

The “Bipartisan Safer Communities Act”: The Bad and The Ugly

The “Bipartisan Safer Communities Act” is a wholesale sellout by RINOs and the dream of every liberal. The result is several more gun laws while spending HUGE amounts of money on government programs and grants that will have no impact on crime or school shootings. This legislation expands the prohibitions and scope of current criminal statutes; creates several new crimes; complicates the process for firearm transfers to young adults (that will ultimately expand to all transfers); bribes states to create their own unconstitutional gun-confiscation programs; gives millions of dollars to the FBI to further restrict firearms, and throw billions of dollars into grants and other programs that have already failed and that will inevitably be used to fund further anti-gun research and legislation. And what did the RINOs get in return: useless verbiage that any state red-flag laws must comply with constitutional guarantees and that future Fast-and-Furious operations (where the government provided firearms to drug cartels) must be more closely monitored. (These violations would have been more properly addressed by imprisoning Eric Holder and the ATF agents involved in the fiasco, which included the death of U.S. Border Patrol Agent Brian Terry as well as many others across the border.)

The answer to every “crisis” for many politicians is to provide the government with more control through direct criminal and civil laws and to throw billions of dollars into grants and programs that lead only to further political corruption. RINOs are complicit. None of these laws ever work to solve the crisis. After all, solving the problem would prevent the need for more laws and money. None of the actions in the “Bipartisan Safer Communities Act” will have any material impact on solving school or other shootings, but will severely infringe on Second Amendment rights of law-abiding citizens and ensure lawmakers become more powerful through their influence as to who receives the exorbitant amounts of money (including family members and campaign donors).

Failure Demands More Money

When the country is already undergoing the most significant inflation in more than forty years, Congress continues to spend huge amounts of money, further exacerbating the inflation that was largely the result of previous, uncontrolled spending. The “Bipartisan Safer Communities Act” continues those policies.

The Act provides significant changes to Medicare to allegedly address mental health services, but most of these involve providing states with large amounts of money for various grants and studies. None of this money will be used to protect schools themselves. These amounts for various mental health and drug programs include grants and other funding of \$40 million, \$8 million, \$50 million, and \$5 million (for two years, then \$1 million each year thereafter). A Pediatric Mental Health Care Access grant is amended to be increased from \$9 million per year to \$31 million for each year from 2023-2027.

The Medicare Improvement Fund is to receive another increase over the \$5 million from last year to **\$7.5 billion** (a 1,500 times increase). (The amount was left blank in the “Discussion Draft.”) This has nothing to do with the stated purpose of bill. Another \$800 million is incurred for

“Health Surveillance and Program Support,” which involves providing more money for existing programs. \$190 million is allocated for the Public Health and Social Services Emergency Fund. Another **\$1 billion** is provided for Safe Schools and Citizenship Education, which further funds existing grant programs related to mental health, including “Mental Health Services Professional Demonstration Grants” (designed “to support and demonstrate innovative partnerships to train school-based mental health service providers for employment in schools and local educational agencies”).

Many of these programs are for progressive research projects to support liberal academia, increase the influence of schools over parents, and help ensure school union support for Democrats. These grants and programs are not new or innovative. But, because they are failing to solve the problem, they must need more money. Within the government, failure is awarded with more money.

The ATF receives \$1 million each year between 2023 and 2027 to “continue and expand current efforts . . . to educate [FFLs] and the public to combat illegal straw purchases of firearms.” The reality of these laws is to scare people from selling and transferring firearms under fears they will be prosecuted for straw sales, firearms racketeering, RICO violations, and drug trafficking laws.

The partisan FBI gets another \$100 million for salaries and expenses related to administering the inaccurate and pointless background check system, where law-abiding citizens are denied and delayed transfers because of inaccurate or misinterpreted records and felons aren’t prosecuted for lying on the Form 4473. Another **\$1.4 billion** is allocated for state and local law enforcement grants to be administered by the Office of Justice Programs. (Will these be used to aid law enforcement, or to pursue “restorative justice” and other progressive nonsense that will only further thwart law enforcement efforts against real criminals?)

\$1.05 billion is provided for school improvement programs. Is this money to be spent securing our schools? Of course not. It will be used to “increase support for the implementation of evidence-based practices intended to increase attendance and engagement of students in the middle grades and high school in community learning centers.” This means more tax-funded, after-school day care. Hasn’t playing basketball after school already been tried?

