

by Gun Owners of America

Summary: On February 8, 1995, the House of Representatives passed H.R. 666 by a vote of 289-142. This bill, along with its companion S. 54, will allow evidence seized from otherwise illegal searches to be included in a trial if the officers can show an "objectively reasonable belief" that they were acting in "good faith." (Another bill, S. 3, is much more liberal in allowing illegally obtained evidence to be included at trial. That is, the bill does not require that the evidence must be obtained in "good faith.") (1)

Supporters of this legislation claim that too many criminals are slipping through "loopholes" in the Fourth Amendment; that too many crooks are getting off on technicalities. But government studies show that the exclusionary rule affects less than one percent of criminals.

The question is, should we sacrifice the security of all law-abiding citizens because less than one percent of the criminals may inadvertently benefit? H.R. 666 and its Senate counterparts could easily encourage the harassment of law-abiding citizens by removing the incentives for officers to secure a warrant. Moreover, this legislation would affect decent people, as even Congressmen have been found to have illegal evidence -- such as "illegal" guns -- in their possession.

Removing incentives to secure a warrant

H.R. 666, S. 3 and S. 54 will remove the deterrents which prevent officers from conducting warrantless searches. Two of the bills (H.R. 666 and S. 54) allow an officer to violate the Fourth Amendment if the officer has an "objectively reasonable belief" that he is acting in "good faith." Some claim that this "objective" standard will allow judges to easily determine whether officers acted properly or not.

The problem is that in many cases, it will be impossible to verify what the officer's "objective belief" really was, and the test will in fact become quite subjective. Rep. Lincoln Diaz-Balart (R-FL), speaking in favor of this legislation, said that under H.R. 666 the defendant will have the burden of proving that the law enforcement officer "could not have reasonably believed that he was acting in conformity with the fourth amendment." (2)

Notice that the defendant will have the burden of trying to prove what the law enforcement officer "believed"! Officers can easily concoct "objective" reasons after the fact to justify an

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illegal search.³ The defense then has to prove that the officer actually knew he was not acting properly; they will have to delve into the officer's mind and show what he was really thinking.

Currently, one protection afforded by the "exclusionary rule" is that evidence seized during an illegal search will be excluded from trial. But under H.R. 666 and S. 54, evidence seized from an otherwise illegal search could be introduced in a trial if the officers can show they were acting in "good faith." In essence, officers could easily find something to justify their actions after the fact.

The BATF is notorious for doing this already. (4)

In June of 1971, four BATF officers burst into the home of Ken Ballew. The tragic events which followed show clearly how renegade officers will always try to justify their actions after brutalizing the innocent. Rep. John Dingell (D-MI) explained on the House floor what happened:

"BATF first entered an apartment upstairs where they held a shotgun at the head of some 8-year-old children. When they found they had raided the wrong place, they then went downstairs, and they broke through a back door in the man's home. . . . They seized the man's wife and threw her into the hall in only her underpants. Mr. Ballew was coming out of the shower with a cap and ball revolver seeking to defend his home and his wife against a noisy band of intruders who bore no indicia of their service as law enforcement officers." (5)

The result? BATF officers shot Mr. Ballew in the head. If he is still alive today, he is disabled and still partially paralyzed, incapable of speech -- and unlike Jim Brady, he has never been available for Congressional testimony.

After the assault, the officers quickly began justifying their actions. Dingell explains:

"They [the BATF officers] went outside, still dressed as hippies with beards and in scruffy clothes, and at which time they first put on their BATF armbands to show that they were law enforcement officers engaged in proper exercise of their legal authority, and that they had given proper warning to the individual of their authority which, in fact, they had not." (6)

The officers immediately tried to justify their actions. And while Mr. Ballew did not have illegal

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evidence, this case clearly demonstrates how officers will always want to justify their actions. It's human nature. At times, they may even be willing to lie.

