Testimony of David B. Kopel
before the
United States Senate
Subcommittee on Crime and Terrorism
of the
Committee on the Judiciary

Regarding S. 436

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Summary of key points:

S. 436 creates a national firearms registry.

Under S. 436, it would be a federal felony to temporarily allow someone to use or hold's one's firearm in the following circumstances:

- While a friend visits your home.
- While taking a friend target shooting on your property, or on public lands where target shooting is allowed.
- While instructing students in a firearms safety class.

Current law bans gun possession if there has been a formal determination that a person's mental illness makes him a danger to himself or others. S. 436 gets rids of the requirement for a fair determination and a finding of dangerousness Instead, S. 436 bans gun possession by anyone who has ever been ordered to receive counseling for any mental problem. This would include:

- A college student who was ordered to get counseling because the school administration was retaliating against him for criticizing the administration.
- An adult who when in fifth grade was ordered to receive counseling for stuttering, for attention deficit disorder, or for mathematics disorder.
- A person who was once ordered to receive counseling for homosexuality, cross-dressing, or for belonging to some other sexual minority.
- A women who was raped in an elevator, and who has therefore developed a phobia about elevators.

S. 436 rejects the constitutional standards of due process and fair trial. S. 436 prohibits gun ownership based on an *arrest*, rather than a conviction. Thus, S. 436 would make it gun possession a felony for a person who was once arrested for marijuana possession, and was later found innocent because a police officer mistook tobacco for marijuana.

Among the reasons that S. 436 is unconstitutional are because it:

- Strips a person of a fundamental constitutional right because of an arrest, rather than a conviction.

- Is purportedly based on the congressional power "to regulate Commerce . . . among the several States"—but its transfer bans apply solely to transfers that are not commerce, and are not interstate.
- Violates the scope of gun control laws approved by the Supreme Court in *District of Columbia v. Heller*. The *Heller* Court approved of some "laws imposing conditions and qualifications on the commercial sale of arms." Yet S. 436 attempts to control non-retail "transfers" that are not even "commercial" or "sales"—such as letting a friend use a gun while target shooting.
- Is "overbroad" because rather than banning gun possession by persons who have been determined to pose a threat to themselves or others (current laws) bans gun possession by anyone who has been ordered to get counseling even for non-dangerous mental problems (such as nicotine dependence, or lack of interest in sex).
- Violates the Fifth Amendment requirement of due process of law, because it imposes gun bans without due process—such as a mere arrest, or the mere order by a school employee or work supervisor that a person receive counseling. Regardless of whether that employee or supervisor offered the person a fair hearing, and regardless of whether the counselor eventually determined that the person had no mental problem at all.
- Violates the equal protection of the laws guarantee which is implicit in the Fifth Amendment, because it bans possession for categories of persons who cannot rationally be classified as more dangerous than other persons. The victims of S. 436's unfair gun bans include homosexuals and other sexual minorities, persons who have a phobia about elevators or diseases, and many other persons who are ordered into counseling for reasons that have nothing to do with dangerousness.

I. Restrictions on Activities with Firearms

Summary: S. 436 bans all "transfers" of firearms unless there is first a government background check. The ban is very broadly worded, so that it applies even to letting someone hold a gun while under supervision. The only exceptions are in subsection(g):

> "(g) EXCEPTIONS.—Unless prohibited by any other provision of law, subsections (b) and (c) shall not apply to any transfer of a firearm between an unlicensed transferor and unlicensed transferee, if—
> "(1) the transfer is a bona fide gift between immediate family members, including spouses, parents, children, siblings, grandparents, and grandchildren;
> "(2) the transfer occurs by operation of law, or because of the death of another person for whom the unlicensed transferor is an executor or administrator of an estate or a trustee of a trust created in a will;
> "(3) the transfer is temporary and occurs while in the home of the unlicensed transferee, if—
> "(A) the unlicensed transferee is not otherwise prohibited from possessing firearms; and
> "(B) the unlicensed transferee believes that possession of the firearm is necessary to prevent imminent death or great bodily harm to the unlicensed transferee;
> . . .
> "(6) the transfer is a temporary transfer of possession without transfer of title that takes place—
> "(A) at a shooting range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in firearms;
> "(B) at a target firearm shooting competition under the auspices of or approved by a State agency or nonprofit organization; or
> "(C) while hunting, fishing, or trapping, if—
> "(i) the activity is legal in all places where the unlicensed transferee possesses the firearm; and
> "(ii) the unlicensed transferee holds any required license or permit.

