilities (rather than military prisons) and that military offenders who are paroled from BOP facilities are supervised by federal probation offices (rather than the military parole supervision systems). In such cases, it is likely to make more sense for BOP or the probation offices to collect the samples, rather than requiring the Department of Defense to do it directly. However, S. 254 § 1503 has no provision comparable to the provision of the Administration's proposal on this point.

The drafters of S. 254 § 1503 may have believed that this situation was adequately addressed by a provision in the S. 254 § 1503(b)(3), proposing 42 U.S.C. § 14132(e)(3)(A) (page 461), which provides that the Secretary of Defense may "waive the collection of a DNA sample from an individual under this subsection if another person or agency has collected or will collect such a sample from the individual under subsection (d)." However, the cross-referenced subsection (d) directs the Bureau of Prisons and the probation officers to collect samples from persons convicted of "qualifying offenses," which are defined to include only federal and D.C. crimes. See S. 254 § 1503(b)(3), proposing 42 U.S.C. § 14132(d) (pages 453-59). Hence, the current formulation of S. 254 § 1503 does not include adequate grants of authority to enable BOP and the probation offices to collect samples from military offenders who come under their jurisdiction. The proposal should be amended so that this authority is clearly provided.

Penalty provision for military offenders who fail to cooperate in sample collection.

As a final point of clarification, the penalty provision for military offenders who fail to cooperate in sample collection (S. 254 § 1503(b)(3), proposing 42 U.S.C. § 14132(f)(2) (page 462), should be revised. The provision is partially unclear, referring to punishment of an individual as a violation of the Uniform Code of Military Justice. It should be revised to refer to punishment of the individual's failure to cooperate as such a violation.

Federal Agency Funding for Sample Collection and Analysis

The Administration's budget request includes \$5.336 million in fiscal year 2000 (and estimated continuing appropriations of \$1 million annually thereafter) for the FBI for costs resulting from expansion of the DNA identification system to include federal, D.C., and military offenders.

S. 254 § 1503(b)(3), proposing 42 U.S.C. § 14132(g), includes authorizations of appropriations for the same purpose that differ in some respects from the Administration's budget request. Specifically, the bill authorizes the following: (1) \$6.6 million in fiscal year 2000 and necessary sums in fiscal years 2001 through 2004 for the Department of Justice, to cover both the Department's own costs and to reimburse costs incurred by the Judiciary, (2) necessary sums for the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) in fiscal years 2000 through 2004, and (3) \$600,000 in fiscal year 2000 and \$300,000 in each of fiscal years 2001 through 2004 for the Department of Defense.

The following information may be helpful to Congress in assessing the funding requirements for implementing the proposed expansion of the DNA identification system. The major costs involved are:

Direct Justice Department costs.

The FBI will be responsible for analyzing DNA samples collected from federal and D.C. offenders. In addition, the FBI will provide sample collection kits to be used by the various agencies that will

collect samples from these offenders (BOP, federal probation offices, and CSOSA). It is estimated that these costs and other costs involved in establishing and operating a database including federal and D.C. offenders will require an initial funding enhancement of approximately \$5 million and annual recurring costs thereafter of approximately \$1 million. See FBI Report at pages 27-28. These amounts are encompassed in the Administration's existing budgetary request. The Bureau of Prisons will also have some direct costs in collecting samples from prisoners in its custody. However, it is expected that this function will be carried out by the Bureau's medical personnel, and that a separate appropriation will not be necessary for this purpose.

Federal probation and CSOSA costs.

The federal probation offices and the Court Services and Offender Supervision Agency for the District of Columbia will incur costs in collecting samples from offenders under their supervision. As noted above, these costs will be partially defrayed through the FBI's provision of sample collection kits to these agencies. In addition, the FBI appropriation in the Administration's fiscal year 2000 budget request includes \$80,000 for "contract services" which could be used to defray other sample collection costs of the probation offices and CSOSA. See FBI Report at page 28. However, to the extent that these agencies' other sample collection costs exceed the limited amount that may be available for this purpose out of the proposed appropriation to the FBI, additional funding will be needed for these agencies to carry out the sample collection required by the legislation. As noted above, the authorization figure in S. 254 for the Justice Department is higher than the Administration's corresponding budget request for fiscal year 2000 (\$6.6 million vs. \$ 5.336 million). The difference may reflect (wholly or in part) the expectation under the bill that the authorized amount will cover the probation offices' costs as well as direct Justice Department costs.

The Department of Defense.

The Department of Defense (DOD) stands on a different footing from the other affected federal agencies, since it is not expected that the FBI will provide sample collection kits to DOD or analyze samples collected from military offenders by DOD. Hence, the Department of Defense will bear the full cost of sample collection and analysis in relation to such offenders. The authorizations proposed in S. 254 § 1503 for the Department of Defense are consistent with the amounts that are expected to be needed for these purposes.

Title XVI – Miscellaneous Provisions

Subtitle A: General Provisions

Prohibition on Firearms Possession by Violent Juvenile Offenders

Section 1601 of the Senate bill is addressed in the discussion of section 841 of the Senate bill, supra.

Study of Marketing Practices of the Firearms Industry

Section 1603 of the Senate bill and the identical provision in H.R. 1501 (section 115) call for a study, jointly conducted by the Attorney General and Federal Trade Commission, to examine the marketing practices of the firearms industry with respect to children. The Administration fully supports this study, but we would urge that the Department of the Treasury be added as an additional federal agency with joint responsibility for conducting the study.

Application of section 923(j) and (m)

Section 1605 of the Senate bill, which allowed licensed dealers to sell guns at out-of-state gun shows, was rendered null and void, and superseded in its entirety, by § 1635 of Title XVI of the Senate bill. See discussion of § 1635, *infra*. We strongly support § 1635, including the repeal of § 1605, because, among other things, we strongly oppose any effort to weaken over thirty years of federal law designed to allow states to control the flow of firearms across its borders, by prohibiting licensees from going to out-of-state gun shows to sell guns.

Attorneys Fees Exemption for Suits Establishing Unconstitutional Religious Expression at School Memorial Services

We note that the Department is reviewing S. 254 § 1606 for constitutional concerns and we will provide further comments, if necessary, at a later time.

Content of Materials Produced with Federal Funds

Section 1609(a) of the Senate bill would require "[a]ll materials produced, procured, or distributed, in whole or in part, as a result of Federal funding authorized under this Act," to contain a provision telling readers where they might raise any objections concerning the religious content of the material. Specifically, it requires the creation of a special office within the Department to field any such complaints, and requires that office to issue periodic reports to Congress on the nature and quantity of any such complaints received. The Department vehemently opposes this provision.

First, in light of all the provisions in the bill separately labeled as "Act[s]," it is unclear whether this provision is intended to apply to the entire text of S. 254, or only to some subset of its provisions. Second, in either case, it would impose an unnecessary, expensive burden on all state agencies and their subawardees who would need to monitor compliance. For its part, the Department already clearly identifies its publications, and lists departmental addresses (or clearinghouse contacts) where the public may address questions to the Department or raise concerns on any topic. The controlled correspondence system already in place is equipped to and, indeed, does answer any written concerns raised to the Department about Department publications. We believe this additional requirement will merely add expense and undue burden, particularly on the states.

Aimee's Law

S. 254 § 1610 would require the Attorney General to penalize a state the amount equal to the costs of incarceration, prosecution, and apprehension of a person released from that state's custody, and transfer those funds to the state where the individual committed a subsequent offense.

While well-intended, this provision (and the comparable provision in H.R. 1501, Title I § 103) would be difficult, if not impossible, to enforce, and could violate individuals' due process rights. This provision defines certain primarily felony sex offenses (S. 254 § 1610(b)) and requires that, if an offender who has been convicted of one of these offenses in one state subsequently commits one of these offenses in a second state, the Attorney General penalize the first state by transferring the costs of apprehending, prosecuting, and incarcerating that person "from federal law enforcement assistance funds that have been allocated to but not distributed to the state that convicted the individual of the prior offense, to the state account that collects federal law enforcement assistance funds of the state that convicted that individual of the subsequent offense." There are several exceptions, however, requiring the Attorney General only to penalize those states: (1) that have not adopted truth-in-sentencing guidelines under the 1994 Crime Act; (2) where the average term of imprisonment for the enumerated offenses is less than 10 percent above the average term imposed for that offense in all states; or (3) where the individual had

served less than 85 percent of the term of imprisonment to which he was sentenced for the prior offense.

This section also requires the Attorney General to collect and maintain data for every calendar year beginning with 1999 from every state as to: (1) the number of convictions for all of the enumerated offenses (namely, dangerous sexual offenses, murder, rape, sexual abuse, and sexually explicit conduct); and (2) the number of convictions for these offenses that constitute second or subsequent convictions of a defendant. Not later than March 1, 2000, and every year thereafter, the Attorney General is required to report to Congress regarding these findings.

The major problems that the Department has found with this section are as follows:

- Neither bill is specific about which “federal law enforcement assistance funds” would be affected. If the “funds” refer to the Edward J. Byrne Memorial State and Local Grant Program, this provision would have the unintended consequence of penalizing primarily the law enforcement component of the criminal justice system for the actions of the judicial and corrections branches, as well. The reporting requirements would require many years of development of criminal history records by the states, which would be an unfunded mandate; as they would require the establishment of a major national data center to collect and match state records. Funding is not provided for in the bill language for these requirements. Thus, the projected approximate six-month period of time allotted for implementation (from approximately September, 1999, to March, 2000) is not even remotely achievable.
- The definitions of included law violations in § 1610(b) of the Senate bill do not conform to standard legal terms and will be exceedingly difficult to operationalize across states. In particular, victim and offender age contingencies, as described in the offense category “dangerous sexual offense,” are generally not a part of state statutes. Unless the definition corresponds to state laws, this provision will be impossible to operationalize and enforce.
- Section 1610(c)(1)(A) envisions some kind of national system of notification to the Attorney General when individuals with such backgrounds are convicted in another state of one of these vaguely defined crimes. Since no time limit is imposed between the prior and subsequent convictions, the system would require electronic criminal records that do not now exist and would be very expensive to accumulate. It may also be a states' rights issue if legislation requires extensive searches of state records by state personnel. The bills fail to discuss how this search of records could even be accomplished.
- Section 1610(c)(C)(ii-iii) describes those states that would be penalized. It requires either certain calculations of time served in each state (nearly impossible ever to calculate since even the relevant offenses are unclear), or a calculation of the percent of sentence served (also impossible to calculate retrospectively, given the absence of sentence credit information – jail credit, prior prison credit on a sentence, portions of sentences suspended, etc. – on criminal records).

- The requirement to collect, maintain, and report annually on the prior records of these categories of convicted offenders will require many years of development of historical criminal history records and the development of a major national data center at the federal level to collect and match records submitted by the states to records held by the states. This will be an enormous undertaking that will also require the complete cooperation of all of the states in conducting background checks of persons convicted in other states of the relevant offenses. It has been estimated that this would require a number of years to build the infrastructure required.

Consequently, while we appreciate the intent of this provision, we think it will be wholly unworkable, and urge the conferees not to adopt it in its current form. We would be happy to work with the conferees to try to develop a more workable alternative.