These billions of dollars could actually solve the problem if simply used to provide security measures within the school and to provide training and programs for armed school personnel and safety officers.

New Law for Straw Sales

Prior to this Act, no statute made the purchase of a firearm for another person illegal. Recognizing that purchasing a firearm on behalf of another person would allow the ultimate recipient to avoid a background check, the ATF initially determined that purchasing a firearm on behalf of a prohibited person was illegal. The person acquiring the firearm could not be

prosecuted for violating a specific statute, however, so they added a question to the Form 4473 asking if the purchaser was the "actual transferee/buyer" of the firearm. If not, the FFL could not transfer the firearm. If the purchaser lied on the form and the firearms' dealer transferred the firearm to a prohibited person, who then transferred it to a prohibited person, the initial purchaser was not prosecuted for purchasing a firearm for someone else, but for lying on the Form 4473. The ATF maintained this position until 1995 when they extended prosecution for "straw sales" even if the ultimate recipient of the firearm was lawfully allowed to purchase and possess the firearm. Exceptions were allowed for gifts and purchases intended for resale or as a raffle prize. (The intended "ultimate recipient" of the firearm was often an undercover ATF agent, who didn't need to be a prohibited person and thus greatly expanded the ability to obtain convictions.)

Ultimately, the United States Supreme Court, in a 5-4 decision, concluded that it didn't matter what the ATF believed as to whether the ultimate recipient needed to be a prohibited person or not. It is the courts who interpret the law. Whether or not the ultimate recipient was a prohibited person or not was irrelevant. If the person purchasing the firearm made a false statement when they stated they were the actual transferee/buyer of the firearm and they were not, they lied. Thus, as Justice Scalia pointed out in his dissent, the ATF could make up any question for Form 4473, such as the buyer's favorite color, and should this be false the person could be prosecuted. (This is also reminiscent of persons being prosecuted for lying to the FBI when there's insufficient evidence to establish they actually committed the crime being investigated.)

The "Bipartisan Safer Communities Act" creates statutory law codifying the "straw sales" law created by the courts, making the act of purchasing a firearm illegal if the person purchases a firearm for another person and knows or has reason to believe that the other person 1) is a prohibited person; 2) intends to use the firearm in furtherance of a felony, federal terrorism, or drug trafficking; or 3) intends to transfer the firearm to a prohibited person (a second level of transfer). Sentences for violating this law include fines and 15-25 years in prison.

The potential good news is that this new law makes more sense in that persons purchasing firearms for another person who is not a prohibited person, planning to use the firearm to commit a felony, etc., cannot be prosecuted. There is absolutely no justification making it a criminal offense to purchase a firearm for another person who would have passed the background check on their own. However, it is not clear whether the ATF will remove the irrelevant question on Form 4473 and still hold purchasers criminally liable for lying on the form if purchasing the firearm for a person who is not prohibited from possessing a firearm. Without making this change, the potential benefit is lost.

The bad news is the criminal liability exposure under the "reason to believe" language. The purchaser doesn't actually have to know the status or intention of the recipient. The "reasonable cause to believe" phrase works well for prosecutors when they can't prove the person actually knew something, so they argue that he should have known. Whatever the "reason to believe" standard is, it is less than actual knowledge. This is an unfortunate and vague phrase used in other firearm laws to aid in convictions. This phrase is also often used as the standard for issuing

search warrants, illustrating how weak the threshold is for meeting the standard.

For example, a person purchases a firearm with the intent to gift it to his 28-year-old nephew. (No "straw sale" exception exists for gifts now.) Your nephew picks out the firearm he wants and his uncle purchases it for him. However, when the nephew was eighteen, he and some friends hauled away a large composite steer from the front of a steak restaurant and placed in on the property of a rival high school with a sign stating the school was full of BS, leaving behind a large amount of BS for effect. The nephew was charged with a felony and, if convicted, would be a prohibited person. The nephew plead guilty and the court, understanding the situation, sentenced the nephew to a fine and community service. The nephew didn't spend a day in jail. Based on the limited sentence, the uncle didn't realize that his nephew was a prohibited person because what matters is the potential sentence, not the actual sentence. Did the uncle have reasonable belief that his nephew was a prohibited person? Was he expected to investigate further, discuss the matter with his nephew (assuming his nephew understood the repercussions of the guilty plea), talk with his nephew's parents, talk with his nephew's attorney, review the court records, research the law, etc.? How much information is needed to form "reasonable cause"? Suddenly the uncle and the nephew may be felons over the gift and subject to serious prison time and fines. Depending on what the salesperson knew, they and the store may also be subject to prosecution. Did the salesperson happen to read the news article about what happened ten years previously?

