

Congress may "regulate those activities having a substantial relation to interstate commerce." *Id.* at 1629-30.

The bill is limiting to regulating commercial activity in that it prohibits and creates liability for "harrasment for commercial purposes" and "trespass and invasion of legitimate interest in privacy for commercial purposes." Commercial purposes is defined as activity "with the expectation of sale, financial gain, or other consideration." In *Lopez*, the Court emphasized the absence of commercial activity in the law or its application.

Moreover, the bill fits within the categories articulated in *Lopez*. Through fact-finding, Congress should be able to document that those who engaged in such activity are engaged in interstate commerce. This, too, is different from *Lopez*, where the Court stress the lack of any evidence linking the prohibited conduct to interstate commerce.

Please let me know if I can be of further assistance.

Sincerely,

ERWIN CHERMERINSKY.

UNIVERSITY OF CHICAGO LAW SCHOOL,
Chicago, IL, Nov. 24, 1997.

Senator DIANNE FEINSTEIN,
Senate Judiciary Committee,
Technology, Terrorism, and Government Information Subcommittee, Washington, DC.

DEAR SENATOR FEINSTEIN: This letter is in response to your request for my views on the constitutionality of the proposed statute designed to protect against harassment and invasion of privacy by exploitative photographers, sound recorders, and film crews. The bill would create a new federal criminal and civil offense and two additional grounds for federal civil liability. I believe that the bill is constitutional as drafted. Here is a brief analysis of the legal issues.

The first question is whether the federal government has the authority to enact a measure of this kind. The most likely candidate is the commerce clause. Under the commerce clause, the federal government does have this authority, especially in light of the fact that the bill, as written, requires a clear connection between the interstate commerce and the harassing and invasive action. See the rules of construction in sections 2 and 4. In fact this connection is stronger than that in several of the cases in which the Court has upheld congressional action under the commerce clause. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941). *United States v. Lopez*, 115 S. Ct. 1624 (1995), is not to the contrary, for in that case, Congress did not require any connection between interstate commerce and the prohibited possession of firearms on or near school property. It is conceivable that the bill might be challenged in some cases in which a photographer did not move in interstate commerce and did not sell anything in interstate commerce but intended to do so (see the rules of construction). But under the cases cited above, its probably constitutional even under such circumstances, because the photographer would be part of a "class" of participants in interstate commerce.

The second question is whether the bill violates the first amendment. Here it is important to distinguish between a constitutional challenge to the bill "on its face" and a challenge to the bill "as applied." I believe that a facial challenge would fail. The bill is content neutral, see *Turner Broadcasting Inc. v. FCC*, 114 S. Ct. 2445 (1994); its prohibitions apply regardless of the particular content of the underlying material. This is especially important, since the Court treats content-neutral restrictions more hospitably than content-based restrictions. See *id.*

Moreover, the bill is directed at action, not at speech itself; speech itself is left unregulated by the bill. In a way the constitutional attack on the bill amounts to a claimed first amendment right of access to private arenas and to information a right that the Court has generally denied. See *Pell v. Procunier*, 417 U.S. 817 (1974); *Houchins v. KQED*, 438 U.S. 1 (1978); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

To be sure, this is not the end of the matter: A content-neutral restriction on action may create constitutional problems if the action would result in restrictions on the production of speech, as this bill would undoubtedly do. Imagine, for example, a law that defined "trespass" to include any effort to take photographs near the White House or the Supreme Court. Cf. *United States v. Kokinda*, 497 U.S. 720 (1990). In assessing the validity of such a restriction, some relevant questions are whether the restriction is justified by sufficient government interests, whether there are less restrictive alternatives for protecting those interests, and whether the restriction on the production of speech is small or large. See *id.* In most cases covered by the bill, the restriction would be amply justified. If a photographer has chased someone in such a way as to produce a reasonable fear of bodily injury, the government has a strong reason to provide protection, and the bill is a narrow tailored means of doing so. Thus section 2, adding the new criminal offense, seems on firm ground.