Waiver for local match requirement for COPS program

The Department supports § 1612 of S. 254, to fund the hiring of law enforcement officers to serve in public schools.

Carjacking Offenses.

The Administration strongly supports S. 254 § 1613, amending 18 U.S.C. § 2119 (page 496), which strikes the requirement that a carjacking must be committed with the intent to cause death or serious bodily harm. Under this provision, persons who engage in carjacking may face the same extent of punishment whether or not they had this intention.

Victims of Terrorism

The Department strongly supports S. 254 § 1618, which provides assistance for victims of terrorism abroad. The Administration has long sought to provide better support for these victims and appreciates the inclusion of this provision.

Death Sentence for Animal Enterprise Terrorism

As a technical matter, we point out that § 1620 of S. 254 is unnecessary since 18 U.S.C. § 3591(a)(2) applies the federal death penalty procedures not only to the specific death-eligible crimes listed in that section but also to "any . . . offense for which a sentence of death is provided." This would include animal enterprise offenses resulting in death (as amended by § 1652 of S. 254).

Prohibitions Relating to Explosive Materials

Section 1621 of the Senate bill and section 617 of the House bill contain provisions that amend 18 U.S.C. §§ 842(d) and (i) to expand the categories of prohibited persons under the federal explosives laws. The effect of these provisions would be to achieve consistency with the categories of prohibited persons under the Gun Control Act, 18 U.S.C. § 922(g). See S. 254 § 1621(a), amending 18 U.S.C. § 842(d) (pages 504-05); H.R. 1501 § 617(a), amending 18 U.S.C. § 842(d) (pages 111-12).

The Senate bill is the narrower of the two provisions in several respects. First, the Senate bill applies only to transfers by licensees. Second, the Senate bill contains an exception for nonimmigrant aliens, allowing them to possess explosives for lawful hunting or sporting purposes. Since explosives generally are not used for hunting or sporting purposes, we assume that the inclusion of this provision was a technical error, and that the provision was erroneously carried over from the firearms laws.

Accordingly, it should be removed. We do not support providing an exception to nonimmigrant aliens. Furthermore, the Senate bill contains a drafting error by removing the existing prohibition in 18 U.S.C. § 842(i) on the possession or receipt of explosives by persons under indictment for a felony.

The House bill is identical in substance to the Administration's proposal. It prohibits the transfer of explosives by licensees and nonlicensees, and it extends the prohibition on receipt of explosives to people who are adjudicated delinquent. The House bill also does not contain the errors present in the Senate bill identified above.

The Department strongly supports section 616 of the House bill, which would require criminal background checks for unlicensed purchasers of explosives. This provision is based on the Brady Law, which requires federal firearms dealers to initiate criminal background checks on prospective firearms purchasers. This section would also require persons obtaining explosive materials from federally-licensed explosives dealers to obtain a federal permit. The permit requirement would result in better compliance with storage requirements, since the federal government may inspect the premises of federal explosives permittees.

District Judges in Arizona, Florida, and Nevada

The Department supports the provisions of S. 254 § 1622 and H.R. 1501 § 108 ("The Emergency Federal Judgeship Act of 1999 ") that would authorize three additional district judges for the district of Arizona, four for the middle district of Florida, and two for the district of Nevada.

NIH Study of Youth Violence

Section 1623 of S. 254 (as well as § 1365 of H.R. 1501) require the National Institutes of Health, acting through its Office of Behavioral and Social Sciences Research, to conduct multi-year research on the causes and prevention of youth violence. We recommend that the responsibility and authorization for appropriations for research on the causes and prevention of youth violence be given to the National Institute of Justice (NIJ), to work in consultation with both the National Institutes of Health (NIH) and the Centers for Disease Control (CDC). This arrangement would build more easily upon the extensive research that the three organizations have performed in this area. In the alternative, we recommend that the statute explicitly require coordination and consultation with NIJ and CDC to avoid duplication of effort.

Violent Crimes in Indian Country

We strongly support section 1626 of S. 254, relating to violence in Indian country and other areas of exclusive federal jurisdiction. The provision, which had bipartisan support, is identical to an Administration proposal and would significantly enhance law enforcement by correcting various problems with the underlying statutes affecting assaults and other crimes of violence committed in Indian country where the incidence of such crime is dramatically higher than in other parts of the nation.

Juvenile Crime in Alaska Villages

Section 1628 of the Senate bill would create a grant program for the State of Alaska to enforce state prohibitions against the sale, importation, or possession of alcohol adopted pursuant to state local option statutes in remote Alaska villages. We recognize the prevalence of alcohol-related problems among Alaska Natives, and recognize that other remote Alaska villages may also have alcohol-related problems. We believe, however, that the Alaska Native villages themselves should be assisted concurrently with the state to regulate or prohibit liquor traffic on Alaska Native village lands. We would like to work with the conferees to address this issue.

Prohibition on Promoting Violence on Federal Property

We note that the Department is reviewing S. 254 § 1633 for constitutional concerns, and we will provide further comments, if necessary, at a later time.

Provisions Relating to Pawn Shops and Special Licensees

S. 254 § 1634 renders null and void S. 254 § 503 by eliminating the exception for pawnbroker redemptions in Title V. However, section 1634 left in place many of the other problems and loopholes created by Title V. Ultimately section 1634 is unnecessary, because section 1635 of S. 254 also repeals § 503. We strongly support § 1635 and its repeal of § 503.

S. 254 §§ 1634 and 1635 eliminate any exception from the Brady Law's background check requirements for pawnbroker transactions, and H.R. 1501 contains no corresponding provision. However, we note that the House did consider a provision that would exempt all pawn transactions from the Brady Law's background check requirements for up to one year following the date that the gun is pawned. We strongly opposed this amendment, which was defeated when the entire House gun bill, H.R. 2122, went down to defeat. The amendment would have reopened a huge loophole for criminals who wanted to raise money by pawning guns they are not legally permitted to possess in the first place, free of any concern that they might be prevented from getting a gun through a background check. Due to the increased likelihood that the person redeeming a gun from pawn is prohibited, there is absolutely no basis for to exempt such persons from undergoing a background check before redeeming a firearm from a pawnshop.

Extension of Brady Background Checks to Gun Shows

We strongly support S. 254 § 1635, which closes the Brady Act's gun show loophole to require Brady Act background checks for all non-licensed persons who purchase firearms at gun shows and records that enable tracing of the firearms sold. There are more than 4,400 gun shows held annually in this country, as well as countless more flea markets and other events where guns can be traded anonymously without background checks or records of the firearms transferred to enable tracing if those guns are used in crime. Consequently, gun shows provide a forum for illegal firearms purchases and gun trafficking.

Reasonable regulation of gun shows is required to close this loophole and prevent gun shows from continuing to serve as a source of firearms to persons who wish to avoid background checks. This proposal accomplishes this goal by requiring: (1) all persons to undergo Brady instant background checks, with the assistance of federally-licensed firearms dealers, in connection with the acquisition of a firearm at a gun show; (2) all vendors to report limited information about the firearms sold at gun shows, so that the guns can be traced by law enforcement if they are subsequently used in crimes; and (3) all gun show promoters to take responsibility for ensuring that the above requirements are met by requiring promoters to register with ATF and notify vendors at their shows of the obligation to ensure that Brady background checks are performed.

Before describing what section 1635 does, it is important to emphasize what it does not do. Section 1635 in no way creates a federal firearms registry, and any suggestion that it does is pure invention. On the contrary, section 1635 provides for the destruction of background check records for approved transactions after a very limited time period, during which the records are used solely for the purpose of conducting system audits to detect fraud and abuse. Section 1635 also does not create a vast new bureaucracy for firearms background checks at gun shows. On the contrary, section 1635 employs a far more streamlined approach to background checks than competing Senate and House proposals by using federal firearms licensees to perform checks. Finally, section 1635 does not impose a three-day waiting period for gun

purchases for law-abiding citizens. On the contrary, section 1635 uses the existing Brady Law – which has no mandatory waiting period – for all gun transactions at gun shows. Under the Brady Law’s National Instant Criminal Background Check System, the overwhelming majority of gun buyers – 73 percent – are allowed to go ahead with the sale within minutes of when the background check is requested, and 95 percent of all buyers are allowed to proceed with their purchase of a gun or are denied within 2 hours.

The gun show provisions that competed with section 1635 and were defeated in both Houses stemmed from misconceptions and misinformation. For example, both the Senate and the House debated gun show proposals that would have lessened the time that law enforcement has to complete background checks when there is an open question about someone’s firearms eligibility. Under current law, law enforcement has up to three business days to complete a background check. When law enforcement needs more than a few minutes to finish a background check, it is because there is information – usually about the disposition of an arrest – that is absent from the electronic record. To finish the check in these cases, law enforcement must contact the courthouse where the underlying record resides to obtain the disposition.

On the weekends, courthouses are closed, so the background checks that cannot be completed electronically in less than a two hours must wait until Monday morning when the courthouse opens. For this reason, according to the FBI, on a typical Saturday, a gun buyer who is delayed for more than two hours from getting a gun is 17 times more likely to be a felon, fugitive or other prohibited person. If law enforcement only had 24 hours to complete a background check, as proposed in the House, the FBI estimates that approximately 17,000 criminals and other prohibited people would have been allowed to buy guns in just the first six months of the NICS. And in the rejected Senate provision, which gave law enforcement only 72 hours, rather than three business days, to finish background checks, the FBI estimates that 9,000 prohibited people would have gotten guns.

The proposal to cut down the time for doing background is at odds with the Administration’s request for an increase in the time available to complete background checks – from three to five business days. We urge the conferees to reject amendments designed to weaken the Brady Law and compromise the ability of the National Instant Criminal Background Check System to look for additional information to enable a determination as to firearms eligibility.

A brief description of the provisions in section 1635 follows.

Registration of Gun Show Promoters

This section would make it unlawful for any person to hold a “gun show” prior to registering with the Secretary. The Secretary would be authorized to charge a fee for the registration.

Definition of Gun Show

A “gun show” would be defined (§ 1635(b), pages 538-39) as any event:

(A) at which 50 or more firearms are offered or exhibited for sale, transfer or exchange if 1 or more of the firearms has been shipped or transported in, or otherwise affects, interstate or foreign commerce; and

(B) at which –

(i) not less than 20 percent of the exhibitors are firearm exhibitors;

(ii) there are not less than 10 firearm exhibitors; or

(iii) 50 or more firearms are offered for sale, transfer, or exchange.

The definition is drafted broadly to include traditional gun shows, flea markets, swap meets, and any other public market where significant numbers of firearms are offered for sale, transfer, or exchange.

A corresponding amendment would be made to 18 U.S.C. § 923(j), which allows licensees to make off-premises sales of firearms at gun shows. The amendment would delete the term “gun show” so that the only definition of the term would be in 18 U.S.C. § 921. The intent of this amendment is to allow off-premises sales only at events that are sponsored by organizations devoted to the collection, competitive use, or other sporting use of firearms in the community. Such “events” would include gun shows if they are sponsored by one of the specified organizations. Thus, the amendment would not extend the privilege of making off-premises sales to all “gun shows” as defined in the proposed legislation, but would allow licensees to make such sales at the same venues as allowed under current law.