New Law for Trafficking in Firearms

The "Bipartisan Safer Communities Act" also creates a new law allowing for the prosecution of "trafficking in firearms." A person can be convicted for "trafficking in firearms" by shipping, transporting, transferring, causing to be transported, or disposing of a single firearm to another person if the person knows or has reasonable cause to believe that the use, carrying, or possession of the firearm by the recipient would constitute a felony. In such a case, the recipient of the firearm is also "trafficking in firearms." (In some situations, the same person may very well be prosecuted for making a straw sale as well as trafficking in firearms.)

Again, there is that same, vague "reasonable cause to believe" standard. In addition, as a catchall, it is also a crime to attempt or conspire to commit these acts. Federal prosecutors find conspiracy convictions very handy when the parties haven't actually committed a real crime. Often, the "conspiracy" is with another law enforcement officer, who then testifies against the co-conspirator. This is obviously entrapment, but prosecutors still get convictions.

In addition to the 15-year penalty for any violation, "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation" shall be forfeited. Extensive laws allowing for the forfeiture of firearms and ammunition already exist. However, these laws provide some protection by allowing a person who sues to government to have those items returned to recover attorney fees. There are no such protections under this new law. Thus, if you use your car or airplane to transport the firearm, you

lose your car or airplane. If you store the firearm at your house, you may lose your house. The due process rights that normally apply in criminal cases do not apply in forfeiture actions. Instead, separate civil cases are created for the property and the person must sue the government to get their property back. Because the standards for proof for the government to keep your property are so low and the costs so prohibitive, many times the property simply becomes an asset to the law enforcement agency. As exemplified with drug trafficking, law enforcement finds these forfeiture laws very lucrative.

In response, if you wish to transfer a firearm to someone else, you may want to provide the firearm to an FFL and have a background check performed, even if only for a short-term loan. However, there is no guarantee that this will be sufficient. The government can make mistakes. You cannot. While the background check may provide evidence of your intent to follow the law, if you still have a “reasonable belief” (whatever that is) that the relative may be prohibited, you are still in violation of the law. A background check does not cover all of the potential grounds for prohibiting a transfer. After all, Hunter Biden lied on his Form 4473 and passed the background check while addicted to drugs.

These New Laws Added to Racketeering and Money Laundering Statutes

The straw sales and trafficking in firearms crimes are also added to the racketeering and money laundering statutes (initially created for mobsters), creating further crimes and penalties, as well as reduced evidentiary standards. In addition, anyone convicted under these new laws is subjected to the increased penalties under the federal Sentencing Guidelines.

Previously, a person was prohibited from “knowingly” transferring a firearm to a person they “knew” would use the firearm to commit a crime of violence or drug trafficking. Violators could be sentenced to a fine and ten years in prison.

The new law adds a crime for the recipient as well as the transferor, adds a new crime for “attempts or conspiracies” to transfer when there was no actual transfer, and makes it easier to violate the law because actual knowledge of the buyer’s intent is no longer required. The person needs only to have a “reasonable cause to believe” that the firearm or ammunition will be used to commit terrorism or drug trafficking. Can this reasonable belief be found based on the person’s clothing, bumper stickers or tattoos, association with certain groups, political affiliation, etc.? What is the transferor’s obligation to investigate and what can trigger that need?

With minimal evidence of a “reasonable belief” or a “conspiracy” regarding the sale of a single firearm, a person can be convicted under the laws of trafficking in firearms, racketeering, and money laundering statutes and lose many of their civil rights, their most significant assets, and spend a significant amount of their life in prison.