S. 436 require background check on almost every "transfer" of a firearm.[1] Under current law, the checks are required for the actual sale of firearms. When a gun store sells a firearm to a customer, the gun store is no longer the owner of the firearm; the customer is the new owner. If the customer merely handles some guns while examining them in the store, or rents a gun to test it at a firing range located in the store, there is no background check

[1] S. 436, § 202.

required, since ownership of the gun remains with the store. The customer who is examining or renting a potential purchase has only temporary custody. Of course no background check is required.

Yet S. 436 makes it a federal felony to temporarily "transfer" a firearm in many innocuous situations:

- Allowing a friend to examine your gun when he visits your home.
- Letting a friend use your gun while the two of you go target shooting on your farm, or on the many undeveloped public lands where informal target shooting is allowed.
- Teaching a NRA firearms safety class in a classroom. The curriculum requires students to become familiar handling a firearm before they use a loaded gun at a range. So in the classroom (where ammunition is prohibited) students handle firearms, and practice "dry firing" them (pulling the trigger when there is no ammunition in the gun. Students also practice loading and unloading the gun, using colored plastic dummy ammunition.
- Shooting at a target range which is owned by an individual, or partnership, rather than by a corporation.
- Sharing a gun for self-defense anywhere outside the home. For example, two women are traveling in an automobile at night. The car breaks down on a deserted road. The younger woman, whose handgun was in the car, walks a few miles to the nearest gas station. She gives her handgun to the older woman, so that the older woman can protect herself while she stays with the car.

II. The Attempt to Impose Federal Control on Purely Intrastate Transfers May Violate the Second Amendment, and is Beyond the Federal Power to Regulate Interstate Commerce

Summary: S. 436 imposes federal control on non-retail, purely intrastate transfers of firearms. Even "transfers" that are not sales. (For example, letting someone examine a gun during a visit to one's home.) This goes far beyond the scope of what Heller *said were legitimate types of gun controls. The such extreme controls are "overbroad," constitutionally speaking. In addition, S. 436 is supposedly based on Congress's power to regulate interstate commerce,*

but S. 436 applies to transfers that are not interstate, and not commercial. As the Supreme Court ruled in United States v. Lopez (1995)*, such micromanagement of intrastate firearms activity violates the Tenth Amendment.*

A. The Second Amendment

1. *Heller* Principles

In *District of Columbia v. Heller*, the Supreme Court explained that not all gun controls are unconstitutional:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[2]

Thus, at least some regulations on the *commercial* sale of arms are constitutional. The current National Instant Criminal Background Check System complies with the Supreme Court decision.[3] S. 436 does not, because it imposes itself on non-commercial sales. By long-standing federal law, everyone who is "engaged in the business" of selling firearms must obtain a Federal Firearms License.[4] Such a person is engaged in the "commercial sale" of firearms.

By definition, S.436 applies solely to persons who are *not* engaged the in commercial sale of firearms. It therefore appears to exceed the permissible bounds of gun control laws sketched by *Heller*.

Further, even at the state level, laws requiring gun-by-gun prior approval for private firearms transactions are rare. (Note that this is different from the more common type of state law which might require a gun owner to have a general license for guns or for handguns, but which does not require prior permission for each individual private transaction.)

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[2] 554 U.S. 570, 626-27 (2008).
[3] 18 U.S.Code § 922(t)(1) (applies only to "licensed importer, licensed manufacturer, or licensed dealer").
[4] 18 U.S.C. § 923(a) (licensing requirement); 18 U.S.C. § 923(a)(21) (22) (defining "engaged in the business" and "with the principle objective of livelihood and profit").