Obligations of Gun Show Promoters

Gun show promoters must verify the identity of all persons selling firearms at the gun show by examining a photographic identification document, requiring that all such sellers sign a ledger with identifying information concerning the sellers, and requiring the sellers to sign a notice acknowledging that they have been advised of their obligations under the law. The records created by these requirements are retained by gun show promoters.

Finally, gun show promoters must advise all buyers of their legal obligation to undergo a Brady background check. Buyers who fail to undergo a background check for a firearm transaction at a gun show face possible criminal penalties.

Penalties for Noncompliance by Gun Show Promoters

Gun show promoters who fail to register prior to holding a gun show would be subject to a fine of not more than \$250,000, imprisonment for not more than five years, or both. The remaining obligations imposed on promoters would be punishable by imprisonment for not more than two years, a fine of not more than \$250,000, or both. For a second or subsequent conviction, gun show promoters would be subject to imprisonment for not more than five years, a fine of \$250,000, or both. In addition, registered gun show promoters who fail to carry out their obligations under the law would be subject to suspension or revocation of their registration, a civil fine of not more than \$10,000, or both.

Requirements for Non-licensed Persons at Gun Shows

Any non-licensed person who sells a firearm to any other non-licensed person at a gun show would be required to transfer the firearms through a federal firearms licensee. Using the federal firearms licensee to perform these background checks relies on the existing network of licensed dealers, who have the expertise and ability to perform Brady background checks without creating any new bureaucracies or classes of individuals who have access to the sensitive personal information in the NICS. Non-licensed sellers would violate the law if they transferred the firearm prior to notification from the licensee that the licensee had complied with the requirements of the Brady Act and had not received any information indicating that the receipt or possession of the firearm by the purchaser would be unlawful. This section would impose the same responsibilities on non-licensed purchasers prior to their receipt of a firearm from a non-licensed seller.

Penalties for Noncompliance by Non-licensed Persons

Non-licensed transferors who knowingly fail to have a background check run prior to the transfer of a firearm at a gun show would be subject to penalties of not more than two years imprisonment, a fine of \$250,000, or both. For a second or subsequent conviction, such persons would be subject to penalties of not more than five years imprisonment, a fine of \$250,000, or both. Criminal penalties also would be available for wilful violations of the background check requirement by non-licensed transferees – up to two years from the first violation and up to five years for the second or subsequent violation.

Requirements for Federal Firearms Licensees at Gun Shows

Licensees who agree to perform a Brady background check for unlicensed sellers would make a record of the sale on a form to be specified by the Secretary, as they do for their own sales. Licensees would also prepare and send in multiple sales reports if they assist in the transfer of two or more handguns during five business days to a non-licensed transferee. The licensees would also send in reports of firearms sales that do not include the names or identifying information concerning the non-licensed seller or purchaser. Licensees would retain a copy of the form used to record the sale as part of their permanent records. This record would allow the tracing of the firearms sold if those firearms are later used in crime.

Many used firearms are sold at gun shows. These firearms may have passed through the hands of several non-licensed purchasers so that the firearms are no longer traceable through the records of federal firearms licensees. In order to enable the tracing of the large numbers of used firearms sold at gun shows, this section would require that licensees provide reports to the Secretary of all the firearms they sell at gun shows. However, the reports would not include the names or identifying information concerning the non-licensed purchasers.

Penalties for Noncompliance by Licensees

Penalties for licensees who agree to act as “transfer” licensees to assist non-licensed persons in transferring firearms at gun shows but who fail to carry out their obligations under the law would be imprisonment for not more than five years, a fine of \$250,000, or both. The same penalties would apply to licensees who sell firearms from their inventories at gun shows and fail to send in the reports of transfer required by the law. S. 254 § 1635(b)(1), amending 18 U.S.C. § 931(f) (page 546). In addition, a licensee who violated these requirements would be subject to license revocation under existing provisions of the law.

Section 1635 would also increase the penalties available for licensees who transfer firearms in violation of the Brady Act, 18 U.S.C. § 922(t). Current law provides for license suspension or revocation and/or civil penalties of not more than \$5,000. Given the importance of conducting background checks on all firearms purchasers, this section would add a criminal penalty of up to five years imprisonment for licensees who knowingly fail to contact the national instant criminal background check system prior to

transferring a firearm to a non-licensed purchasers. This will give the Government a wider range of penalties from which to choose in punishing licensees who fail in their obligations under the Brady Act.

S. 254 § 1635, as well as H.R. 1501 § 607, would also increase the penalties for licensees who commit serious record-keeping violations, making them consistent with the new penalties created by this section. At present, all record-keeping violations by licensees are misdemeanors carrying a maximum of one year in prison. This is insufficient in situations in which the knowingly false record-keeping entry is serious and closely associated with or in the nature of aiding and abetting a violation involving the provision of a firearm to a person not legally entitled to possess it. Accordingly, the amendment would increase the penalty for such record-keeping violations to the same as would attach to the underlying violation. For example, 18 U.S.C. § 922(b)(1) and 18 U.S.C. § 922(b)(3) proscribe sales of firearms to persons known to be juveniles or to reside out of state, respectively. Each carries a five-year maximum sentence for a willful violation under 18 U.S.C. § 924(a)(1)(D). 18 U.S.C. § 922(a)(6) and 18 U.S.C. § 922(d) proscribe, respectively, making false statements to a licensee in relation to the acquisition of a firearm and knowingly selling a firearm to a felon or other prohibited person. Each is punishable by up to ten years imprisonment.

This section also would give the Secretary the right to conduct warrantless inspections of the business premises of gun show promoters, sites where gun shows are held, and the records and inventory of licensees selling firearms at gun shows for purposes of determining compliance with the law.

Gun Owner Privacy and Prevention of Fraud and Abuse of System Information

This provision writes into the Brady Law the requirement that records of gun sales approved by the National Instant Check System be destroyed within 90 days. The Brady Law currently requires that the records of approved sales be destroyed, but it does not specify any time period for the destruction. We do not oppose placing a 90-day time restriction on the retention of records into the Brady Law, because a retention period of 90 days will give the FBI an opportunity to perform security audits of the NICS to identify and prevent abuse and misuse of the NICS. In addition, we support a further modification to this provision – included in the amendment Congresswoman McCarthy offered to H.R. 2122 – that makes explicit the prohibition on using information retained in the audit to create a federal firearms registry.

The Administration strongly supports passage of the provisions of S. 254 § 1635, which will close the dangerous loophole that allows criminals and other prohibited persons to buy guns at gun shows.

Appropriate Intervention and Services; Clarification of Federal Law

We generally support the purposes of S. 254 § 1636(a), which would require schools to provide appropriate interventions and services to children removed from school for engaging in an act of violence. Unfortunately, we are concerned that, as drafted, this provision may be unconstitutional. It provides, *inter alia*, that "[s]chool personnel shall ensure that immediate appropriate interventions and services, including mental health interventions and services, are provided to a child removed from school for any act of violence." Presumably, many of the "school personnel" to whom this command would be addressed would be state and local public employees. Congress generally may not "commandeer" state and local officials and employees to enforce or implement federal programs. See *Printz v. United States*, 521 U.S. 898 (1997). The directive in § 1636(a), therefore, would appear to be unconstitutional. It also is not apparent what Congress's source of authority would be for enactment of this provision. The constitutional problems could be eliminated by amending the provision to make the directive a condition on states' receipt of certain education-related federal funds. See *New York v. United States*, 505 U.S. 144, 167, 171-73 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987). We would be happy to work with the conferees to try to develop a more workable alternative.

Prohibition on Distribution of Explosives Information

Section 1639 of S.254 and section 501 of H.R.1501 would create a new criminal prohibition, to be codified at 18 U.S.C. § 842(p), that would make it unlawful under certain circumstances to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction. The Department supports this prohibition, the terms of which are consistent with recommendations that the Department made in a Report submitted to Congress in April 1997. See United States Department of Justice, Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution (April 1997) ("DOJ Report") (<http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html>).

We note that this provision recently was passed in S. 606 and is awaiting action by the President. Should these provisions become law, S. 254 §1639 and H.R. 1501 § 501 would no longer be necessary.

Subtitle B: James Guelff Body Armor Act

Prohibition of Purchase, Use, or Possession of Body Armor by Violent Felons

Section 1645(b) of S. 254, amending 18 U.S.C. § 931 (pages 571-73), would, with certain exceptions, make it unlawful "for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is [a crime of violence]." Unlike similar provisions that prohibit felons from receiving or possessing any explosive or firearm that "has been shipped or transported in interstate or foreign commerce," see 18 U.S.C. § 842(i) (explosives) and 18 U.S.C. § 922(g) (firearms), S. 254 § 1645(b), amending 18 U.S.C. § 931 (pages 571-73), contains no jurisdictional "commerce" element. Section 1642(3) of S.254 contains a congressional finding that "there is a traffic in body armor moving in or otherwise affecting interstate commerce," but the findings do not address the effects that body armor ownership or possession by convicted felons has upon interstate commerce. See United States v. Lopez, 514 U.S. 549, 562 (1995) (explaining that neither the Gun Free School Zones Act nor its legislative history contained express congressional findings "regarding the effects upon interstate commerce of gun possession in a school zone") (quotation marks and citation omitted). We recommend that the provision be redrafted to incorporate a jurisdictional element like those found in 18 U.S.C. § 842(i) and 18 U.S.C. § 922(g), which should ensure that the statute is confined to a class of conduct within Congress's power to regulate interstate commerce. See Lopez, 514 U.S. at 561-62; Scarborough v. United States, 431 U.S. 563, 575 (1977); see also, e.g., United States v. Cunningham, 161 F.3d 1343, 1345-46 (11th Cir. 1998), and cases cited therein; United States v. Pierson, 139 F.3d 501, 503-04 (5th Cir.), cert. denied, 119 S. Ct. 220 (1998); United States v. Lewis, 100 F.3d 49, 50-53 (7th Cir. 1996), and cases cited therein.

Donation of Federal Surplus Body Armor

We recommend that additional language be added to absolve any federal agency from liability for the performance of a vest it donates to a state, local, or tribal agency and the same would apply if it donates it for distribution through the Surplus Property Program.

Matching Grant Programs for Law Enforcement Bullet Resistant Equipment and for Video Cameras

S. 254 § 1648(a) amends existing law relating to bullet resistant equipment and video cameras. In creating a new "Subpart B – Grant Program" for Bullet Resistant Equipment, the bill proposes that the Bureau of Justice Assistance make grants for other types of bullet resistance equipment including windshield glass, car panels, shields, and protective gear. S. 254 § 1648(a), amending Pub. L. No. 90-351 (42 U.S.C. § 3796ll et seq.) § 2511 (1968) (pages 577-79). However, unlike the Subpart A provisions pertaining to Armor Vests, there is no accompanying requirement concerning minimum standards for testing. Contrary to the intent of the legislation, this could likely lead to federal funds being

used to purchase equipment that will not adequately protect law enforcement officers. It is imperative that any protective equipment be evaluated against proven standards to ensure that users are getting the protection they need.

