



# Issue Backgrounder

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## H.R. 1528: *A Threat to Gun Owners, Families, and Privacy*

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Rep. James Sensenbrenner (R, WI) has introduced H.R. 1528, the “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005.”<sup>1</sup> This sweeping bill would impose harsh federal mandatory sentences for very low-level drug offenses. The bill attempts to require Americans to become informers against one another. As federal legislation, the bill far exceeds

the scope of legitimate federal action, and is extremely intrusive into the privacy of the home.

The bill also directly threatens the Second Amendment.

The bill has already passed the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, and the full House

Judiciary Committee will be taking it up soon.

The bill is promoted as a response to some recent Supreme Court decisions concerning federal sentencing, but the bill also includes many extraneous items which are unwise, unfair, and contrary to federalism.

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### **Supreme Court Background**

On January 12, 2005, in *United States v. Booker*,<sup>2</sup> and the companion case *United States v. Fanfan*<sup>3</sup> issued the same day, the U.S. Supreme Court ruled that it is unconstitutional to force federal judges to increase sentences based on facts not presented to and found by a jury. The Court’s ruling was a straightforward application of the Sixth Amendment’s right to jury trial. The right would be undermined if judges were required to sentence people based on facts which have not been proven beyond a reasonable doubt to a jury.

The ruling affects many of the sentences imposed under the Federal Sentencing Guidelines. For example, a jury might convict a defendant of a particular crime, for which the ordinary sentencing range might be 3 to 4 years in federal prison. The conviction would, of course, be based on the jury finding beyond a reasonable doubt all the facts necessary to establish the defendant’s guilt of the crime.

But, at the sentencing phase, a prosecutor could introduce new evidence about the defendant’s alleged other conduct. In the sentencing phase, raw hearsay and other forms of unreliable evidence can be used, even though such evidence is normally excluded from jury trials, precisely because of reliability concerns.

If the judge found that the prosecutor in the sentencing phase had merely shown enough evidence to support particular facts by a preponderance of the evidence (51%), then the judge would be required to sentence the defendant to extra months or years. The Court held that forcing the additional sentence length violated the Sixth Amendment, because the mandatory add-on would not be based on jury findings beyond a reasonable doubt.

Accordingly, ruled the Court, the parts of the Sentencing Guidelines which require extra prison time based on allegations not proven to a jury should be treated as optional guidelines for judges, rather than as mandates.

The *Booker* and *Fanfan* rulings only applied to the Sentencing Guidelines created by the U.S. Sentencing Commission. The rulings do not apply to statutory mandatory minimum sentences specifically enacted by Congress. In a statutory mandatory minimum, the jury must find beyond a reasonable doubt all the elements necessary for the mandatory

sentence. For example, if robbery carries a five-year sentence, and robbery with a machine gun carries a 15-year mandatory add-on, the jury must find beyond a reasonable doubt that the defendant committed a robbery and that the defendant used a machine gun in the robbery.

According to Chief Justice Rehnquist—who could hardly be called “soft” on crime—the proliferation of mandatory sentences in the last two decades has been a mistake, and has deprived our judicial system of the ability to administer justice based on the

unique facts of each case. Almost a decade ago, when Congress was debating increases in mandatory minimum sentences for drug offenses, the Chief Justice noted that such sentencing policies “frustrate the careful calibration of sentences from one end of the spectrum to the other that the [sentencing] guidelines were intended to accomplish.”<sup>4</sup>

There is little reason to worry, though, that the *Booker* and *Fanfan* decisions about the Sentencing Guidelines will lead to convicted criminals escaping with little or no punishment. First of all, every defendant will still be sentenced for the crime for which he was actually convicted.

Moreover, judges still have the discretion to add additional time for alleged conduct which was not proven to the jury. The only effect of *Booker* and *Fanfan* is that such additional sentences are not inflexibly required. When the *Booker* case returned to the federal district court, Freddie Booker was resentenced—by the same judge—to the same 30-year prison term which originally led to the *Booker* decision.<sup>5</sup>

Accordingly, there is little reason for a bill to “fix” *Booker* and *Fanfan* to be rushed through Congress. Even if a fix bill were necessary, H.R. 1528 would be a poor choice, because it goes very far beyond the *Booker* and *Fanfan* issues.

## Destroying the Safety Valve

In the “1994 Violent Crime Control and Law Enforcement Act”,<sup>6</sup> Congress created a “safety valve” which allows certain first-time, nonviolent drug offenders to escape the statutory mandatory minimums and instead be sentenced under the federal Sentencing Guidelines as long as the guideline is at least a 2-year sentence.