Of the very few states which require government permission for individual private sales, almost none of the laws are "longstanding" in the sense in which *Heller* uses the term. The D.C. handgun ban, which *Heller* ruled unconstitutional, was enacted in 1975. Only New York and New Jersey have laws about permission for private sales that are any older than that. New Jersey's is only a few years older (1966). And even those laws apply solely to handguns, not to all guns.

2. Overbreadth

The *Heller* Court itself looked to state constitutional law cases, explicating the right to arms guarantees in state constitutions, for elucidation of the meaning of the Second Amendment. For example, the Heller Court cited with approval the 1833 case Tennessee *Simpson v. State*, which found that a gun control law was excessively broad.[5]

The *Simpson* court ruled that a law which outlawed gun carrying in general was too broad. In contrast, a law which outlawed gun carrying that was intended to terrorize the public would have been legitimate.[6]

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5. For a discussion of modern overbreadth doctrine, see John F. Decker, Overbreadth Outside the First Amendment, 34 N.M. L. Rev. 53 (2004).

6. *Simpson* involved an old English statute (which was considered part of the common law) had restricted going armed in public: "[T]he statute of the 2d Edward III, which enacts, that no man, great nor small, of what condition soever he be, except the king's servants, etc., shall go or ride armed by night or by day, etc." Simpson v. State, 13 Tenn. (5 Yer.) 356, 356 (1833).

As construed by the English courts, the statute applied only to arms carrying with the specific intent of terrorizing the public. *Sir John Knight's Case* (1686), 87 Eng. Rep. 75 (King's Bench); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104–05 (1994) (explaining that the result in *Knight's Case* comported with previous standards of enforcement).

A related but separate criminal charge was affray, which occurs when two persons fight in a public place "to the terror of his majesty's subjects." 4 WILLIAM BLACKSTONE, COMMENTARIES *144–45.

The 1833 Tennessee Supreme Court dismissed an indictment charging the common law crime of affray. As expressed in the indictment, the terms of the offense might be broad enough to criminalize gun carrying for innocent purposes. *Simpson*, 13 Tenn. at 356-57. Therefore, the offense violated the constitutional right to bear arms:

> By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgment a constitutional privilege which is so declared; neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a

The modern use of overbreadth analysis in arms rights cases begins with the Colorado Supreme Court's 1972 decision in *Lakewood v. Pillow*. A Lakewood, Colorado, ordinance prohibited carrying or possession of any handgun "except within his own domicile," with the exemptions for travel to and from "any range, gallery or hunting areas."[7] Also exempted were people licensed by the city.[8]

The Colorado Supreme Court overturned the ordinance, explaining:

> [T]hat it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful . . . . Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected.[9]

While the Court agreed that the Lakewood ordinance was a lawful exercise of the police power, that was not the end of the analysis. The ordinance had to have a proper fit with its objectives:

> A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[10]

Overbreadth is a well-developed technique of judicial review in First Amendment cases, which the Lakewood court found appropriate to use for the right to arms. In the subsequent decades, many other state courts have favorably cited Lakewood, sometimes as part of a decision declaring an anti-gun law unconstitutional.[11]

> necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it the absence of such a view.

Id. at 359–60.

7. *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972).

8. *Id*.

9. *Id*. (citing Colo. Const. art. II, §13).

10. *Id*. (citations omitted).

11. *Benjamin v. Bailey*, 662 A.2d 1226, 1234 (Conn. 1995); *Winters v. Concentra Health Services, Inc*., No. CV075012082S, 2008 WL 803134, at *3 (Conn. Super. Ct. Mar. 5, 2008) (refusing to strike plaintiff's claim that he was illegally discharged for lawful carry of a firearm at work, when the company had no policy against firearms in the workplace, and the state constitution protected the right to carry handguns); *Junction City v. Mevis*, 601 P.2d

The Fifth Circuit Court of Appeals in *United States v. Emerson* adopted a similar standard, allowing "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."[12]

There is no doubt that the Second Amendment allows gun bans for persons who in a hearing with due process have been determined to be dangerous to others. The Second Amendment does not allow bans for cases in which there has never been a fair hearing, and for persons who are (even by a fair and accurate hearing) only accused of having a status (e.g., homosexuality, nicotine dependence) which is not a threat to anyone. Part III of this testimony, below, details S. 436's vast, unfair, and unconstitutionally "overbroad" addition of tens of millions of people to the category of prohibited persons.