S. 254 § 1648(a), amending Pub. L. No. 90-351 (42 U.S.C. § 3796ff et seq.) § 2521-23 (1968) (pages 582-87), creates a new grant program for a specific piece of equipment. We are concerned about the proliferation of statutorily created grant programs for specific pieces of technology. Instead, we would favor more generic grant programs (such as the Local Law Enforcement Block Grant Program) that would allow local law enforcement agencies to purchase equipment based on their needs. Further, the Bureau of Justice Assistance needs to create a new grant administration infrastructure with each specified equipment grant program; this requires considerably more management and administration funds than does a more general grant program under which equipment is one authorized purpose.

Subtitle D: Jail-Based Substance Abuse

Jail-Based Substance Abuse Treatment Programs

On the whole, we enthusiastically support S. 254 § 1654, because it recognizes the importance of using Residential Substance Abuse Treatment (RSAT) funds for offenders after they return to their communities. In addition, this provision makes it easier for communities to use RSAT funds in jails and other local corrections facilities, where drug testing and treatment are badly needed.

We have three relatively small concerns. The requirement at S. 254 § 1654(b), amending Pub. L. No. 90-35 (42 U.S.C. § 3796ff et seq.) § 1906(c)(2)(A)(i) (1968) (page 596), that the jail-based program must have been operational for "not less than 2 consecutive years" eliminates the possibility that jails will develop and implement much-needed new programs. It also seems to increase the likelihood of supplanting by jurisdictions. Second, the restriction on the use of RSAT funds for grant administration (S. 254 § 1654(b), amending Pub. L. No. 90-35 (42 U.S.C. § 3796ff et seq.) §§ 1906(f)(1)-(2) (1968) (pages 602-03), may be problematic for some jurisdictions.

Finally, the requirement that the Attorney General collect annual evaluation reports from all grantee jails and conduct annual reviews of these programs concerns us. These requirements could be exceedingly onerous and burdensome, although we recognize that the provision allows the Attorney General to set the guidelines for the reporting requirements. We would appreciate working with the conferees further on this issue.

Subtitle E: School Safety Security

Establishment of School Safety Security Technology Center

S. 254 § 1656 would establish a school safety security technology center at Sandia National Laboratories, authorizing the center to "be a resource to local educational agencies for school security assessments, security technology development, technology availability and implementation, and technical assistance relating to improving school security." In addition, the provision instructs the center to "conduct and publish research on school violence, coalesce data from victim groups, and monitor and report on schools that implement school security strategies." We are concerned about the latter functions, particularly the research on school violence and the data from the victims groups. These activities should be conducted by agencies more appropriately equipped and experienced in the behavioral sciences required to perform these functions. Indeed, a considerable amount of school violence research has already been conducted by the Departments of Education and Justice (both in the National Institute of Justice and the Office of Juvenile Justice and Delinquency Prevention) and by other organizations. Coalescence of data from victim groups may best be conducted by the Office of Justice Programs' Office

for Victims of Crime or the Bureau of Justice Statistics. While Sandia National Laboratories clearly has appropriate and well-recognized expertise in many broad areas of security technology, and more limited but also adequate experience in school security technology, we are concerned that it may not possess the requisite expertise in behavioral sciences relevant to the school environment. In addition, the proposed function for the Center to "monitor and report on schools that implement school security technologies" is not consistent with the role of a technology development organization. It would be more appropriate to have another, independent organization perform this function, perhaps as part of its broader work with the schools.

Findings of Second Amendment Rights

Section 1662(1) of S. 254 would contain the congressional "find[ing]" that "[c]itizens have an individual right, under the Second Amendment to the United States Constitution, to keep and bear arms." This subsection would not, in and of itself, have any operative legal effect. Nevertheless, we note that this "finding" would be at odds with governing precedent. In *United States v. Miller*, 307 U.S. 174 (1939), for example, the Court rejected a Second Amendment challenge to a statute requiring registration for possession of certain shotguns, due to the absence of any evidence that such possession "has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178.

Subtitle G: Partnerships for High Risk Youth

Establishment of Demonstration Project

Section 1674 of S.254 would require the Attorney General to award a grant to "Public-Private Ventures, Inc.," to enable that organization "to award grants to eligible partnerships to pay for the Federal share of the cost of carrying out collaborative intervention programs for high-risk youth" in twelve specified cities. Section 1675(a)(3)(A), in turn, would provide that, in order to be eligible for a grant under § 1674, a partnership "shall be a collaborative entity that includes representatives of local government, juvenile detention service providers, local law enforcement, probation officers, youth street workers, and local educational agencies, and religious institutions that have resident-to-membership percentages of at least 40 percent."

While its purposes are laudable, the Department has concerns with this section. As a general rule, grant laws do not specify recipient private nonprofit agencies for grant funds, leaving this matter to agency discretion. This section authorizes the award to grassroots organizations and subsidiaries of Public-Private Ventures in specific cities, potentially undermining the principle that the award or (sub-award) of federal grant funds is inherently a governmental function.

If this section advances, we would recommend, at a minimum, the following additions to try to provide some safeguards for quality. Insert after § 1675 (a)(3)(B) a new subsection to require sub-grant recipients in each city "to create and convene (at least once prior to the start of programming and every six months thereafter) an advisory group consisting of persons engaged in research related to youth crime prevention, to assist the sub-grantee in planning and executing grant activities."

In addition, if this section is included in the final bill, we would urge that it be applied in a manner consistent with the constitutional requirements in *Bowen v. Kendrick*, 487 U.S. 589 (1988).

Subtitle H: National Youth Crime Prevention

National Youth Crime Prevention Demonstration Project

Please see the above discussion on S. 254, Title XVI, Subtitle G (§§ 1674-76). That discussion

was originally crafted to respond to these sections (§§ 1683-85) when this legislation was introduced in the 105th Congress as H.R. 3607 and again in the 106th as H.R. 102. We have concerns about the directed nature of this grant program in an authorization bill. Generally, such directed funding is usually left to the appropriations process to allow for flexibility in the event of changed circumstances or other problems.

Subtitle I: National Youth Violence Commission

National Youth Violence Commission

Section 1692 of the Senate bill would establish the National Youth Violence Commission, to be composed of 16 members. Sections 1692(b)(2)(C)(ii) and 1692(b)(2)(D)(iv) would require that two of those members be "recognized religious leader[s]." This requirement is unconstitutional. Although clergy may, of course, be appointed to government commissions, the religion clauses of the First Amendment prohibit the government from conditioning employment, appointment, or benefit on satisfaction of any test of religious belief, conduct, or status, and the Religious Test Clause, Art. VI, cl. 3, provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." See Board of Educ. of Kiryas Joel School Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment); McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961).

The constitutional problem could be avoided if sections 1692(b)(2)(C)(ii) and 1692(b)(2)(D)(iv) were amended to replace "recognized religious leader" with something like "a person experienced in a position of moral leadership (including, for example, a recognized religious leader)".

Amendments to the Individuals with Disabilities Education Act

The Administration's position on S. 254 § 1699 and H.R. 1501 § 118 is presented in a letter from the Department of Education.

PART II – PROVISIONS OF H.R. 1501

NOT IN S. 254

In addition to those provisions in the House bill that also appear in the Senate bill, described above, the House bill contains a number of provisions that do not appear in the Senate bill. We describe these provisions below and note that a number of the provisions were drawn from the Administration's proposed gun legislation.

Title I – Consequences for Juvenile Offenders

Explicit Inclusion of Indian Tribes

Please see our comment in Part I of this letter that discusses our about the omission of Indian tribes from certain provisions within this title, and throughout S.254 and H.R. 1501, concerning assistance to communities.

Sentencing Factors

Please see our comment in Part I of this letter that discusses our concerns about provisions throughout S. 254 and H.R. 1501 relating to sentencing factors.

Evaluation by General Accounting Office

See also our comments to H.R. 1501 § 1363.

This provision and section 1363 require the same study due to Congress by two different dates (October 1, 2002 for § 119 and October 1, 2003 for § 1363). These sections provide for a comprehensive GAO evaluation of the performance, functions, programs, and grants of the Office of Juvenile Justice and Delinquency Prevention (as renamed). This three- (or four-) year evaluation – the length of which may be unprecedented for a Congressional request to GAO – is not only unusual in duration and scope, but it seems duplicative of the comprehensive work already undertaken in the context of the OJP restructuring plan, discussed above. In preparing that plan, the Assistant Attorney General for OJP has, among other things, already studied the “potential benefits of consolidating programs administered by the agency with *similar or duplicative programs of other agencies, and the potential for consolidating such programs.”

Moreover, the factors GAO is to consider in its analysis and evaluation are overly broad, and several have no relevance to the issue of continuation. We believe the factors should be limited to those relevant to the determination of whether and how a program should be continued. Suggested language has been prepared. The broad scope of the study would present an onerous burden on OJJDP, requiring significant staff time and resources.

Finally, the “sunset” provision is unnecessary. As part of its oversight of OJJDP, Congress regularly holds oversight hearings and calls for studies on any issues relevant to the future and operation of OJJDP. Since the passage of the Juvenile Justice and Delinquency Prevention Act in 1974, the Act has regularly undergone program review and revision by Congress, as provided under three- to four-year reauthorization cycles. Fundamental changes in programs that reflect changes in juvenile justice practice in the states, as well as needs arising from both the states and from independent studies, have been incorporated into the Act, while outdated practices and programs have been eliminated. Since its inception, but particularly in the past six years, OJJDP has placed a great emphasis on evaluation to determine if funded programs are working as they are intended. In fact, OJJDP has made evaluation a

required component of its demonstration grant programs, so that best practices are promoted and ineffective programs are identified. This close scrutiny creates greater accountability and more effective juvenile justice programs. Consequently, we think the sunset provision included in this bill is unnecessary.

Mandatory life imprisonment for repeat sex offenders against children

Section 104 of H.R. 1501 would create a mandatory life imprisonment penalty for a person who is convicted of a second sex offense (as defined) in which a minor is the victim, that is committed after the sentence for the first such offense was imposed. The offenses as defined are: 18 U.S.C. § 2241 (aggravated sexual abuse), 18 U.S.C. § 2242 (sexual abuse) 18 U.S.C. § 2243 (sexual abuse of a minor or ward), 18 U.S.C. § 2244 (abusive sexual contact) 18 U.S.C. § 2245 (sexual abuse resulting in death) 18 U.S.C. § 2251A (selling or buying of children) 18 U.S.C. § 2423 (transportation of minors) and offenses under state law comparable to the enumerated federal offenses.

We support a targeted, 2-strikes provision for serious sex offenses against children, but we think it should be limited to the most serious offenses. As drafted, the provision includes among the predicate acts not only serious offenses, like aggravated sexual abuse of a child under 16 (which, incidentally, already carries a mandatory life sentence for a recidivist), but also less serious crimes. We believe mandatory life would in some cases be unjustified, and that this provision could result in sentences that are excessive. Under 18 U.S.C. § 2247 and 18 U.S.C. § 2426, a second conviction (defined to include comparable state offenses) for any of these crimes carries a maximum penalty up to twice that available for a first offense. This is adequate and appropriate, whereas a mandatory life sentence as applied to these violations is unduly severe. Moreover, it is noteworthy that Congress only recently passed legislation substantially enhancing the penalties for federal sex offenses (Pub. L. No. 105-314, effective October 30, 1998).