Sensenbrenner’s bill would end the “safety valve” by eliminating nearly all conceivable grounds for a downward departure in sentencing. The bill forbids 36 specific grounds, including the absence of a criminal record, a record of prior good works, or even judicial consideration of reports or recommendations by the Sentencing Commission to Congress.<sup>7</sup> The bill further prohibits courts from sentencing below the guidelines range based on defendant cooperation “except upon motion of the government.”

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Rather than destroying what few protections exist for persons caught up in the periphery of drug crimes, Congress should expand the “safety valve,” especially as it relates to women caught in the drug activity of husbands and boyfriends.

For instance, in 1999, Tammi Bloom, a mother of two with no previous criminal record, was sentenced to over 19 years in federal prison for the drug activity of her husband and his mistress. She received a 2-level enhancement for the firearms belonging to her husband, which were found in the search of their home. She also received a 2-level obstruction of justice enhancement for testifying to her own innocence at trial. She received a 2-level reduction for being a “minor participant in the conspiracy.”<sup>8</sup>

Separating children from their mother for nearly two decades for an offense in which the mother was a “minor participant” can hardly be called “protecting children.” Yet H.R. 1528 would break apart even more families than current law does.

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More generally, H.R. 1528 aggravates the problem of extreme sentences for minor drug crimes. “Long sentences for minor, non-violent drug offenders are perhaps the least defensible aspect of

current drug policy,” is the conclusion of the new book, *An Analytical Assessment of U.S. Drug Policy*, published by the conservative American Enterprise Institute.<sup>9</sup>

According to the Federal Bureau of Prisons, over 53 percent of the more than 180,000 current federal inmates are drug offenders.<sup>10</sup> In a rational assessment of federal spending priorities, lawmakers should seek to reduce total federal drug incarceration, especially for low level and non-violent offenders.

Incarceration for minor, intra-state offenders is the responsibility of the states and municipalities, not the federal government. State and local governments

have certainly not slacked off on drug incarceration. In Colorado, drug offenders make up over 20% of the state’s nearly 19,800 inmates. The number of incarcerated drug offenders in Colorado prisons today is about the same as the state’s entire inmate population was 20 years ago.<sup>11</sup>

The vast majority of new offenses created by H.R. 1528 have nothing to do with genuine Congressional powers. They do not involve drug cartels operating across state lines (interstate commerce) or drug dealing on federal property. Rather, they involve offenses in homes, universities, and other places which are the proper subjects of state criminal law, not federal law.

## Second Amendment Threat

No one disputes the authority of Congress to enact laws punishing bankruptcy fraud. Establishing rules for bankruptcies is one of the specific powers which the Constitution gives to the Congress. Now suppose Congress enacted a law which said “The penalty for a first offense of bankruptcy fraud shall be 4 to 5 years in federal prison. However, if the defendant convicted of bankruptcy fraud owns a firearm, the person shall serve an additional 3 years.”

The mandatory sentence for gun possession clearly would be contrary to the Second Amendment. The defendant would receive significant additional punishment simply because he exercised his constitutional right to possess a gun. The gun was not used to perpetrate the bankruptcy fraud. Punishing a person for gun possession—when the gun was not used for any unlawful purpose—is a direct attack on Second Amendment rights.

H.R. 1528 actually does punish people for simple gun possession in cases where the gun was never misused, and had no connection to a crime. If H.R. 1528 becomes a law, it will create a horrible precedent allowing people to be punished for the non-criminal exercise of their Second Amendment rights.

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The bill vastly expands sentencing enhancements for gun possession during drug offenses, including an 8-level enhancement for possession of a gun “in or near the presence of a person under the age of 18, or in a location in which a person under the age of 18 resides for *any period of time*.”<sup>12</sup>

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So under the 2-level enhancement, a drug crime that carries a federal sentence of between 18-24 months would be enhanced to 24-30 months. With an 8-level enhancement, that sentence would increase to between 46-57 months. The enhancement would be on top of the severe new mandatory minimum sentences created by the Sensenbrenner bill.

The bill applies a 6-level enhancement if “the defendant discharged a firearm” or possesses a firearm already illegal under federal law.<sup>13</sup>

Consider a divorced father whose 17 year old son spends every other weekend at his house. The father owns a shotgun for hunting, and buys a few grams of marijuana from an adult friend. The father could conceivably spend more time—2 enhancement levels worth—in federal prison as someone who actually discharged a gun during a similar drug offense in a place where no minor has ever resided.