"Indeed, the [Ballew raid] was classed as a training exercise," Rep. Dingell explained. "This whole unfortunate matter was covered up under the aegis of Mr. Connelly, the then-Secretary of the Treasury." (7)

H.R. 666 and S. 54 will encourage cover ups. They will encourage warrantless searches and seizures, and the subsequent justification of actions. If this legislation becomes law, officers may find it's much easier to justify their actions after they've collected substantial evidence from an innocent victim, rather than demonstrating ahead of time to a judge that they have probable cause.

(Under S. 3, officers will not even have to justify their actions. This bill will allow illegally obtained evidence to be introduced at trial, even if the officers knew they were acting improperly.) (8)

What if "illegal" evidence had been found in Mr. Ballew's apartment? Would that mean that Mr. Ballew -- an otherwise law-abiding, decent person -- was in reality a violent thug? Hardly. Would, say, an "illegal" handgun found in his apartment have justified the treatment that Mr. Ballew received? Never. But could the BATF have invented reasons after the fact to "show" their raid was executed in good faith? Probably.

Fourth Amendment helps protect the Second Amendment

Some have claimed that honest people -- like Mr. Ballew -- would never have illegal evidence in their possession. These folks argue that this reform measure only seeks to stop criminals from getting off on technicalities; that honest people will never have illegal evidence that needs to be suppressed.

In the first place, the Fourth Amendment (and the exclusionary rule) were not designed to protect the guilty, they were intended to protect the innocent from invasion by renegade officials.

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(The exclusionary rule says that illegally obtained evidence cannot be introduced at trial. While the exclusionary rule is not technically a part of the Fourth Amendment, advocates point out that it has historically been the best way to enforce the guarantees which protect honest citizens in their "persons, houses, papers, and effects." The exclusionary rule is one of the best deterrents against government abuse. In essence, one could view the exclusionary rule as that which puts teeth into the Fourth Amendment guarantees.) (9)

The exclusionary rule protects every law-abiding American by strongly encouraging police officers to conduct proper searches. If they do not follow procedures -- obtaining valid search warrants, etc. -- officers risk the possibility of the court suppressing the evidence which they obtained illegally.

Does the exclusionary rule just let criminals go free? No. Government studies have found that only a small percentage of persons arrested for felonies (less than one percent) ever benefit from having evidence suppressed because it was obtained illegally. (10)

On the other hand, there are countless numbers of cases where the police did not undertake an illegal search because the exclusionary rule discouraged them from doing so. As a result, millions of Americans have enjoyed the protection of both the exclusionary rule and the Fourth Amendment.

The question is, should we sacrifice the security of all law-abiding citizens because less than one percent of the criminals may inadvertently benefit? And even more basic, will giving officers broader powers to conduct -- what would otherwise be -- illegal searches even affect the average person? After all, would any decent, law-abiding person ever be in possession of illegal evidence? The answer might not be so obvious.

H.R. 666, S. 3 and S. 54 will lead to harassing of law-abiding gun owners

Many Americans are in possession of guns, that while protected by the Second Amendment, are "illegal" because of local anti-gun laws. Even Congressmen have been known to run afoul of the law because they owned such "illegal" evidence.

Rep. Maurice Hinchey (D-NY) was caught illegally carrying a handgun in Northern Virginia in 1994. (11) Fortunately for him, he was not caught near his home in the District where the

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handgun is illegal and would have netted Mr. Hinchey a much more serious penalty.

Also in 1994, The Washington Times reported that Sen. Jay Rockefeller (D-WV) owned one of the rifles covered by the "assault weapons" ban. The gun, which was reportedly located at Sen. Rockefeller's D.C. home, is illegal under D.C. law. (12)

And then there are several well-known cases from the private sector. For example, Carl Rowan and Bernard Goetz are decent and upstanding citizens. Both exercised their constitutional right to protect themselves, and in doing so, both were caught with "illegal" evidence.

Carl Rowan used an unregistered handgun to shoot a trespasser in his backyard. The 1988 shooting occurred in Washington, D.C. where such firearms are strictly controlled. And Bernard Goetz used an "illegal" handgun to shoot several attackers on a New York City subway in 1984. A jury acquitted Goetz on assault charges, ruling that he acted in self-defense. Nevertheless, he was convicted of possessing an "illegal" firearm and sent to jail.