In addition to limiting the predicate crimes as indicated above, we would also urge the conferees to include a tribal opt-in provision as a prerequisite to its use against Indians for crimes committed in Indian country. Such a provision would resemble the tribal opt-in provisions already included in the federal "three strikes" sentencing statute, 18 U.S.C. § 2559(c)(6), and the federal death penalty, 18 U.S.C. § 3598. A similar opt-in provision is appropriate with respect to § 104 because the impact of § 104 would fall disproportionately on Indian defendants. That disproportionate impact would arise from the fact that the federal government exercises general criminal jurisdiction (on which the applicability of most predicate offenses set forth in § 104 depends) in few areas, of which Indian country is by far the most populous. As a result of that jurisdictional framework, the overwhelming majority of persons prosecuted for federal sex abuse offenses are Indian. In 1994 and 1995, for example, 82 percent of defendants prosecuted for federal sex abuse offenses were Indians from Indian country. Thus, the effects of enhancing sentences for repeat offenders, which would be particularly acute with respect to the predicate offenses that do not under current law carry maximum life sentences, would apply disproportionately to Native Americans. Such a disproportionate sentencing impact should not be imposed upon Native Americans without the assent of their governing bodies, a requirement that would, moreover, be consistent with federal policies supporting tribal self-determination and self-government.

Increase of Age relating to Transfer of Obscene Material

The Department supports this provision, which would modify the federal prohibition on sending of obscene material by mail by raising from 16 to 18 the age of prohibited recipients.

Prohibition on Certain Transfers of Firearms to Juveniles

Section 107(a) of H.R. 1501 would amend 18 U.S.C. § 922 to add a new subsection (z), which would make it unlawful "for a person to sell, deliver, or otherwise transfer any firearm to a person who the

transferor knows or has reasonable cause to know is a juvenile, and knowing or having reasonable cause to believe that the juvenile intends to possess, discharge, or otherwise use the firearm" either (i) "in a school" (proposed § 922(z)(1)) or (ii) "in the commission of a serious violent felony" (proposed § 922(z)(2)). This provision might be subject to constitutional challenge on the ground that it exceeds Congress's power under the Commerce Clause, particularly as it applies to transfers of firearms other than handguns.

In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court held that the Gun Free School Zone Act of 1990, which made it a federal offense "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," exceeded Congress's authority under the Commerce Clause. Observing that the statute had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," id. at 561, the Court concluded that the law could not be defended on the ground that it regulated activity substantially affecting interstate commerce, because that effect would be too attenuated and speculative. Id. at 563-68.

Since Lopez, two courts of appeals have upheld the Youth Handgun Safety Act, 18 U.S.C. § 922(x), which prohibits the transfer of a handgun by or to a juvenile and the possession of a handgun by a juvenile, as legislation regulating commerce in handguns with juveniles. See United States v. Michael R., 90 F.3d 340, 343-45 (9th Cir. 1996); United States v. Cardoza, 129 F.3d 6, 11-13 (1st Cir. 1997). Under these decisions, proposed § 922(z) should be sustained as applied to transfers of handguns, because the provision would simply make such transfers a more serious offense if the transferor knew the juvenile intended to possess the handgun in a school zone or to use it in a serious violent felony, and it is well established that the power to criminalize an activity includes the power to treat a subset of that activity as a more serious offense. See, e.g., United States v. Tucker, 90 F.3d 1135, 1140 (6th Cir. 1996). For similar reasons, section 107 also should be sustained as applied to any other type of firearm insofar as Congress has prohibited the sales of such firearms to juveniles.

In the case of firearms whose markets are not otherwise restricted, the foregoing argument would not be available. Even in this context, however, the nexus to commerce is clearer than it was in Lopez, because § 922(z) would regulate the transfer, rather than the mere possession, of such firearms. Accordingly, the government could argue (as it could not in Lopez itself) that § 922(z) would directly regulate commerce (i.e., the transfer of goods). Nonetheless, existing caselaw does not foreclose the possibility that a court would invalidate the statute, at least as applied to noncommercial transfers of firearms whose markets are not otherwise restricted. This possibility could be averted if section 107 were redrafted to include a jurisdictional element like the one now found in § 922(q)(2)(A). See Lopez, 514 U.S. at 561-62 (jurisdictional element sufficient to bring statute within Congress's Commerce power); Scarborough v. United States, 431 U.S. 563, 575 (1977); see also, e.g., United States v. Cunningham, 161 F.3d 1343, 1345-46 (11th Cir. 1998), and cases cited therein; United States v. Pierson, 139 F.3d 501, 503-04 (5th Cir.), cert. denied, 119 S. Ct. 220 (1998); United States v. Lewis, 100 F.3d 49, 50-53 (7th Cir. 1996), and cases cited therein.

We note that the Department is reviewing H.R. 1501 § 110(a) for constitutional concerns and we will provide further comments, if necessary, at a later time.

Termination of Consent Decrees

We note that the Department is reviewing H.R. 1501 § 110(c) for constitutional concerns and we will provide further comments, if necessary, at a later time.

Constitutionality of Memorial Services

We note that the Department is reviewing H.R. 1501 § 112 for constitutional concerns and we will provide further comments, if necessary, at a later time.

Title II – Juvenile Justice Reform

With respect to sections 201, 202, 205, 206, and 207 of H.R. 1501, see our discussion of S. 254 sections 102, 104, 106, 107 and 108, respectively.

Title III – Effective Enforcement of Federal Firearms Laws

With respect to sections 301, 302, and 303 of H.R. 1501, please see our discussion of S. 254 sections 803; 804 and 831; and 805, respectively.

Title IV – Limiting Juvenile Access to Firearms and Explosives

Prohibiting Possession of Explosives by Juveniles and Young Adults

Section 403 of the House bill prohibits individuals under the age of 21 from possessing or receiving explosives. There is an exemption for black powder in small amounts. The Administration supports H.R. 1501 § 403 and notes that the exemption for possession of black powder may be unnecessary, because commercially manufactured black powder in quantities of 50 pounds or less is already exempt from the requirements of the federal explosives laws. We support repealing the black powder exception so that convicted felons and other dangerous persons would be prohibited from possessing black powder. The Administration bill included this proposal, as well as the exception to allow juvenile to possess small amount of black powder. We look forward to working with the conferees to address this issue.

Title V – Preventing Criminal Access to Firearms and Explosives

The Administration supports the provisions included in Title V of the House bill that will enhance ATF's ability to enforce the Gun Control Act and to trace guns that are used in crime. With respect to H.R. 1501 § 501, see our discussion of S. 254 § 1639.

Requiring Thefts From Common Carriers To Be Reported

The Administration supports H.R. 1501 § 502, amending 18 U.S.C. § 922(f) (page 89), to impose a responsibility upon common or contract carriers to report the theft or loss of a firearm within 48 hours after the theft or loss is discovered. This is similar to the responsibility already imposed on firearms licensees. The new reporting requirement will enhance the ability of law enforcement agencies to trace

and recover stolen firearms. A knowing violation of this requirement will be punishable by a civil fine of not more than \$10,000.

Voluntary Submission of Dealer's Records

The Administration strongly supports section 503 of the House bill, which will allow federal firearms licensees to voluntarily submit old business records to ATF. Currently, if a licensee's records are greater than 20 years old, the licensee has the option of continuing to retain the records or destroying them; he or she may not transfer them to ATF. Some licensees would prefer not to destroy their records – which would make the guns identified in the records untraceable if the guns are later used in crime – but instead, would prefer to transfer the old records to ATF. This proposal also will allow a successor licensee to either submit the predecessor's records to ATF or retain them. The Administration believes this provision will significantly assist ATF with the tracing of crime guns.

Grant Program for Juvenile Records

Section 504 of the House bill authorizes the Attorney General to provide grants to states to improve the quality and accessibility of juvenile records and ensure that such records are routinely available for firearm checks. The proposed section would limit funding for juvenile record development to states submitting an "assurance that the state has in place a system of records that ensures that juvenile records are available for background checks performed in connection with the transfer of a firearm. . . ." This would appear to limit award of funds to states that have already developed an effective system and would preclude funding to assist states in establishing such a juvenile record system. With respect to state policy in this area, it should be noted that such a limitation appears inappropriate since those states not wanting to develop such systems would not be required to request funding for such purposes. Accordingly, we recommend that the limiting language be deleted from the bill.

We believe that enhancement of current adult record systems to include juvenile records is critical to providing a complete record for law enforcement and related purposes such as background checks for persons attempting firearm purchases, or seeking positions of responsibility with children, the elderly, and the disabled. Moreover, current proposals to amend federal firearm legislation to prevent firearm sales to persons with selected juvenile offenses could not be effectively implemented absent a rapid development of state systems capable of providing such records on an immediate basis. In recognition of the importance of juvenile records to an individual's complete criminal history, the FBI recently revised its policy to accept state juvenile records for exchange through the interstate system. Only fingerprint supported records are accepted for the federal system, and grants to assist states in developing such systems are necessary to facilitate implementation of the federal goal.

The Department's Bureau of Justice Statistics (BJS) has managed the National Criminal History Improvement Program (NCHIP) since its inception in 1995. Under the program, all states have received funds to develop and upgrade adult record systems which support the FBI's interstate record and identification systems and the National Instant Criminal Background Check System (NICS) established pursuant to the Brady Act. Since the legislation envisions that juvenile records be maintained as part of the adult record system, appropriation of funds for award as part of the NCHIP program is appropriate to maximize the impact of such funding. The NCHIP program also has focused on the related privacy issues that will be critical in expanding systems to include juvenile records. Meeting the goal of the legislation will require adequate funding in light of the complexity of this task.

Title VI – Punishing and Deterring Criminal Use of Firearms and

Explosives

Title VI of the House bill gives law enforcement additional tools to combat crime involving firearms.

Increasing Penalties on Gun Kingpins

The Administration supports section 606 of the House bill, which increases the penalties for illegal gun trafficking by unlicensed dealers. The House bill increases the maximum penalty for engaging in the business of selling firearms without a license, 18 U.S.C. § 922(a)(1), from five years to ten years. This penalty is appropriate given the seriousness of the offense. It also is consistent with the penalties for other Gun Control Act trafficking offenses.

The provision also directs the United States Sentencing Commission to review and amend the federal Sentencing Guidelines to provide an appropriate enhancement for violating 18 U.S.C. § 922(a)(1). Presently, United States Sentencing Guideline § 2K2.1(b)(1) provides for an increase in the base offense level for firearms offenses if the crime involved three or more firearms. However, the guidelines reach their peak with respect to firearms involvement at 50 firearms, with six levels added for crimes involving "50 or more" firearms. This amendment directs the Sentencing Commission to review and amend the guidelines to provide additional sentencing increases, as appropriate, for offenses involving more than 50 firearms.

Termination of Firearms Dealer's License Upon Felony Conviction

Section 608 of the House bill will remove the right of federal firearms licensees to continue to operate their licensed businesses after a felony conviction. Under current law, a licensee convicted of a felony may continue to conduct business under the license until appeal rights are exhausted. Under the amendment, the license will terminate upon conviction. We support this provision.