New Law: Prohibition for Transfers Based on Recipient's Intent, Including Ammunition

In addition to the new laws summarized above, the "Bipartisan Safer Communities Act" makes it illegal to sell or otherwise dispose of any **firearm or ammunition** to any person knowing or having reasonable cause to believe that such person intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense or intends to sell or otherwise dispose of the firearm or ammunition to a person who is a prohibited person. Background checks are not relevant here as the categories under this new law deal with potential, future conduct of the ultimate receiver of the firearm or ammunition, including possibly transferring the items to a third party the seller/transfer doesn't even know about. Before selling or transferring a firearm to another person, you may want to have them sign a statement, under penalty of perjury, that they are not a prohibited person; do not intend to use the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; nor do they intend to sell or otherwise dispose of the firearm or ammunition to a prohibited person. All of the definitions and formalities should be included with the statement.

Would this be sufficient? Maybe. Is it unreasonable? Definitely. Is there a pattern forming with these laws? Of course. You shouldn't be transferring firearms to anyone as you may lose everything you have, including your fundamental rights and freedom if you do. But of course, none of these laws constitute an infringement of the Second Amendment because these liberal and RINOs support the Second Amendment and would never infringe on that right.

New NICS Procedures for Young Adults

The new Act provides for additional background check scrutiny for adults between the ages of 18 and 20. Normally, when an FFL submits the information for a background check, the firearm cannot be transferred unless either (i) the transfer is approved and the system has provided the licensee with a unique identification number; or (ii) three business days have elapsed since the licensee contacted the system, and the system has not notified the licensee that the recipient is a prohibited person. For persons aged 18-20, this three business days is expanded to ten business days if the FBI determines that "cause exists to further investigate a possibly disqualifying juvenile record." The need for this additional time is supposedly to allow the FBI to review the young adult's criminal juvenile history records and mental health adjudication records.

There are several concerns about this process. First, the "cause exists to further investigate" standard will always be met, at least according to the FBI. Logically, some evidence should exist based on what is discovered in the first three days to justify further investigation. This logical requirement, however, is unlikely to be considered necessary. Inevitably, the FBI will always find the need for additional time to obtain and review the records regardless of whether they have any existing evidence justifying the need or not. To avoid such abuse, the statute needs these decisions to be evaluated by an independent agency and needs to provide consequences when abuses occur.

Second, the existing problems with the NICS system will be perpetuated. The same Texas Senator responsible for the disaster Fix NICS legislation (John Cornyn) is also responsible for the RINO capitulation with this legislation. As John Lott's extensive research has established, the vast majority of transfer denials under the NICS system are erroneous. Part of the problem is that law enforcement reports information that does not constitute a prohibition, such as arrest records. Rather than recognizing that an arrest record does not mean the person was convicted, the FBI uses the evidence as information that a conviction may have occurred and denies the transfer. The potential purchaser then has to incur time, costs, and often legal fees to establish that no charges were ever filed, the charges were dropped, the arrest never led to a conviction, the conviction was for a lesser offense that did not lead to a prohibited person status, that the conviction was expunged, etc. The combination of too much and often incorrect information and the FBI's failure to require the records to establish prohibited person status rather than placing the burden on the purchaser to prove otherwise has led to an expensive and unreliable system. This system fails to provide the protections for which NICS was established. Moreover, in the few cases where a prohibited person does apply for a firearm's transfer, the person is rarely prosecuted.

Third, the additional evidence of juvenile criminal history will not be limited to those aged 18 to 20 for long. Once the new system is running, it will inevitably be expanded to background checks for all transfers. This is merely the first step to get the system up and running.

Fourth, the very system of the felony prohibition is flawed. A person should not be prohibited from protecting themselves, their family, and others based on a nonviolent felony. Opening up juvenile records will inevitably find a large number of nonviolent felonies that have nothing to do with whether the person should have his or her rights to possess a firearm removed. Only violent felonies should be considered. This violent felony limitation for everyone would have made a significant and fruitful compromise had the RINO senators actually been interested in insisting that the Democrats provide any substantive compromise.

Finally, holding 18-20 year olds to a different standard is discriminatory and simply unconstitutional.