Section 4 is designed to ensure that photographers do not engage in trespasses, or the equivalent of trespasses, in order to invade people's privacy without their consent. This section is also supported by the strong government interest in ensuring that people have a secure private realm, one into which those using the channels of interstate commerce do not enter without consent. In most of its applications, section 4 is also likely to be constitutional. Assume, for example, that a photographer has trespassed into the private property of a movie star in order to take pictures of a dinner or a romantic encounter. Since the images are themselves unregulated (see section 4(d)), the government almost certainly has sufficient grounds to forbid this kind of behavior, a trespass at common law. Although the Supreme Court has subjected some common law rules to first amendment limitations, it has never held that the law of trespass, even though it restricts activity that would produce speech, generally raises constitutional questions. Thus I conclude that section 4 is constitutional in most of its likely applications.

There are some contexts in which harder questions might be raised. Assume, for example, that a presidential candidate is engaged in unlawful activity on private property, and that a journalist and a photographer have used technological devices in order to obtain a record of that activity. Under section 4(b)(2), there has been a kind of federal tort, giving rise of compensatory and punitive damages. It is possible that the special first amendment liability in such cases. Cf. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Thus a series of cases might be imagined in which section 4, and conceivably even section 2, would give rise to a reasonable constitutional challenge as applied. This is true, however, of a large range of generally permissible statutes; the question for present purposes is whether the bill would be constitutional on its face. I conclude that it would be.

I hope that these brief remarks are helpful.
Sincerely,

CASS R. SUNSTEIN.

ADDITIONAL COSPONSORS

S. 249

At the request of Mr. D'AMATO, the names of the Senator from Massachusetts [Mr. KERRY] and the Senator from Oregon [Mr. SMITH] were added as cosponsors of S. 249, a bill to require that health plans provide coverage for a minimum hospital stay for mastectomies and lymph node dissection for the treatment of breast cancer, coverage for reconstructive surgery following mastectomies, and coverage for secondary consultations.

S. 472

At the request of Mr. CRAIG, the name of the Senator from Connecticut [Mr. LIEBERMAN] was added as a cosponsor of S. 472, a bill to provide for referenda in which the residents of Puerto Rico may express democratically their preferences regarding the political status of the territory, and for other purposes.

S. 882

At the request of Mrs. BOXER, the name of the Senator from Massachusetts [Mr. KENNEDY] was added as a cosponsor of S. 882, a bill to improve academic and social outcomes for students by providing productive activities during after school hours.

S. 1021

At the request of Mr. HAGEL, the name of the Senator from Tennessee [Mr. FRIST] was added as a cosponsor of S. 1021, a bill to amend title 5, United States Code, to provide that consideration may not be denied to preference eligibles applying for certain positions in the competitive service, and for other purposes.

S. 1194

At the request of Mr. D'AMATO, his name was withdrawn as a cosponsor of S. 1194, a bill to amend title XVIII of the Social Security Act to clarify the right of medicare beneficiaries to enter into private contracts with physicians and other health care professionals for the provision of health services for which no payment is sought under the medicare program.

S. 1252

At the request of Mr. D'AMATO, the name of the Senator from Indiana [Mr. COATS] was added as a cosponsor of S. 1252, a bill to amend the Internal Revenue Code of 1986 to increase the amount of low-income housing credits which may be allocated in each State, and to index such amount for inflation.

S. 1298

At the request of Mr. SHELBY, the name of the Senator from Alabama [Mr. SESSIONS] was added as a cosponsor of S. 1298, a bill to designate a Federal building located in Florence, Alabama, as the "Justice John McKinley Federal Building."

S. 1459

At the request of Mr. GRASSLEY, the name of the Senator from Washington [Mrs. MURRAY] was added as a cosponsor of S. 1459, a bill to amend the Internal Revenue Code of 1986 to provide a 5-

year extension of the credit for producing electricity from wind and closed-loop biomass.