Increased Penalty for Transactions Involving Firearms With Obliterated Serial Numbers

The Administration supports H.R. 1501 § 609 (page 99), which will increase the maximum penalty for transactions involving firearms with obliterated or altered serial numbers from five to ten years. The current maximum penalty for knowingly transporting, shipping, possessing or receiving a firearm with an obliterated or altered serial number in violation of 18 U.S.C. § 922(k) is five years. Transactions involving weapons with obliterated serial numbers, like transactions involving stolen guns, are indicative of an intent to use the firearm for a criminal purpose. However, transactions involving stolen guns already carry a higher maximum penalty of ten years, and this proposal creates parity among the two sentencing provisions.

Criminal Forfeiture for Gun Trafficking

We support H.R. 1501 § 610, amending 18 U.S.C. § 982(a) (page 99), which calls for the Criminal Forfeiture, under 18 U.S.C. § 982, of vehicles used to commit gunrunning crimes, such as transporting stolen firearms, and the proceeds of such offenses. We also support H.R. 1501 § 614, which calls for criminal forfeiture of firearms used in crimes of violence and felonies. However, the Administration favors extending both provisions to include Civil Forfeiture as well, amending 18 U.S.C. § 981(a)(1), to authorize the confiscation of property associated with gun trafficking offenses such as transporting stolen firearms, traveling with a firearm in furtherance of racketeering, stealing a firearm, or traveling interstate to promote firearms trafficking, and to authorize civil forfeiture of firearms used to commit violent crimes or felonies. This additional authorization will permit forfeiture actions to be undertaken by Department of Justice law enforcement agencies that have authority to enforce the statutes governing crimes of violence but that do

not have authority to pursue forfeitures of firearms under current law.

It should also be noted that without an amendment to 18 U.S.C. § 981, sections 610 and 614 contain a significant drafting error. As currently drafted, section 610 includes a reference to the definition of a "gun trafficking offense" found in section 981(a)(1)(G). However, this definition is not found in current law, and there is currently no section 981(a)(1)(G) in Title 18. Similarly, section 614 refers to firearms forfeited pursuant to 981(a)(1)(H). We believe that these references were carried over from the Administration Bill, in which section 981 was amended to include these definitions. However, the House bill does not amend section 981 to include them. We recommend that the final bill incorporate the new subsections (G) and (H) from the Administration Bill. We would be happy to assist you with language for this amendment.

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Increased Penalty for Firearms Conspiracy

We support H.R. 1501 § 611, amending 18 U.S.C. § 924 (page 99), which will amend the penalty provisions of the Gun Control Act to provide that a conspiracy to commit any violation of that chapter is punishable by the same maximum term that applies to the substantive offense that was the object of the conspiracy. An identical amendment was enacted in the explosives chapter of Title 18 by § 701 of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132). This also accords with several other recent congressional enactments, including 21 U.S.C. § 846 (applicable to drug conspiracies) and 18 U.S.C. § 1956(h) (applicable to money laundering conspiracies).

Gun Convictions as Predicate Crimes for Armed Career Criminal Act

Under current law, violent felonies and serious drug offenses are the only predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). H.R. 1501 § 612, amending 18 U.S.C. § 924(e)(1) (page 100), would add to the list of predicate offenses in the ACCA prior convictions for violations of 18 U.S.C. § 922(g)(1) of the Gun Control Act of 1968 (GCA). This provision of the GCA prohibits the possession of a firearm by a convicted felon.

Persons who have been convicted of a violent felony or serious drug offense and twice convicted of violating the felon-in-possession statute have demonstrated a propensity for violence deserving of sentencing under the ACCA. Thus, the amendment provides that a conviction under 18 U.S.C. § 922(g)(1) would constitute a predicate offense for purposes of imposing a mandatory term of imprisonment of not less than 15 years under the ACCA. Under this proposal, no more than two prior convictions for violations of section 18 U.S.C. § 922(g)(1) may be considered as predicate offenses for purposes of the ACCA. The Administration supports this proposal.

Separate Licenses for Gunsmiths

We support H.R. 1501 § 615 (pages 102-04), establishing separate licenses for firearms dealers and gunsmiths, and lowering the licensing fees for gunsmiths. As the federal firearms licensing provisions presently are structured, there is no distinction between licenses issued to gunsmiths and those issued to firearms dealers. The establishment of separate licenses for firearms dealers and gunsmiths will allow an assignment of inspection priorities that will promote regulatory efficiency and significantly reduce inspection costs. The proposed legislation recognizes the lower costs associated with regulating gunsmiths by lowering the licensing fees for dealers who are only engaged in gunsmith activities. The Administration supports this proposal.

Title VII - Punishing Gang Violence and Drug Trafficking to Minors

Sections 701 through 703 impose stricter penalties for selling drugs to children, using children to sell drugs, or selling drugs near a school or other protected location. The Department fully supports the inclusion of these provisions.

With regard to the provisions concerning gangs, the Department prefers Title II of the Senate bill, as discussed above.

Title VIII - Juvenile Gangs

The Department prefers Title II of the Senate bill to this provision in the House bill, as discussed above.

Title IX – Matthew’s Law

Directive to the United States Sentencing Commission

Section 902(a) directs the United States Sentencing Commission to amend the sentencing guidelines to provide a sentencing enhancement of not less than 5 levels for defendants who commit a crime of violence against a child. Currently, there are a number of provisions in the sentencing guidelines that enhance penalties when a child is victim of a violent crime. For example, the guidelines currently provide specific enhanced penalties when a child is the victim of criminal sexual abuse (see, United States Sentencing Commission, Guidelines Manual, §2A3.1 (Nov. 1998)), kidnapping (USSG §2A4.1), and promoting prostitution (USSG §2G2.1). In addition, the guidelines provide a generally applicable sentencing enhancement when a crime victim is vulnerable including when a victim is vulnerable to due his or her young age.

We agree with the general policy goal underlying the directive — that those who commit violent crimes against children ought to be punished severely and with a sentence that accounts for the additional harm done that results when a violent crime victim is a child. However, we prefer that Congress allow the Commission sufficient flexibility to develop a child victim enhancement that is reasonable consistent with other relevant directives and with the sentencing guidelines as a whole. We would be happy to work with the Congress and the Commission to achieve this goal.

Conforming Repeal

Section 902(b) repeals section 240002 of the Violent Crime Control and Law Enforcement Act of 1994. We oppose this provision, which appears to be premised on the misunderstanding that it is somehow at odds or redundant with the directive in section 902(a). Section 24002 directed the Sentencing Commission to ensure that the applicable guideline range for a defendant convicted of a crime of violence against an elderly victim is sufficiently stringent.

It is not clear to us why this provision is being repealed. While its repeal has no direct legal impact, it may signal the Sentencing Commission that Congress no longer believes that sentences for defendants who victimize the elderly should be enhanced. This provision ought to be removed from the bill.

Title X – Drug Dealer Liability

Title X of H.R. 1501 would create a federal civil cause of action against any person who feloniously manufactures or distributes a controlled substance. The action could be brought by any party harmed, directly or indirectly, by the use of the controlled substance, provided that an individual user could not bring an action unless that user “personally discloses to narcotics enforcement authorities all of the information known to the individual regarding all that individual’s sources of illegal controlled substances.”

We have serious concerns about this amendment. The provision is likely to flood the federal courts with thousands of civil cases each year, without the prospect of much relief to victims or of additional deterrence of drug violations. The most likely defendant in a civil action under this provision will be a person who has been convicted of a Title 21 felony violation. Such defendants will in most instances have had their property forfeited, and will have been subject to criminal fines, in addition to tough prison sentences. In addition, federal law provides for community restitution penalties against convicted federal drug offenders. 18 U.S.C. 3663(c). The effect of all these sanctions is that it is unlikely that there will be any remaining available assets possessed by drug defendants, many of whom will be low level distributors. Moreover, when the defendant has not yet been convicted, persons bringing the civil actions authorized by this provision will often need to conduct private investigations, which may well interfere with the conduct of criminal investigations.

The requirement that the person bringing the action also “personally” divulge all information to narcotics enforcement authorities about his sources of illegal drugs as a prerequisite to suit is also problematic. Leaving aside questions relating to defining “narcotics enforcement authorities,” it is unclear to us who will determine, and how, whether the individual has divulged “all” his information. If it later appears that the plaintiff knew something at the time of the action that he did not disclose, it seems possible that the drug defendant could cause the civil judgment to be overturned. Also, the requirement that the person harmed “personally” reveal this information may mean that, where death resulted to the user — the most serious consequence imaginable — no civil action could be maintained on his behalf by his estate or next of kin, even if they disclose information about the victim’s illegal sources of drugs that the victim imparted to them before his death.

In sum, despite the appeal of this amendment, it will not in our judgment operate as much of a deterrent against illegal drug activity nor as an effective means of recompense for individuals harmed by their use of illegal drugs, while at the same time burdening the federal courts. In addition, the provision’s requirement for disclosure of information as a precondition to bringing an action appears practically unenforceable.

Title XI – Limitation on Recovery of Attorneys Fees in Certain Cases

Denial of Attorneys' Fees for Successful Establishment Clause Suits Involving Students' Religious Expression

We note that the Department is reviewing H.R. 1501 § 1101 for constitutional concerns and we will provide further comments, if necessary, at a later time.

Title XII Rights to Religious Liberty

Ten Commandments Displays, Religious Expression, and Directing Courts' Constitutional Interpretation

Section 1202(a) of H.R.1501 provides:

The power to display the Ten Commandments on or within property owned or administered by the several states or political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively.

Section 1202(b), in turn, provides:

The expression of religious faith by individual persons on or within property owned or administered by the several States or political subdivisions thereof is hereby—

(1) declared to be among the rights secured against laws respecting an establishment of religion or prohibiting the free exercise of religion made or enforced by the United States Government or by any department or executive or judicial officer thereof; and

(2) declared to be among the liberties of which no State shall deprive any person without due process of law made in pursuance of powers reserved to the States respectively.

These "declar[ations]" would not, in and of themselves, have any operative legal effect. Nevertheless, we note that the "declar[ations]" are not, as a categorical matter, a correct description of constitutional law under governing First Amendment precedents.

For example, in certain contexts, a display of the Ten Commandments in a government building might be constitutional, such as where it is part of a broader tableau depicting historical lawgivers, see Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 652-53 & n.13 (1989) (Stevens, J., concurring in part and dissenting in part); see also Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987), or in a context in which it is apparent that the display reflects merely the private expression or sentiments of a government employee in her personal capacity. In many other contexts, however, such displays will violate the Establishment Clause. See, e.g., Stone v. Graham, 449 U.S. 39 (1980) (per curiam).² Similarly, as explained in detail in the Administration's guidelines entitled "Religious Expression in Public Schools" (revised May 1998) and "Guidelines on Religious Exercise and Religious

² The provision in question would state that the power to display the Ten Commandments on or within state property is "among the powers reserved to the States respectively," a finding that would, in turn, be based on the "find[ing]" that "[t]he Tenth Amendment reserves to the States respectively the powers not delegated to the United States Government nor prohibited to the States." Section 1201(5) (emphasis added). As explained in the text, however, the Establishment Clause does, in certain contexts, "prohibit[]" the states from effecting such displays.