Red Flag Laws

The most commonly discussed parts of the Act in the press address the provisions for federal bribes to states to create mental health courts, drug courts, veteran courts, and extreme risk protection order programs (ERPO). The government should never be used to pay for state programs, including bribing them to enact laws that it can't enact at the federal level. (Unfortunately, this problem is pernicious throughout our federal legislation. Federal politicians want the federal government to control everything, regardless of constitutional limits. They are generally successful through tax-funded bribes and falling back on the erroneous extension of the Commerce Clause of The Constitution to regulate even entirely intrastate activity.) The problems with ERPO's are extensive and have been addressed more completely by others, so

only a few of the provisions are addressed here.

As an apparent “compromise,” the Act provides meaningless requirements that any state ERPO programs enacted using federal dollars must not violate the Constitution or Bill of Rights, as though the new laws could violate the Constitution and Bill of Rights if it were not for these legislative provisions. This language has no teeth. It is the judiciary that will determine if the provisions are constitutional. It’s hard to find a liberal-leaning court that finds restrictions on the possession of firearms to be a constitutional violation. Instead, their view is that the Bill of Rights exists to protect criminals, not law abiding citizens who are merely having their firearms confiscated.

Moreover, these provisions ignore reality. State judges are generally subject to ongoing elections. A judge improperly granting an ERPO faces little risk of voter backlash. However, a judge who refuses an ERPO and someone is subsequently injured afterwards will face stinging voter backlash. Despite any good intentions of the judiciary, the system is stacked against the firearm owner. Rather than providing some heightened burden of proof, such as beyond a reasonable doubt, that must be met before firearms are confiscated, the act merely provides for “heightened evidentiary standards and proof which mean not less than the protection afforded to a similarly situated litigation in Federal court or promulgated by the State’s evidentiary body” to provide the necessary constitutional protections. Thus, the state decides the standard of proof and the Act provides no concrete threshold on what that standard must be. This is just one more example of vagueness that will ultimately allow for firearm confiscations based on meager or nonexistent evidence.

While the Act provides for “the right to be represented by counsel,” it also explains that pursuing this right will not be at the “expense to the government.” Thus, a person is not entitled to a public defender before their firearms are confiscated. Legal fees for such proceedings, including investigators and expert witnesses, could easily reach \$25,000.

Domestic Violence Misdemeanor Convictions

The Act expands the relationships that qualify a person as a prohibited person based on a domestic violence misdemeanor conviction. It now includes dating relationships, addressing the liberals screaming about the “boyfriend loophole.” As a result, a dating relationship will be vaguely defined as “a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.” Relevant factors in deciding whether there is a dating relationship must be based on the length of the relationship, the nature of the relationship; and the frequency and type of interaction between the individuals involved in the relationship. We can’t get liberals to define what a woman is, how can we expect them to know what a dating relationship is?

There is absolutely nothing sufficient here to make a consistent determination. What is a “serious” relationship? What is a “romantic” relationship? If one of party to the relationship

buys flowers, is that "romantic," or merely a prelude to a hopeful or a thanks for a past hookup? (The individuals involved may have very different ideas about whether a relationship is romantic.) How far must the two go before the relationship becomes "intimate?" (Apparently, a strictly sexual relationship without romance is sufficient.) How long is long enough to be a "continuing serious" relationship? What is meant by the "nature" of the relationship? How frequent must they be together or engage in romantic or intimate conduct? Is a monthly hookup sufficient? All of these terms and factors are so vague as to guarantee inconsistent application to identical or similar relationships based on who is making the decision.

Also, who is going to make this decision? State laws regarding misdemeanor convictions may or may not be based on dating relationships and, even if they are, they may not be based on the same criteria. This makes it impractical for a person to know whether or not they are actually a prohibited person. This law is so vague and the ability of a person to know whether it applies to them or not so undeterminable that the law is unconstitutional on its face.

There are specific grounds allowing for the removal of a conviction for a "dating relationship" misdemeanor crime of domestic violence: 1) conviction expunged or set aside, 2) person pardoned, or 3) person had firearms rights restored. However, anyone who receives an expungement or set aside order, is pardoned, or has their civil rights restored, is still a prohibited person if these order expressly state the person is still prohibited from possessing firearms. Restoration is only available for dating relationships, but not when the relationship was for "a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim." In these cases, the prohibited person status is permanent. (These laws provide an arsenal of ammunition (no pun intended) in divorce actions, whether or not any domestic violence actually exists. After all, all women should be believed.)