1145, 1150 (Kan. 1979) (relying on *Pillow* to void a city ordinance against handgun carrying); *Bowers v. State*, 389 A.2d 341, 347 (Md. 1978) (citing *Pillow* for the proposition that "more rigorous standard of vagueness review is triggered whenever an ill-defined penal statute is alleged to infringe upon Any of the fundamental freedoms protected under the Bill of Rights," but upholding the child abuse law because it would pass strict scrutiny); *People v. Swint*, 572 N.W.2d 666, 673 n.8 (Mich. Ct. App. 1997) (upholding felon-in-possession law, and noting Colorado courts had done the same because *Pillow* involved a non-felon); *Arnold v. Cleveland*, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., concurring and dissenting) (stating that because "[e]xercise of the police power may not be achieved by a means which sweeps unnecessarily broadly," the Cleveland "assault weapon" ban should be declared unconstitutional); *City of Seattle v. Riggins*, 818 P.2d 1100, 1104 (Wash. Ct. App. 1991) (stating that *Pillow* is not applicable because carrying a dangerous knife within city limits is not an innocent activity); *Perito v. County of Brooke*, 597 S.E.2d 311, 316 (W. Va. 2004) (stating that *Pillow* is consistent with ban on firearms possession by convicted felons); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 143 (W. Va. 1988) (finding that discretionary statute licensing for concealed handguns is unconstitutional); *State v. Hamdan*, 665 N.W.2d 785, 817 (Wis. 2003) (Crooks, J., concurring and dissenting) (stating that because the concealed carry law was "unnecessarily broad" it should be declared unconstitutional, rather than, in the majority decision, only declared unconstitutional in certain applications). But see *Galloway v. State*, 781 A.2d 851, 861 n.11 (Md. 2001) (finding that in Maryland, overbreadth is only for First Amendment, and not applicable to harassment statute).

12. *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

B. The Power to Regulate Interstate Commerce

In the Constitution, the People gave Congress the power "to regulate Commerce . . . among the several States."[13] The People did not grant Congress a general "police power"—the broad and somewhat indeterminate power to make laws regarding public safety, health and welfare. That power was never granted, and the Tenth Amendment confirms that the police power is reserved to the States.[14]

Ever since the Gun Control Act of 1968, interstate firearms sales between private persons have been forbidden. The only private sales that may take place are between residents of the same state.

Thus, S.436 by its own terms applies only to transactions are

- Not interstate (being solely intrastate), and
- Not commerce (since commercial sellers have a Federal Firearms License).

Some progressive legal scholars wish to interpret Congressional powers so expansively that Congress has the power to legislate on any matter where there is a multistate collective action problem which the states themselves cannot solve.[15] They assert that Congress has power to act as if the Constitutional Convention had adopted a proposal giving Congress power "to legislate in all cases to which the several states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

Put aside the obvious fact that this proposal was never adopted, and that when the new Constitution was being considered for adoption by the People, advocates for the Constitution did not explain the Constitution as giving Congress such expansive powers.[16] To the contrary, the Federalists explained

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13 U.S. Const., art. I, § 8.

14 E.g., Printz v. United States, 521 U.S. 898 (1997) (Congress may not order local law enforcement to carry out federal background check); United States v. Lopez, 514 U.S. 549 (1995) (Congress did not have the power to enact the federal Gun Free School Zones Act).

15 *E.g.*, Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

16 See, *e.g.*, Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE LAW JOURNAL ONLINE 267 (2011); Robert G. Natelson & David B. Kopel, *"Health Laws of Every Description": John Marshall's Ruling on a Federal Health Care Law*, 12 ENGAGE 49 (2011); Robert G. Natelson

that Congress's powers were "few and defined."[17] Even if this proposal had been adopted, S.436 would still not be within congressional power.