Expression in the Federal Workplace" (Aug. 1997), there are many contexts in which the expression of religious faith by individual persons on or within government property is permissible, or even protected by statutory or constitutional law. See also, e.g., Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); Chandler v. James, 1999 WL 493495 (11th Cir. July 13, 1999). But there also are contexts in which such expression (or the government's endorsement of, or preference for, such expression) would violate the Establishment Clause — in particular, where such expression is, or would reasonably be perceived as being, the state's own religious speech, or as having been endorsed or preferred by the state. See, e.g., Lee v. Weisman, 505 U.S. 577 (1992); Allegheny County, *supra*; Engel v. Vitale, 370 U.S. 421 (1962); Chandler, 1999 WL 493495, at *3-*4, *8, *9; Doe v. Santa Fe Indep. School Dist., 168 F.3d 806 (5th Cir. 1999); Ingebreetsen v. Jackson Public School Dist., 88 F.3d 274 (5th Cir.), *cert. denied sub nom. Moore v. Ingebreetsen*, 519 U.S. 965 (1996); ACLU of New Jersey v. Black Horse Pike Regional Board of Educ., 84 F.3d 1471 (3d Cir. 1996). The Establishment Clause analysis will depend in large part on the facts and circumstances of each case, including, e.g., the persons responsible for the religious expression, the government's endorsement of, or preference for, the expression, the extent to which the expression can be said to occur in a "public forum," the extent to which the expression is conveyed in a situation where the government has created a "captive audience," and whether governmental action results in any sectarian discrimination.

Subsection 1202(c) of H.R.1501 would violate the constitutional separation of powers. That subsection would provide that "[t]he courts constituted, ordained, and established by the Congress shall exercise the judicial power in a manner consistent with the foregoing declarations [regarding the Ten Commandments and religious expression]." As explained above, the "foregoing declarations [regarding the Ten Commandments and religious expression]" are in certain respects inconsistent with governing Supreme Court doctrines. However, regardless of the particular content of the "foregoing declarations," and regardless of whether and to what extent those declarations are consistent with governing judicial precedent at any particular point in time, Congress may not direct the federal courts to interpret the Constitution in a particular way. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (Congress lacks the "power to decree the substance of the Fourteenth Amendment's restrictions on the States" and "the power to determine what constitutes a constitutional violation"); *id.* at 536 ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.") (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) (Congress may not "assume[] the right to determine what shall be the measure of compensation" for a taking of property, because the "ascertainment" of that "constitutional" requirement "is a judicial inquiry"); Crowell v. Benson, 285 U.S. 22, 60 (1932) ("in cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function"); *cf.* United States v. Klein, 80 U.S. (13 Wall.) 128, 145-48 (1872); Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements This Congress cannot do. . . . [W]henver the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.").

Title XIII – Juvenile Crime Control and Delinquency Prevention

Subtitle A Amendments to Juvenile Justice and Delinquency Prevention Act of 1974

Definitions

H.R. 1501 § 1304(2), amending 42 U.S.C. § 5603 (page 142), a proposed amendment to Sec. 103(4) of the JJDP Act instructs to insert language before “the Omnibus.” This term does not appear in the referenced section.

Content of Material Produced with Federal Funds

Section 1321 of H.R. 1501 directs that any hate crime prevention materials be “respectful of the diversity” of religious beliefs and “make it clear that for most people religious faith is not associated with prejudice and intolerance.” We strongly oppose this provision as unnecessary and counterproductive.

Subtitle E Studies and Evaluation

General Accounting Report

Section 1364 of the House bill authorizes a GAO study of certain services available in local communities. Because of the federal trust responsibility to tribes, it would be particularly appropriate to study circumstances in Indian country. We recommend amending subsection (2) to require that at least two or three of the fifteen communities studied be located in Indian country as that term is defined by 18 U.S.C. § 1151.

Title XIV– Children’s Internet Protection

Requiring Schools and Libraries to Implement an Internet Filtering Technology In Order to be Eligible to Receive Universal Service Assistance

The Department of Education is submitting to you its objections to this provision. We note that the Department of Justice is reviewing H.R. 1501 § 1402(a) for constitutional concerns and we will provide further comments, if necessary, at a later time.

Title XV – Teacher Liability Protection

Please see the discussion of Title XII of S. 254.

Gu: JJ bill

October 8, 1999

The Honorable Janet Reno
Attorney General
U.S. Dept. of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

The Honorable Richard Riley
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Attorney General Reno and Secretary Riley:

We understand that in the coming weeks, the Senate and House will be developing a final version of the juvenile justice legislation. We would like to take this opportunity to bring a number of concerns to your attention.

We believe that any final juvenile justice legislation must address the following issues:

- 1) Provide core protections for children in the juvenile justice system.

Issue: JJDPA 'Separation' protection.

For the past 25 years, the Juvenile Justice and Delinquency Prevention Act (JJDPA) has protected children from abuse and assault by adults in adult jails. The House-passed bill would weaken this policy by allowing "incidental" contact between children and adult inmates in the state system, which in many jails will mean that children will be walked down hallways past adult cells and thereby subjected to verbal abuse. Additionally, the House-passed bill weakens protections for children in the federal system as it creates a loophole which could allow youth who are prosecuted in federal court to have unlimited exposure to adult inmates. Under the House bill, children as young as age 13 could be placed in cells with adult inmates in the federal system. This is of grave concern, since research has shown that children commit suicide in adult jails eight times as often as children held in juvenile detention facilities, and children housed in adult prisons are five times more likely to be sexually assaulted, two times more likely to be assaulted by staff, and 50% more likely to be attacked with a weapon compared to children in juvenile facilities.

Recommendation:

We are pleased that the Administration is in agreement with us in supporting the Senate provisions which essentially maintain the protection to separate juveniles from adults in adult jails in both the state and federal systems.

Issue: JJDPA 'Removal' protection.

Both the House and Senate bills significantly weaken the requirement to keep children out of adult jails by including provisions to allow parental consent to place children in adult jails. The Senate bill would allow children to be placed in adult facilities with parental consent indefinitely. The parental consent exception is a radical change from current law and will result in children being placed in adult jails for unacceptably long periods.

Recommendation:

We urged conferees to drop these provisions from the final bill, and instead, maintain current law protections for children. We urge the Administration to take a stronger position on this issue, which is more consistent with maintaining core protections for children and would not result in more children jailed with adults.

Issue: Dangerous conditions for incarcerated children. The House-passed bill contains a provision which will seriously harm children by terminating consent decrees which existed before the passage of the Prison Litigation Reform Act (PLRA). Under this language, dozens of consent decrees which have kept children out of adult jails and prohibited abusive practices, including beatings, tying children to beds, and locking them in isolation rooms for days and weeks at a time, would be abolished.

Recommendation:

We urged conferees to not include this provision in the final bill, and we hope that the Administration will weigh in with us to ensure that this provision which would have devastating consequences for children is not included in the final bill.

Issue: Prosecutorial discretion, trying children as adults, and federalizing juvenile crimes Both bills propose drastic changes in the way that children are prosecuted in the federal system, changes which are opposed by prominent federal officials including Chief Justice Rehnquist and former Attorney General Edwin Meese III. Among some of the changes we oppose are: the presumption that children will be prosecuted in the federal system contrary to current law which assumes prosecution in the state system; prosecuting and sentencing children as young as 13 as adults; giving prosecutors unfettered discretion to prosecute children as adults without judicial review; subjecting children both in the juvenile and adult system to mandatory sentencing; and removing confidentiality protections in juvenile court by opening juvenile court proceedings to the public and making juvenile records available.

Recommendation:

We urged conferees to drop these provisions from the final legislation in light of all the evidence which illustrates that these policies will most certainly lead to an increase in juvenile crime. We strongly urge the Administration to reconsider its' position which serves the convenience of federal prosecutors at the expense of children, in particular, Native American youth.

Issue: Reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDP A).

The House-passed bill includes a provision which would sunset the Juvenile Justice and Delinquency Prevention Act (JJDP A) in 2004. The JJDP A includes the core requirements that have provided the most basic protections against harm to children in correctional facilities for the last 25 years. Sunsetting JJDP A would also eliminate critical funding under the Act to states and communities for improvements to their juvenile justice systems.

Recommendation:

We urged conferees to not include this provision in the final bill, and we appreciate the Administration's support of our position.

2) Support state efforts to reduce disproportionate confinement of minority youth.

Issue: Disproportionate confinement of minority youth in the juvenile justice system In virtually every state, minority youth are over-represented at every stage of the juvenile justice system, particularly in secure confinement. Current law directs states generally to "address" this issue, without requiring release of juveniles or incarceration quotas or any other specific change of policy or practice. The Senate-passed bill, however, deletes all reference to "minority" or "race" and instead refers to "segments of the juvenile population." This minimizes an important issue, is offensive to many, and hinders efforts to remedy the disparate treatment of minority youth.

Recommendation:

We urged conferees to adopt the House-passed provision which maintains a requirement to address disproportionate minority confinement under the JJDP A. We are very pleased that the Administration has taken a strong position in favor of this requirement.

3) Significantly invest in juvenile crime prevention.

Issue: Prevention funding set-aside and programs. Although both bills contain a "prevention block grant," there is no set-aside for prevention funding. Without a significant guarantee of funding, there is no assurance that any funds will ever be appropriated for prevention programs.

Recommendation:

We are pleased that the Administration supports the Senate provisions which add further prevention activities as allowable uses under the Juvenile Accountability Block Grant (JABG) and set-aside a minimum of 25% of the Juvenile Accountability Incentive Block Grant for prevention purposes and to establish a new 'Parenting as Prevention' program.

4) Take serious steps to reduce gun violence.

Issue: Availability of and access to guns to children and people who kill children.

The House-passed bill fails to take any significant action to make guns safer or less accessible to children or people who kill children. At a time when, on average, nearly 13 children and young people are killed by firearms every day, it is critically important that the final bill address gun violence in a meaningful way.

Recommendation:

We agree with the Administration that the final conference report must adopt at a minimum the Senate-passed provisions to close the gun-show loophole, require child safety locks, and ban the importation of high capacity ammunition clips.

5) Provide appropriate support services for at-risk and delinquent youth.

Issue: Graduated sanctions

Both bills allow Juvenile Accountability Incentive Block Grant (JAIBG) funds to be used to implement graduated sanctions or a system of graduated sanctions in order to assure a consequence for every delinquent act by a youth. The House bill provides states with some discretion in implementing graduated sanctions, while the Senate bill restricts states' discretion, and instead mandates this as a condition of receiving JAIBG funds.

Recommendation:

We are pleased that the Administration agrees with us in recommending the adoption of the House language which allows states the discretion to implement graduated sanctions as a condition of receipt of JAIBG funds. We also hope you will consider supporting our recommendation for defining graduated sanctions per the the House Title XIII definition.

Issue: Intervention services to children with disabilities who bring firearms to school The Senate and House bills amend current law by allowing school personnel to discipline and to cease educational services to students with disabilities who possess or carry a firearm or weapon to school. The Senate bill requires that immediate mental health intervention services be provided for children removed from school for any violent acts, including carrying or possessing a weapon.

Recommendation:

We oppose the cessation of educational services to students with disabilities and urge that this provision be removed, and we appreciate the Administration's strong position in opposition to the IDEA amendments to this legislation. Despite these concerns, should the conferees retain these provisions, we would prefer that the conferees adopt the Senate provision which provides for immediate mental health services as this would better assure that schools are safe learning environments and reduce future violence.