Even without the “minor residing in the home for any period of time” provision, the bill is still quite dangerous to gun owners, carrying a 6-level enhancement if “8 or more firearms were possessed;”<sup>14</sup> a 3-level enhancement if “2 or more firearms were possessed,”<sup>15</sup> and a 2-level enhancement if “a dangerous weapon (including a firearm) was possessed.”<sup>16</sup>

According to the “Federal Sentencing Guidelines Handbook,” concerning the existing 2-level “dangerous weapon” possession enhancement, “That the gun

was possessed for a reason other than facilitating a drug offense does not preclude the enhancement.”<sup>17</sup>

The sentence enhancements do *not* require that a gun be used during the drug offense. (Actually using the gun is covered by separate provisions). Indeed, the gun possession provision could easily apply to guns locked in a safe in a basement, while adults on the second floor smoke marijuana.

The existing 2-level dangerous weapon possession enhancement remains in effect, untouched by *Booker* or *Fanfan*. Accordingly, the firearms-related effect of H.R. 1528 serves only to provide stringent additional punishments for gun owners who *did not* use their firearms in any improper way.

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### More Zones

To protect children, the bill adds public libraries and daycare facilities to the already long list of “drug free” zones,<sup>18</sup> which oddly enough includes colleges and universities. Drug crimes within drug free zones would carry a five-year mandatory minimum for a first drug offense and 10 years for a second or subsequent drug offense. The bill applies a range of 1,000 feet around such protected areas.<sup>19</sup>

The net effect is that in any high-density urban area, any type of drug activity in any setting, including small time marijuana dealing, could conceivably be in the “presence of children.”

The original point of creating “drug free zones” was to select special, unique areas where children might be especially endangered by drug dealers. H.R. 1528, however, converts almost every square foot of almost every city and suburb into a “drug free zone.” It is disingenuous for the bill to create, in effect, a national mandatory minimum sentence of five years for selling a single marijuana cigarette, through the indirect method of making every place in every city and town into a special zone. If Congress believes that there should be a five-year mandatory sentence

for a first-time, low-level marijuana sale, Congress should create such a law forthrightly, not by hiding the mandatory sentences in special zones language.

As the American Enterprise Institute authors note, “marijuana is bought and sold in markets that, while not free of violence, are less violent than cocaine or heroin markets, perhaps because so much is sold in residential settings—for instance college dormitories—by dealers who themselves do not have expensive habits.”<sup>20</sup> The American Enterprise Institute authors conclude that current marijuana enforcement is “unjustifiable,” but H.R. 1528 would make matters worse.

H.R. 1528 aggravates the irrational policy of treating marijuana like other, harder drugs and treating small-time marijuana selling among friends like interstate trafficking.

### Enticing

H.R. 1528 also creates a five-year mandatory sentence for the crime of “enticing” someone who has ever been enrolled in a drug treatment program or facility to “purchase, receive, or possess a controlled substance...”<sup>21</sup> A second or subsequent offense of “enticing” carries a ten-year sentence. The bill also demands a life sentence if “death or serious bodily injury occurs from the use of such substance.”

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In other words, simply passing along a joint at an outdoor bonfire party to someone who went through drug rehab for prescription drug addiction five years ago would be a federal offense with a mandatory prison term. Were that person, out of their own irresponsibility, to fall in the fire while high and burn to death, the punishment is life in federal prison. The bill does *not* require the defendant to have any prior knowledge of the person having ever been in drug rehabilitation.

### Mandatory Snitching on One’s Children and Neighbors

The act creates a 2-year mandatory sentence for anyone simply failing, within 24 hours, to notify police of drug activity, including illegal drug use, and provide full assistance investigating, apprehending and prosecuting the offender, “in or near the presence” of anyone 18 or younger. If you are the parent or legal guardian, it is three years.<sup>22</sup> The mandatory sentence also applies to drug use, that “involves or is intended to involve a person under the age of eighteen or an incompetent person.”<sup>23</sup>

The bill defines “in or near the presence” of children as “within 500 feet of such a person.” This could easily include circumstances which in no way touch upon a minor, such as small time marijuana dealing in a fifth floor apartment when an unrelated teenager happens to live on the fourth floor in the same building.

More to the point, not telling police within 24 hours that you have found out that your neighbors, who also have a teenager, smoke marijuana a few times a year could send you to federal prison.