Another innocent victim is Wanda Boley of Northern Virginia. Boley is a teacher who began carrying a firearm in her car after she had been threatened by a car-full of punks several years ago. Virginia law allows one to carry a gun in one's car, as long as the gun is kept in plain view. So Boley was careful to obey the law, and she began keeping a gun in plain view at all times.

But little did she know that Congress had passed the School Zones Safety Act in 1990. As a result, every time she drove her car to work, she was committing a felony. One day while Boley was teaching, a passerby saw the gun in her car, which of course was still in plain view. The passerby called the authorities and Boley was arrested during the middle of class. (13)

Boley was not a criminal. She was not violent. She was a decent person who was trying to obey the law. But not having kept up with the tremendous number of unconstitutional changes in the law, she was caught with "illegal" evidence.

Another lady who ran afoul of the law is one whom newspapers will only identify as "Becky." Becky lives in Washington, D.C. and owns an unregistered firearm, which she used to defend

her family in December, 1994. (14)

After two thugs entered Becky's home, they began preparing to burn the house. They were armed with knives and had already tied up one of her daughters with (duct tape). As one of the intruders charged Becky, she grabbed her gun and shot him. The other fled -- that being the good news. The bad news is that Becky was in possession of an illegal gun and District officials could decide to prosecute her.

Carl Rowan, Bernard Goetz, Wanda Boley and Becky -- all decent people who were exercising their constitutional right to protect themselves. If any of them had been subject to warrantless searches before they used their guns for self-defense, officers would have found a gold-mine of "illegal evidence." But were these people really criminals? Hardly.

And yet, H.R. 666, S. 3 and S. 54 give a green light to anti-gun officials who want to harass law-abiding gun owners. In the name of getting tough on crime, constitutional protections will be thrown out the window and otherwise honest citizens can be persecuted by their government.

Congress should curtail, not encourage, warrantless searches

In Chicago, police have conducted routine sweeps through apartment complexes, entering homes without warrants to search for guns. Any guns found are "illegal evidence" in a city that prohibits most firearms which could be used for self-defense.

Warrantless searches are not a new phenomenon in the city of Chicago. Rep. Bobby Rush (D-IL) was a victim of one of these warrantless searches as far back as 1969. (15) Police invaded his home without a warrant searching for guns and drugs. They found a bag of what appeared to be marijuana and used it to justify their raid on his apartment. As it turned out, the bag only contained bird seed.

The Chicago raids in 1969 resulted in the deaths of two people. The city was sued and monetary damages were awarded, but as stated by Mr. Rush, "It did not bring life back to the two individuals who were killed." (16)

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Under H.R. 666 and S. 54, there are no protections and no disincentives to keep police from conducting warrantless searches. (S. 3 attempts to afford some protections, but it will ultimately fail as will be shown in the following section.) The problem with this type of legislation was correctly stated by Rep. Harold Volkmer (D-MO):

"[Officers will] not have to go to the magistrate and get a warrant for anything. They [can] just go right in there and bust those doors down and go in and take the guns and if they find something illegal, they say 'Hey, we gotcha.' And if they do not find anything illegal, they say 'sorry.'

Sometimes they do not even say that, folks." (17)

How will police be dissuaded under this legislation? Currently, police are deterred from conducting warrantless searches because illegal evidence is thrown out at trial. But under this legislation, these disincentives are removed.

"Punishments" in S. 3 will not provide a deterrent

Some have put forth the argument that illegal evidence found should be admitted in trial, with the subsequent punishment of any officer that violated procedures. This is the approach of S. 3, but it is destined to fail.

Consider that in Waco, Texas and Ruby Ridge, Idaho, people were killed -- and yet the offending officials only received wrist slaps. The two commanding officers for the BATF, while originally fired for lying to cover up their actions, were subsequently rehired. And in Idaho, a mother and son were killed, and yet the Justice Department has repeatedly defended the actions of the offending agents.

If the agencies in question will only slap wrists when people have been killed, will these same agencies be any more forceful when the infraction is just a mere procedural violation? The provisions in S. 3 requiring the agency to conduct an in-house investigation is hardly a deterrent!