Issue: Mental health services to at-risk and delinquent youth. The Senate and House bills, respectively, include a number of similar provisions which focus on assessing and providing mental health services to at-risk and delinquent youth. In addition, the House bill allows Juvenile Accountability Incentive

Block Grant (JAIBG) funds to be used for mental health screening and services, and requires the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to conduct research on mental health services for juveniles, providing training and technical assistance to mental health and law enforcement personnel, and to conduct a comprehensive study on the mental health needs of juveniles in the juvenile justice system. Also, the Senate bill allows funds to be used to train justice system personnel and probation officers with these funds, authorizes a demonstration program on violence prevention, and reauthorizes the Elementary School Counseling Demonstration Act.

Recommendation:

We agree with the Administration in urging conferees to include the screening, research, training, and study provisions contained in the House bill and the training, violence prevention and counseling program provisions in the Senate bill.

6) Focus federal support, technical assistance and research on children and youth.

Issue: Reorganization of the Office of Juvenile Justice and Delinquency Prevention.

The Senate-passed bill fails to recognize the importance of juvenile justice research, training, and technical assistance. The bill transfers most of these functions currently supported by the Office of Juvenile Justice and Delinquency Prevention to the National Institute of Justice, an agency primarily responsible for research on adult crime. Juvenile justice research (e.g., on effective delinquency prevention programs), training of juvenile justice personnel, public officials and their staffs, and technical assistance to communities have proved invaluable to public officials, policymakers, and concerned citizens. There is a significant danger that these important activities will inevitably have a lower priority at NIJ, resulting in far fewer resources for communities to use in their juvenile crime control and prevention efforts. The House bill includes no similar provision.

Recommendation:

We urged conferees to not include these provisions in the final bill. We are disappointed that the Administration continues to promote this restructuring plan despite overwhelming concerns raised by numerous juvenile justice advocates. WE have no confidence that concerns we've raised will be addressed under the restructuring plan and we believe that this plan is highly inconsistent with the President's commitment to address youth violence, and therefore, we strongly urge you to reconsider the Administration's position in light of these concerns.

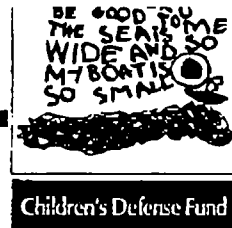
We appreciate your thoughtful consideration to assure that the final juvenile justice legislation protects children.

Sincerely,

Alliance for Children and Families
The American Academy of Child and Adolescent Psychiatry
American Academy of Pediatrics
American Psychiatric Association
American Psychological Association
Brain Injury Association/Violence and Brain Injury Institute
Campaign for an Effective Crime Policy
Campaign for Equity – Restorative Justice (CERJ)
Center for Women Policy Studies
Child Welfare League of America
Children's Defense Fund
Coalition on Human Needs
Covenant House
Family Watch
Federation of Families for Children's Mental Health
Friends Committee on National Legislation (Quaker)
Girl Scouts of the USA

Justice Policy Institute
Lutheran Office for Governmental Affairs, Evangelical Lutheran Church in America
Minorities in Law Enforcement
National Association of Counsels for Children
National Association of School Psychologists
National Association of Social Workers
National Association of Service and Conservation Corps
National Association of Criminal Defense Lawyers
National Council of Churches – Washington Office
National Mental Health Association
National Network for Youth
Partnerships for Creative Action
Peace and Social Witness Committee, Homewood Friends Meeting
Presbyterian Church (USA), Washington Office
Shiloh Baptist Church
Union of American Hebrew Congregations
Unitarian Universalist Association of Congregations
The United Methodist Church, The General Board of Church & Society
Washington Ethical Action Office, American Ethical Union
Women of Reform Judaism
Virginia CURE
Youth Law Center

Ku-07511



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To: Ann O'LearyOrganization: The White House

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From: Liz RyanCDF dept.: Intergovernmental Relations

FAX number transmitted from: _____

If you have a transmittal/receiving problem, please contact me
at (202) 662-_____.Date: 9/22/99 Time: _____Number of pages sent (including this cover sheet): 5

Comments: Ann - Thanks again for taking the
time to meet with us yesterday. Here's
the reorganization letter (Marian's name is
informately spelled wrong!)
Thanks again!

Children's Defense Fund 2000 Annual National Conference

March 25 - 28, 2000
The Hilton New York
& Towers
New York, NY

Look for more
information to come
in early fall!

[www.childrensdefense.org/
conference](http://www.childrensdefense.org/conference)

or call our
conference hotline
1-800-CDF-1200

LEAVE NO CHILD BEHIND®

June 15, 1999

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Reno:

We are writing to express our deep concern about the plan for reorganizing the Office of Juvenile Justice and Delinquency Prevention within the Office of Justice Programs. The plan is contained in "A Report to the U.S. Congress Concerning A New Organizational Structure for the U.S. Department of Justice, Office of Justice Programs," which was submitted to Congress on March 10, 1999, and released to the public on April 15, 1999.

We represent very diverse interests within the juvenile justice field -- juvenile court judges, researchers, service providers, policymakers, and advocates -- but we are united in our belief that the reorganization plan would create enormous difficulty for those who work with, and for, troubled youth.

As the report notes, the vast majority of Justice Department officials, interest group representatives, and juvenile justice practitioners interviewed during preparation of the plan, as well as an advisory Working Group convened by the OJJDP Administrator, recommended retaining a separate, active, and effective juvenile justice agency within the OJP administrative structure. We are particularly concerned that the plan technically follows that recommendation but ignores its spirit and substance by taking away many of OJJDP's most important functions.

While the stated purpose of the reorganization plan is to streamline and consolidate programs and activities within OJP, consistent with principles of good government and sound management, the plan instead creates disorganization, confusion, and dispersal of juvenile justice functions currently consolidated in OJJDP. Specifically, the plan:

- * transfers the research, evaluation, statistics, publication, formula and block grants (such as Title V Prevention and Juvenile Accountability Incentive Block Grant functions of OJJDP), and most of the monitoring functions, to other agencies within OJP;

- * removes control from OJJDP of nearly 75% of its current budget;

- * reduces the prominence and independence of OJJDP by having its Administrator appointed by the Attorney General, rather than appointed by the President and confirmed by the Senate, and gives the Assistant Attorney General final authority over all programs administered by OJJDP;

* sends a message to the field, and to the country, that juvenile justice concerns no longer occupy as high a priority as they have in the past, and blurs the distinction between the juvenile and criminal justice systems;

* represents a significant setback to delinquency prevention just as research documenting its effectiveness becomes widely accepted.

For these reasons, we urge you to reconsider the reorganization plan as it applies to OJJDP. We would welcome the opportunity to meet with you to discuss our concerns. Thank you for your attention to this important matter.

Sincerely,

Louis W. McHardy, Executive Director
National Council of Juvenile and Family
Court Judges

Gordon Raley, President/CEO
National Collaboration for Youth

Mark Soler, President
Youth Law Center

Mildred Wurf, Director of Public Policy
Girls Incorporated

Michael Faenza, President and CEO
National Mental Health Association

Marion Wright Edelman
Children's Defense Fund

Richard J. Sauer, President and CEO
Donald T. Floyd, Jr., Vice-President and COO
National 4-H Council

Laura Murphy, Director, Washington office
American Civil Liberties Union

Tom McKenna
Big Brothers/Big Sisters of America

Karabelle Pizzigati, Director
Public Policy Department
Child Welfare League of America

Vincent Schiraldi, Executive Director
Justice Policy Institute

Libby Kuffner, Director of Public Policy
National Association of School Psychologists

Harmon L. Wray, Executive Director
Restorative Justice Ministries of the United
Methodist Church

Janice Christensen, National Campaign Director
Amnesty International

Jill Kagan, Chair
National Respite Coalition

Carmen Delgado Votaw
Senior Vice President, Public Policy
Alliance for Children and Families

Robert E. Shepherd, Jr.
University of Richmond Law School

Joseph B. Tulman, Professor of Law
U.D.C. David A. Clarke School of Law
Juvenile Law Clinic

David J. Utter, Director
Juvenile Justice Project of Louisiana

Regina H. Lockett, President
Howard University School of Law
Child Advocacy Law Association

Dr. Thom White Wolf Fassett, General Secretary
General Board of Church and Society
The United Methodist Church

Ronald H. Field
Vice President, Public Policy
Volunteers of America

James P. McComb, Chairman of the Coalition
Juvenile Justice Coalition of Maryland

Chris Erhardt, LCSW-C, Executive Director
Dundalk Youth Service Center

Frank Dunbaugh, Executive Director
Maryland Justice Policy Institute

Barbara Huff, Executive Director
Federation of Families for Children's Mental Health

Twin Cities One to One Mentoring Inc.

National Dropout Prevention

Minorities In Law Enforcement

Cc: Laurie Robinson
Shay Bilchik



Liz Ryan <lryan@childrensdefense.org>

10/01/99 02:53:09 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: JJ: dmc letter

Here's what we sent to the Administration today on the dmc issue, along with other civil rights organizations:

October 1, 1999

The President
The White House
Washington, D.C. 20500

Dear President Clinton:

On behalf of the civil rights and children's advocacy communities, we are writing to bring to your attention a matter of serious concern to us and which we believe to be a most basic issue of fundamental fairness in the justice system.

It is well documented that the racial disparities which exist in the treatment of minorities in our society are reflected in our juvenile justice system as well. We strongly believe that any final juvenile justice legislation must address the issue of the disproportionate confinement of minority youth in the juvenile justice system. While the House bill maintains this requirement, the Senate bill essentially guts the current law requirement which directs states to identify the extent to which disproportionate minority confinement (DMC) exists in their states, to assess the reason that it exists, and to develop strategies to address the disproportionate number of minority children in confinement.

We believe it is critically important to retain this core requirement in federal law. In nearly every state, minority youth are over-represented at every stage of the juvenile justice system, particularly in secure confinement. Moreover, federal and state research, ironically much of it funded through the provision which the Senate has substantially repealed, has consistently shown that minority youth are more likely than white youth to be detained for the same charges and minorities are detained at higher rates even when other factors are taken into account, such as arrest charge, prior offenses, gender and home living situation. By gutting the DMC provision, the issue of the widespread disparity in the treatment of minority youth will be minimized and current efforts underway in the states to remedy this disparate treatment of minority youth would be seriously undermined.

We applaud the Administration for taking a strong stance as shown in the Statement of Administration Policy this past August on the juvenile justice legislation, and we stand ready to work with you to ensure that this provision is not only maintained in the final juvenile justice bill, but that efforts continue to be implemented at the state and community level to ensure a fairer and more equitable juvenile justice system for all of America's children and youth.

Sincerely,

ACLU
Amnesty International
ASPIRA
Child Welfare League of America
Children's Defense Fund
Friends Committee on National Legislation (Quaker)
Human Rights Watch
Justice Policy Institute
Latino Civil Rights Center
Lawyer's Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
League of United Latin American Citizens
NAACP
National Association of Counsel for Children
National Council of La Raza
National Legal Aid and Defender Association
National Network for Youth
National Urban League, Inc.
The Sentencing Project
Youth Law Center

Message Sent To:

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