There would also be a mandatory federal prison term for parents who decide to take action against their teenaged children’s drug use themselves, rather than immediately turning the children over to the police.

The “snitch” provision also applies to “drug free zones”, and thus, colleges and universities. At any small to mid-size school, it would be next to impossible to be involved in campus life and not hear or know of some kind of drug activity (including the sale of prescription drugs as “study aids”). As blogger Pete Guthier, who works at a university, puts it, “most of the students themselves would be in violation of this snitch law.”<sup>24</sup>

Suppose a Christian undergraduate student befriends someone with a drug problem, who also

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sells illegal drugs to support his habit. They have many long, private discussions about addiction and drug dealing. Finally, she convinces him to attend church with her and pray together. Her intervention leads him to give up drug and alcohol use, while she gets a mandatory 2-year federal sentence.

### **Mandatory Snitching Dangerous for Gun Owners**

The “snitch” provision is not just dangerous in practice, but also in principle. Overeager, anti-gun lawmakers, federal or state, could decide to expand the “snitch or go to jail” idea to gun laws. If you know your neighbor keeps a loaded pistol in his nightstand for home protection, and you live in a state with irrational gun storage laws (guns and ammo kept separate and locked up) and you do not immediately notify the police, how does a couple of years in prison sound?

### **Punishing People Who Do not Sell Drugs for “Drug Trafficking”**

Illegal drug “trafficking” does not necessarily require that money change hands, only that drugs are delivered from one person to another. Denver attorney Jeralyn Merritt writes of a potential scenario under the “snitch or go to jail” provision of the bill, “You run out of your Ambien or your pain pills. You ask a friend to bring one over. If you live with kids, even if they are not home, it is a ten-year mandatory minimum. Now reverse

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it. Your friend is out of pills, you bring her one. She has kids at home. She gets a mandatory ten year sentence, you get away with five.”<sup>25</sup>

### **Three Strikes**

The bill also includes life imprisonment without release for a drug violation under H.R. 1528 or a crime of violence after “2 or more prior convictions for a felony drug offense or a crime of violence or for any combination thereof have become final.”<sup>26</sup> The bill makes no specific distinction between federal and state convictions for prior drug offenses. In any “three strikes and you’re out” law, it would seem

reasonable that the crimes covered be of a type justifying removal from society for life.

But what often constitutes a drug felony simply does not rise to this level. For example, in Colorado, like many other states, possession of even one gram of cocaine or heroin is a felony.<sup>27</sup> No violence need be involved. For comparison, a U.S. penny weighs 2.5 grams. A three strikes law for a mix of drug felonies and violent crimes should at least require a complete rethinking of what should constitute a drug felony in the first place.

### **Conclusion**

H.R. 1528 is a vast and harsh piece of legislation, most of which could just as easily be applied to small time drug activity between friends as to international narco-trafficking.

Only the most tortured definition of the interstate commerce clause of the constitution would find many of the activities covered by the Sensenbrenner bill to be “interstate commerce” and thus a proper subject of federal regulation.

H.R. 1528 is in no way a “conservative” bill. The bill:

- Assaults the Second Amendment.
- Assaults family privacy.
- Tries to turn family members, college students, and neighbors into informers.
- Recklessly intrudes into homes and other local spaces that are the proper concern of state and local governments, not the Congress.
- Imposes draconian mandatory sentences, which are contrary to fundamental principles of justice, and of letting the punishment fit the crime.

Nor does H.R. 1528 reflect the best “liberal” values of open-mindedness, tolerance, and empiricism. Rather, H.R. 1528 continues the failed drug war

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policies of the past. At a time when our nation is under attack by radical Islamic terrorists, H.R. 1528 would divert federal law enforcement resources that should be used to hunt down *al Qaeda* spies, not to prosecute parents who deal with their children's misbehavior without the need to call the police.

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ADDITIONAL RESOURCES on this subject can be found at: <http://www.IndependenceInstitute.org> and at <http://www.davekopel.com/2dAmendment.htm> and <http://www.davekopel.com/cj.htm>

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## Endnotes

<sup>1</sup> HR 1528, 109th Cong., 1st sess., (April 6, 2005), *Congressional Record* 151, no. 16, Feb. 15, 2005. <http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c109LBD8Vr>

<sup>2</sup> *United States v. Booker*, No. 04-104 (U.S. Jan. 12, 2005). <http://www.supremecourtus.gov/qp/04-00104qp.pdf>

<sup>3</sup> *United States v. Fanfan*, No. 04-105 (U.S. Jan. 12, 2005).