S. 1677

At the request of Mr. CHAFEE, the name of the Senator from Massachusetts [Mr. KERRY] was added as a cosponsor of S. 1677, a bill to reauthorize the North American Wetlands Conservation Act and the Partnerships for Wildlife Act.

S. 1864

At the request of Ms. MIKULSKI, the name of the Senator from South Dakota [Mr. JOHNSON] was added as a cosponsor of S. 1864, a bill to amend title XVIII of the Social Security Act to exclude clinical social worker services from coverage under the medicare skilled nursing facility prospective payment system.

S. 1868

At the request of Mr. NICKLES, the name of the Senator from Indiana [Mr. COATS] was added as a cosponsor of S. 1868, a bill to express United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted for their faith worldwide; to authorize United States actions in response to religious persecution worldwide; to establish an Ambassador at Large on International Religious Freedom within the Department of State, a Commission on International Religious Persecution, and a Special Adviser on International Religious Freedom within the National Security Council; and for other purposes.

S. 1890

At the request of Mr. DASCHLE, the name of the Senator from Nevada [Mr. REID] was added as a cosponsor of S. 1890, a bill to amend the Public Health Service Act and the Employee Retirement Income Security Act of 1974 to protect consumers in managed care plans and other health coverage.

S. 1891

At the request of Mr. DASCHLE, the name of the Senator from Nevada [Mr. REID] was added as a cosponsor of S. 1891, a bill to amend the Internal Revenue Code of 1986 to protect consumers in managed care plans and other health coverage.

S. 1924

At the request of Mr. MACK, the names of the Senator from New Hampshire [Mr. SMITH], the Senator from Indiana [Mr. LUGAR], and the Senator from North Carolina [Mr. HELMS] were added as cosponsors of S. 1924, a bill to restore the standards used for determining whether technical workers are not employees as in effect before the Tax Reform Act of 1986.

S. 1957

At the request of Mr. BURNS, the name of the Senator from Alabama [Mr. SESSIONS] was added as a cosponsor of S. 1957, a bill to provide regulatory assistance to small business concerns, and for other purposes.

S. 2007

At the request of Mr. COCHRAN, the name of the Senator from Utah [Mr.

BENNETT] was added as a cosponsor of S. 2007, a bill to amend the false claims provisions of chapter 37 of title 31, United States Code.

S. 2078

At the request of Mr. GRASSLEY, the names of the Senator from Montana [Mr. BURNS], the Senator from California [Mrs. FEINSTEIN], and the Senator from Missouri [Mr. BOND] were added as cosponsors of S. 2078, a bill to amend the Internal Revenue Code of 1986 to provide for Farm and Ranch Risk Management Accounts, and for other purposes.

SENATE CONCURRENT RESOLUTION 94

At the request of Mr. ABRAHAM, the name of the Senator from Minnesota [Mr. WELLSTONE] was added as a cosponsor of Senate Concurrent Resolution 94, A concurrent resolution supporting the religious tolerance toward Muslims.

SENATE RESOLUTION 210

At the request of Mr. WARNER, the name of the Senator from Louisiana [Mr. LANDRIEU] was added as a cosponsor of Senate Resolution 210, a resolution designating the week of June 22, 1998 through June 28, 1998 as "National Mosquito Control Awareness Week."

AMENDMENT NO. 2393

At the request of Mr. BROWNBACK the names of the Senator from Missouri [Mr. ASHCROFT], the Senator from Wyoming [Mr. ENZI], the Senator from North Carolina [Mr. HELMS], the Senator from North Carolina [Mr. FAIRCLOTH], the Senator from Oklahoma [Mr. INHOFE], and the Senator from Alabama [Mr. SESSIONS] were added as cosponsors of amendment No. 2393 intended to be proposed to S. 2057, an original bill to authorize appropriations for the fiscal year 1999 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

AMENDMENTS SUBMITTED

NATIONAL TOBACCO POLICY AND YOUTH SMOKING REDUCTION ACT

THOMAS AMENDMENTS NOS. 2431-2432

(Ordered to lie on the table.)