Also, a person is not considered to have a misdemeanor domestic violence conviction related to a dating relationship if: 1) there is not more than one of these convictions (without other prohibited person qualifications); 2) five years have elapsed since the conviction or completion of the person's custodial or supervisory sentence; 3) AND the person has "not subsequently been convicted of another such offense" (seems this is duplicative of #1), a misdemeanor conviction involving the attempted use of physical force or threatened use of a deadly weapon, or any other offense that would make the person a prohibited person. The NICS system "shall be updated to reflect the status of the person." (This will never happen and the legislators passing this Act know it. State law enforcement agencies do not have the time and resources to make these convoluted evaluations for each case on an ongoing basis. Events in NICS are generally reported, but rarely if ever followed up on or updated. The FBI is not going to pursue states for failing to update their reports to NICS. Again, a law with no teeth is meaningless.)

Information Collection and Studies for School Safety

The Act provides that the Secretary of Homeland Security shall establish a “Federal Clearinghouse on School Safety Evidence-based Practices.” The Clearinghouse will be coordinated with the Secretary of Education (who was asked to resign by several Congress members over links to a letter that targeted protesting parents), the Attorney General (who believes parents are terrorists), and the Secretary of Health and Human Services (former California Attorney General after Kamala Harris and helped draft the Affordable Care Act). It shall serve as a Federal resource to identify and publish online through SchoolSafety.gov practices and recommendations to improve school safety. The “evidence or research” that will be included is limited to those that “support a positive and safe learning environment for all students,” as well as having “a significant effect on improving the health, safety, and welfare of persons in school settings.” Democrats have already made clear that armed school safety officers and teachers are not consistent with the feeling of a safe learning environment and have adverse effects on minorities. In fact, consultations under this Act will be made with government organizations and “non-governmental organizations, including civil rights and disability rights organizations.”

The results of these studies will be greater school influence on children at the exclusion of parents, greater concentration on progressive indoctrination in school at the exclusion of providing an education, and throwing a lot of money around for grants to anti-gun groups. This research and resulting reports will then be posted online with policies for all schools to adopt. Nothing immediate will be resolved and anything truly effective, such as preventing access to school buildings, training and arming teachers, providing for armed security, etc. will not be deemed an appropriate option under this program.

Removing Records from NICS

A few of the new laws apply to FFLs and related firearm transfers. For example, NICS reporting agencies, on an annual basis, “shall submit to the Committee on the Judiciary and the Committee on Appropriations of the Senate and the Committee on the Judiciary and the Committee on Appropriations of the House of Representatives a report detailing the removal from the system of records that no longer prohibit an individual from lawfully acquiring or possessing a firearm” under the prohibited person statutes. Each report submitted by a State or Federal agency under paragraph (1) shall include pertinent information on—(A) the number of records that the State or Federal agency removed from the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) during the reporting period; (B) why the records were removed; and (C) for each record removed, the nature of the disqualifying characteristic outlined in subsection (d), (g), or (n) of section 922 of title 18, United States Code, that caused the State or Federal agency to originally submit the record to the system.

Oddly, the most important provision of actually requiring these reporting agencies to remove this irrelevant information is NOT required. They are only required to report records they bother to remove. This results in a disincentive for these agencies to remove such records because, by doing so, they will have significant reporting requirements they will need to comply with.

Also, what records "no longer prohibit an individual from lawfully acquiring or possessing a firearm"? Technically, an arrest record would be such a record as an arrest does not make the person a prohibited person. They must have existing charges for or been convicted of qualifying crimes. According, all arrest records should be removed and only records showing unresolved charges or convictions should be included, and only if the related charges or convictions involve a crime that would result in the person becoming a prohibited person.

There are several primary problems. Most of the FBI's erroneous denials of firearm transfers seem to be based solely on arrest records. The FBI relies on arrest records to deny firearm transfers under NICS on grounds that they provide evidence that the person may have a qualifying conviction. Based on the disincentive to remove records and the federal attitude that arrest records should be included as relevant (even if they do not, by themselves, establish the person is a prohibited person), this law accomplishes nothing to benefit firearm owners. The FBI will continue to wrongfully deny firearm transfers.