<http://www.supremecourtus.gov/qp/04-00105qp.pdf>

<sup>4</sup> Simon, Paul and Kopel, Dave. "Restore Flexibility to U.S. Sentences". *National Law Journal*, December 16, 1996, A15. <http://www.davekopel.com/CJ/crsimon.htm>

<sup>5</sup> Treleven, Ed. "No benefit from his landmark case." *Wisconsin State Journal* (2005).

<http://www.madison.com/wsj/home/local/index.php?ntid=38550&ntpid=1>

<sup>6</sup> *Violent Crime Control and Law Enforcement Act*, U.S. Code 42 (1994)

<sup>7</sup> Sec. 12. Sentencing Protections. Subsection (2).

<sup>8</sup> For details on the Tammi Bloom case, and other horror stories of irrational federal drug sentencing, see the "Profiles of Injustice: Federal Case Profiles" on the Families Against Mandatory Minimum's website, [http://www.famm.org/si\\_poi\\_federal.htm](http://www.famm.org/si_poi_federal.htm)

<sup>9</sup> Boyum, David, and Peter Reuter. *An Analytic Assessment of U.S. Drug Policy*. Washington: American Enterprise Institute Press, 2005, 95. [http://www.aei.org/books/boodID.812.filter.all/book\\_detail.asp](http://www.aei.org/books/boodID.812.filter.all/book_detail.asp)

<sup>10</sup> Federal Bureau of Prisons. *Quick Facts About the Bureau of Prisons* (as of May 28, 2005).

<http://www.bop.gov/news/quick.jsp>

<sup>11</sup> Krause, Mike. *Getting Smart on Crime: Time to Reform Colorado's Drug Offense Sentencing Policies*. Golden: Independence Institute, 2005.

[http://www.i2i.org/articles/IP\\_1\\_2005.pdf](http://www.i2i.org/articles/IP_1_2005.pdf)

<sup>12</sup> Sec. 8. Assuring Progressive Enhancements For Persons Possessing or Using Firearms. Subsection (1)(A)(emphasis added).

<sup>13</sup> Sec. 8, Subsection (1)(B)

<sup>14</sup> Sec. 8, Subsection (1)(B)

<sup>15</sup> Sec. 8, Subsection (1)(D)

<sup>16</sup> Sec. 8, Subsection (1)(E)

<sup>17</sup> Haines, Roger; Bowman, Frank, and Woll, Jennifer, *Federal Sentencing Guidelines Handbook* (West, 2004). Drugs and Guns-Author's Discussion, 522-523.

<sup>18</sup> Sec. 2, Protecting Children from Drug Traffickers, Subsection (c)(4)

<sup>19</sup> Price, Mary and Jim Cho, "Summary of H.R. 1528," Washington: Families Against Mandatory Minimums, 2005, 2. <http://www.famm.org/pdfs/Sensenbrenner%20Bill%202005%20Summary%20LATEST.pdf>

<sup>20</sup> Boyum, David, and Peter Reuter. *An Analytic Assessment of U.S. Drug Policy*. Washington: American Enterprise Institute Press, 2005, 98.

<sup>21</sup> Sec. 4. Protection of Persons in Drug Treatment. Subsection (b).

<sup>22</sup> Sec. 2. Subsection (m)(1)(a).

<sup>23</sup> Sec. 2, Subsection (k)(2).

<sup>24</sup> Guthrie, Pete, "H.R. 1528", [blogs.salon.com](http://blogs.salon.com/0002762/2005/05/15.html#a928), May, 15, 2005. <http://blogs.salon.com/0002762/2005/05/15.html#a928>

<sup>25</sup> Merritt, Jeralyn. "Sensenbrenner's Snitch-or-Go-to-Jail Bill." [Talkleft.com](http://talkleft.com/new_archives/010719.html#more), May 16, 2005. [http://talkleft.com/new\\_archives/010719.html#more](http://talkleft.com/new_archives/010719.html#more)

<sup>26</sup> Sec. 11. Life Imprisonment Without Release for Drug Felons and Violent Criminals Convicted a Third Time, Subsection (3).

<sup>27</sup> Co. Rev. Stat. 18-18-405(2.3)(a)(1) makes possession of one gram or less of any schedule I through IV substance (except marijuana) a class-6 felony, carrying a sentence of between 12 and 18 months.