Mr. THOMAS submitted two amendments intended to be proposed by him to the bill (S. 1415) to reform and restructure the processes by which tobacco products are manufactured, marketed, and distributed, to prevent the use of tobacco products by minors, to redress the adverse health effects of tobacco use, and for other purposes; as follows:

AMENDMENT NO. 2431

At the appropriate place, insert the following:

SEC. ____ AMENDMENT TO THE SOCIAL SECURITY ACT.

(A) IN GENERAL.—The table set forth in section 1923(f)(2) of the Social Security Act

(42 U.S.C. 1396r-4(f)(2)) is amended in the item relating to Wyoming, in the case of fiscal years 2000, 2001, and 2002, by striking "0" each place in appears with respect to those fiscal years and inserting "0.191".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect as if included in the enactment of section 4721 of the Balanced Budget Act of 1997 (Public Law 105-33; 111 Stat. 511).

AMENDMENT NO. 2432

At the appropriate place, insert the following:

SEC. ____ CERTAIN HEALTH CLINICS PERMITTED TO PARTICIPATE IN A MEDICARE RURAL HOSPITAL FLEXIBILITY PROGRAM.

(a) IN GENERAL.—Section 1820(c)(2) of the Social Security Act (42 U.S.C. 1395i-4(c)(2)) (as amended by section 4201(a) of the Balanced Budget Act of 1997 (Public Law 105-33; 111 Stat. 370)) is amended—

(1) in subparagraph (B)(i), by striking "public hospital" and inserting "public hospital, or a health clinic described in subparagraph (C)."; and

(2) by adding at the end the following:

"(C) HEALTH CLINIC DESCRIBED.—A health clinic described in this subparagraph is a health clinic that—

"(i) operated as a hospital prior to 1993; and

"(ii) is located in a State that promulgated rules for medical assistance facilities on July 15, 1997.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect as if included in the enactment of the Balanced Budget Act of 1997 (Public Law 105-33; 111 Stat. 251).

GREGG (AND LEAHY) AMENDMENT NO. 2433

Mr. GREGG (for himself and Mr. LEAHY) proposed an amendment to the bill, S. 1415, supra; as follows:

In title XIV, strike section 1406 and all that follows through section 1412 and insert the following:

SEC. 1406. RESOLUTION OF AND LIMITATIONS ON CIVIL ACTIONS.

(a) STATE ATTORNEY GENERAL ACTIONS.—

(1) PENDING CLAIMS.—With respect to a State, to be eligible to receive payments from the State Litigation Settlement Account, the attorney general for such State shall resolve any civil action seeking recovery for expenditures attributable to the treatment of tobacco related illnesses and conditions that have been commenced by the State against a tobacco product manufacturer, distributor, or retailer that is pending on the date of enactment of this Act.

(2) FUTURE ACTIONS BASED ON PRIOR CONDUCT.—With respect to a State, to be eligible to receive payments from the State Litigation Settlement Account, the attorney general for such State shall agree that the State will not commence any new tobacco claim after the date of enactment of this Act (other than to enforce the terms of a previous judgment) that is based on the conduct of a participating tobacco product manufacturer, distributor, or retailer that occurred prior to the date of enactment of this Act, seeking recovery for expenditures attributable to the treatment of tobacco induced illnesses and conditions against such a participating tobacco product manufacturer, distributor, or retailer.

(3) APPLICATION TO LOCAL GOVERNMENTAL ENTITIES.—The requirements described in paragraphs (1) and (2) shall apply to civil actions commenced by or on behalf of local governmental entities for the recovery of