Throughout this nation's history, non-violent Americans have been harassed for possessing items such as gold, booze, excessive cash, certain handguns, rifles and shotguns, and much more. The Founding Fathers certainly faced this scourge.

And thus, they crafted the Bill of Rights as a way of erecting a barrier between the government

and the people. The Bill of Rights assume that government officials will not always act in "good faith." And rather than having citizens open their home to any inquisitive officer who might want to search for "illegal" evidence, it is the government that should be forced to open its doors to the inspection by its master -- the people.

Case after case can be given of government officials sealing records, withholding evidence, burying damaging reports -- in short, shielding their actions from public scrutiny. Again, it should not be the law-abiding citizens who must live in fear of their government, rather, the servants must be held accountable to their masters.

Justice Douglas, in his dissenting opinion in *Terry v. Ohio* (1968), correctly noted the dangers in compromising the Fourth Amendment:

"To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment." H.R. 666, S. 3 and S. 54 turn the Bill of Rights on its head. Not only are they an attack on the Fourth Amendment, they will endanger the Second Amendment as well.

ENDNOTES

1. A careful reading of S. 3 will note a conflict in the text. A non-binding subsection heading (as inserted by section 507 of the bill) purports to only allow the inclusion of evidence which is seized as the result of an "objectively reasonable search or seizure." However, such language requiring an "objectively reasonable" search or seizure is absent in the text.

2. Congressional Record, February 7, 1995, p. H 1315.

3. As noted by one member of the House Judiciary Committee, the difference between objective and subjective can become quite blurred:

"I am happy to see the committee report spent some time clarifying the objective standard. But the fact is when you talk about what a police officer thought at the time, I would suggest these may be words [objective v. subjective] but it may not have any real meaning. In the end, you may really be giving to the police officer the final decision on whether or not he thought that search was in good faith, and we will slide very quickly to the intent to provide an objective standard to the reality in the courtroom of a subjective standard which rewards a lack of knowledge about search and seizure law, it promotes and encourages not knowing the specifics of what is permitted and what is not permitted. I do not think it is a healthy standard to give real meaning to the fourth amendment protections. (Congressional Record, February 7, 1995, p. H 1329.)"

4. An amendment attached by Rep. Harold Volkmer (D-MO) exempts the Bureau of Alcohol,

Tobacco and Firearms from the provisions of H.R. 666. (The BATF is the federal agency with jurisdiction over firearms.) But House leaders have predicted the Volkmer amendment will be dropped in the Senate.

5. Congressional Record, February 8, 1995, p. H 1381.

6. Ibid.

7. Ibid.

8. See footnote 1.

9. The "exclusionary rule" doctrine was first articulated in 1914. Advocates point out that it helps enforce the guarantees in the Fourth Amendment, just like the "no prior restraints" doctrine -- which says officials cannot restrain freedom of speech, press, etc. prior to publication -- enforces the guarantees in the First Amendment. (The "no prior restraints" doctrine was articulated by the Supreme Court in *Near v. Minnesota*, 1931.)

10. Studies by the American Bar Association have found that less than one percent of people arrested for felonies are released because of evidence acquired during illegal searches. Moreover, the leading commentator on search and seizure law has found that, "the most careful and balanced assessment of all available empirical evidence shows that . . . the cumulative loss in felony cases because of prosecutor screening, police releases and court dismissals attributable to the acquisition of evidence in violation of the Fourth Amendment is from 0.6% to 2.35%." (W. LaFave, "The Seductive Call of Expedience: *U.S. v. Leon*, Its Rationale and Ramifications," 1984 Ill. L. Rev. 895, 913, cited in the Congressional Record, February 7, 1995, p. H 1330.)

11. "Hinchey broke D.C. gun law," Poughkeepsie Journal, 3 December 1994.

12. "Come and get it," The Washington Times, 26 August 1994.

13. "Twist of Fate Turns Teacher's Source of Protection Into Tormentor," The Washington Post, 19 November 1992.