These continued erroneous denials with threats by Sen. John Cornyn (the same Texas Senator responsible for the horrible Fix NICS law as well as this "bipartisan" act), to pass laws to prosecute any denial under NICS is a serious threat to those owning firearms. Law-abiding firearm owners could receive a wrongful denial and before they have time to get the FBI to admit they were wrong, a SWAT team will show up at their house, threaten those present, shoot their dog, tear the house apart, and confiscate their firearms. (Or, as exemplified by Ruby Ridge, shoot their son and the wife in addition to the dog; or as exemplified by Waco, burn down their house and kill everyone in it.) There is no recourse for the emotional trauma, loss of the house pet, property damage, legal fees, etc.

Currently, NICS is intended to be comprehensive of all law enforcement incidents, relevant or not. They include arrests where no further action was taken and information about charges or convictions that have nothing to do with being a prohibited person. Yet, the FBI will deem these records relevant as they are the basis for many if not most of their erroneous denials. Under the Act, state agencies are now required to make the relevancy determination (for state incidents), which involves the evaluation of both state law regarding the incident and federal law regarding firearms prohibitions. If states take this responsibility seriously, the NICS database should become significantly smaller, but there is also a high likelihood it will become more unreliable and inconsistent. In most cases, however, states will not bother and choose to error in favor of reporting and keeping the information with the NICS system. As explained above, there is no requirement to do remove the information and a significant burdens apply should they do so. Moreover, they want to avoid any potential bad press from removing information from NICS about a person who later is improperly approved for a firearm transfer and then used the firearm

in a crime. Accordingly, the law accomplishes nothing. To be effective, the law should provide grants for states to create agencies whose sole responsibility is to be trained for and to review and update all records for state reporting agencies to ensure they are reflective of only items that establish that a person is restricted from possessing a firearm.

If states take this obligation seriously, they will also need to be provided with more complete records from courts and other agencies. For example, if expunction orders are properly reported, states need to ensure that the details of the expunction order are reviewed to determine if firearm restrictions were maintained or if all civil rights were restored. Many computerized reports only report the expunction.

Firearms Dealer or Not?

The Act also attempts to clarify who qualifies as a dealer and, therefore is required to have a federal firearms license to sell a firearm. It strikes "with the principal objective of livelihood and profit" and inserts "to predominantly earn a profit." This will increase the number of individuals required to have a license because the person selling firearms no longer needs to have a "primary objective of livelihood" in doing so.

The Act explains that the term "to predominantly earn a profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. However, the proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. (Thus, a person who purchases and sells firearms for criminal purposes or terrorism is required to obtain a federal firearms license even if they do not have a profit motive. Just like mass shooters are expected to obey the "no gun" signs, I'm sure these individuals will comply with obtaining FFLs.)

In discussing the FFL requirement, most politicians ignore the other relevant provisions of the law. It is still critical that the person "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business . . . through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." (18 U.S.C. § 921.) (Contrary to President Obama, the sale of one firearm is not a "repetitive purchase and resale of firearms.")

NICS for Licensee Background Checks

FFLs will be able to use the NICS system to ensure their potential employees are not prohibited persons. Employers must provide notice and the employee must consent. The Attorney General may not collect a fee for employment background checks. Employees can challenge the results, which will likely be often under the flawed NICS system. However, it's likely better to have the matter cleared up prior to employment.

FFL Access to List of Stolen Firearms

The Attorney General shall provide FFLs "with information necessary to verify whether firearms offered for sale to such licensees have been stolen." The Act leaves it to the Attorney General to issue regulations as to how this will be achieved. Once available, any purchaser will want to verify prior to purchase or receipt to avoid charges for receiving stolen property, or conspiring to do so.

Limits on "Operation Fast and Furious" Operations

The Department of Justice and its agencies (which includes the ATF) "shall not conduct or otherwise facilitate the transfer of an operable firearm or ammunition to an individual if any law enforcement officer employed by the Department of Justice involved with the transfer knows or has reasonable cause to believe that the recipient of the firearm or ammunition is an agent of a drug cartel, unless law enforcement personnel of the United States continuously monitor or control the firearm or ammunition at all times." It's unclear what, if any, penalty would result for a violation, but based on past experience the offending agents will be promoted and receive an increase in salary. After all, failure is rewarded. Also, while the location of firearms and ammunition may be tracked across the border, is this sufficient "monitoring," and, if so, they aren't exactly retrievable from Mexican cartels.