

Nov. 30, 2011

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Dear Senator Hatch:

My answers to your questions regarding S. 436 are below, following each question.

Senator Hatch - Follow Up Questions for Prof. Kopel

Q. In your testimony notes you indicate that the “Fix Gun Checks Act” operates retroactively. You specifically mention an instance in which a person who was ordered into counseling in 1972 for homosexuality would retroactively become a prohibited person upon enactment of S. 436, making the person’s continuing possession of a firearm a felony. If S. 436 is enacted in its current form, what is the practical effect? Would local police be responsible for confiscating weapons owned by those individuals (acquired legally at an earlier date)?

A. To the first question: The practical effect is that the person would be prohibited by federal law from owning, carrying, purchasing a firearm, or even holding a firearm temporarily in his hands. Currently, past records of counseling orders issued by universities, other schools, employers, and so on, are not centralized in the National Instant Criminal Background Check Systems (NICS) databases maintained by the FBI. However, the enactment of S. 436 would provide a basis for the FBI or BATFE to issue regulations requiring entities which issued counseling orders to report those counseling orders to NICS. Since the establishment of NICS, many old and dispersed records for other categories of prohibited persons have been collected into the NICS database.

To the second question: Generally speaking, local police cannot be ordered by Congress to enforce federal gun control laws. *Printz v. United States*, 521 US 898 (1997). However, many state gun laws are parasitic on federal laws. For example, a state law may say that a person who under federal law is ineligible to possess a firearm is also barred under state law from possessing or carrying firearms. In addition, local police are often cross-deputized as federal agents (e.g., in joint state-federal task forces) so that they may act as federal agents in making arrests and

confiscations under federal law. Finally, local police always have the option of referring a situation to federal authorities for confiscation or prosecution.

Q. In a similar fashion, what would be the practical effect for active members of the U.S. Military who have received counseling and whose possession of a firearm for their employment would constitute a felony?

A. The bill would not change the Gun Control Act's exemption for active members of the U.S. Military, regarding their possession of firearms as part of their military service. 18 U.S. Code § 925(a):

(1) The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold, or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof. (2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

After the member of the Armed Forces received an honorable discharge, and returned to civilian life, it would be a federal felony for that person to possess a firearm.

Sincerely,

/s/ David B. Kopel

David B. Kopel