14. "Thank God I had a gun," The Washington Times, 20 December, 1994.

15. Congressional Record, February 7, 1995, p. H 1330.

16. Ibid.

17. Congressional Record, February 8, 1995, p. H 1387.

Appendix:

Did Your Rep. Vote for the Beast?

On February 8, 1995, the House of Representatives voted on an H.R. 666 amendment -- introduced by Rep. Harold Volkmer (D-MO). The amendment would prevent the Bureau of Alcohol, Tobacco and Firearms from conducting searches and seizures in violation of the Fourth Amendment. Under the provisions of H.R. 666, law enforcement officers will be able to conduct such searches if they act in "good faith." Rep. Volkmer defended his amendment saying that without it, the bill will give the BATF a "green light" to conduct warrantless searches. "They [will] not have to go to the magistrate and get a warrant for anything," Volkmer said. "They [can] just go right in there and bust those doors down and go in and take the guns." The Volkmer amendment passed 228-198.

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The following Representatives voted anti-gun by voting AGAINST the Volkmer amendment in the House:

| | | | | |
|-------------|--------------|--------------|-------------|---------------|
| Abercrombie | Cunningham | Hefley | Lowey | Rohrabacher |
| Andrews | Davis | Heineman | Lucas | Ros-Lehtinen |
| Archer | Deal | Hilleary | Luther | Roukema |
| Armey | DeLauro | Hobson | Maloney | Royce |
| Bachus | DeLay | Hoekstra | Manton | Sanford |
| Baesler | Deutsch | Hoke | Manzullo | Sawyer |
| Baker (CA) | Diaz-Balart | Horn | Markey | Saxton |
| Baker (LA) | Dickey | Hostettler | Martini | Schiff |
| Ballenger | Dixon | Houghton | McCollum | Schumer |
| Barr | Doggett | Hoyer | McCrery | Sensenbrenner |
| Barrett(NE) | Dornan | Hutchinson | McDade | Shadegg |
| Barton | Dreier | Hyde | McHale | Shaw |
| Bateman | Ehlers | Inglis | McKeon | Shays |
| Beilenson | Ehrlich | Johnson (CT) | McNulty | Skeen |
| Bentsen | English | Johnson (SD) | Meyers | Smith (MI) |
| Bereuter | Eshoo | Johnston | Mfume | Smith (NJ) |
| Berman | Everett | Jones | Mica | Smith (TX) |
| Bilbray | Ewing | Kaptur | Miller (FL) | Talent |
| Blute | Fawell | Kasich | Molinari | Taylor (NC) |
| Boehlert | Flanagan | Kennelly | Moran | Thomas |
| Boehner | Ford | Kim | Morella | Torkildsen |
| Bonilla | Fowler | King | Myrick | Torricelli |
| Bono | Fox | Kingston | Neal | Upton |
| Brownback | Frank (MA) | Kleczka | Nethercutt | Waldholtz |
| Bryant (TN) | Franks (NJ) | Knollenberg | Neumann | Walker |
| Bunning | Frelinghuysn | Kolbe | Norwood | Wamp |
| Burr | Gallegly | LaFalce | Nussle | Ward |
| Buyer | Ganske | Lantos | Owens | Watts |
| (OK) | | | | |
| Calvert | Gekas | Largent | Oxley | Weldon (FL) |
| Canady | Gibbons | Latham | Packard | Weldon (PA) |
| Cardin | Gilchrest | LaTourette | Pallone | Weller |
| Castle | Gillmor | Lazio | Paxon | White |
| Chabot | Goodlatte | Leach | Porter | Wolf |
| Chambliss | Goodling | Lewis (CA) | Portman | Wyden |
| Christensen | Goss | Lewis (KY) | Pryce | Yates |
| Clinger | Greenwood | Lightfoot | Quinn | Young (FL) |
| Coble | Gunderson | Linder | Radanovich | Zeliff |
| Collins(GA) | Hansen | Livingston | Ramstad | Zimmer |
| Cox | Hastert | LoBiondo | Regula | |

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Coyne Hayworth Longley Rivers

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