States obviously have the ability to enact their own laws about private sales. The vast majority of have chosen not to. This strongly suggests that this is not an issue on which the states are individually incompetent, or for which there is some kind of collective action problem which is impossible for individual states to address.

The above analysis is of course consistent with the Supreme Court's most recent decision about the federal interstate commerce power as applied to guns. People can argue all day about Supreme Court cases involving the cultivation of wheat or marijuana, and what they imply about the individual health insurance mandate in the Patient Protection and Affordable Care Act. But those cases are, of course, about the actual production of something, not the simple intrastate transfer of something which already exists.

More directly, the key precedents for guns are cases about guns. This is not the question "How is not buying health insurance [Florida v. Sebelius, 2011] similar to cultivating wheat [Wickard v. Filburn, 1942]?" Cases about gun control are the most relevant precedents for gun control issues.

In *United States v. Lopez* (1995), the Supreme Court ruled that Congress had no authority under the interstate commerce clause to prohibit the carrying of a firearm within the borders of a single state. Notably, Mr. Lopez himself was engaged in commerce; the reason that he was in the "gun free school zone" was to meet a gangster to whom he would sell the gun.

Of course Texas had its own law against selling guns to gangsters, and carrying guns near schools. There was no need for a federal law on such intensely local activity.

& David B. Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICHIGAN LAW REVIEW FIRST IMPRESSIONS 55 (2010); Kurt T. Lash, *'Resolution VI': The Virginia Plan and Authority to Resolve 'Collective Action Problems' Under Article I, Section 8*, 87 Notre Dame Law Review (forthcoming 2012), , http://ssrn.com/abstract=1894737.

[17] James Madison, THE FEDERALIST no. 45: "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

As the Supreme Court explained in *Lopez*, congressional power to regulate the actual interstate commerce in firearms must not be perverted so as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[18]

III. Banning Tens of Millions of Americans from Possessing Guns

A. Persons who are ordered to receive counseling

Summary: Current federal law bans a "mental defective" from possessing guns. The law requires a "determination" by a competent authority that the person is a danger to himself or others. S. 436 would remove both of these requirements. It would ban gun possession for anybody who is ordered to receive counseling for any mental issue. The unintended effect of the extreme expansion of the mental health language could be to terminate the Second Amendment rights of millions of people, including sexual minorities, persons dependent on nicotine, and many others. Another unintended consequence of S. 436 is that school authorities will be more reluctant to order counseling, once they realize that the automatic consequence is the recipient of the order will be stripped of her constitutional rights.

> a) DEFINITION.—Section 921(a) of title 18, United 20 States Code, is amended by adding at the end the following:
> "(36) The term 'adjudicated as a mental defective' includes an order by a court, board, commission, or other lawful authority that a person, in response to marked subnormal intelligence, mental illness or incompetency, be compelled to receive services—
> "(A) including counseling, medication, or testing to determine compliance with prescribed medications; and
> "(B) not including testing for use of alcohol or for abuse of any controlled substance or other drug."

[18] Lopez, *supra*, 514 U.S. at 557. The *Lopez* Court was quoting N.L.R.B. v. Jones & Laughlin Steel Corp, 301 U.S. 1, 57 (1937), one of the leading cases for the expansion of the federal power of economic regulation during the New Deal. In both 1937 and 1995, the Court granted great latitude to Congress in regulating actual commerce, while holding firm to the principle that the regulation of commerce should be misconstrued to create a federal police power.

1. Contrasting S. 436 with current federal law

a. Eliminating the requirement for an adjudication or determination

Under the Gun Control Act, as person may not possess a gun if he is "Adjudicated as a mental defective."[19] Regulations define this to mean

> "(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the mental capacity to contract or manage his own affairs."[20]

In short, there are two requirements, both of which would be drastically changed by S. 436. First, there is the requirement that someone be "adjudicated"—that is, that someone makes a "determination."

S. 436 eliminates the requirement of a "determination" that a particular person is a "mental defective." Instead, S. 436 imposes the gun ban whenever someone is ordered to receive counseling for being allegedly mental defective. So if a psychologist quickly determinates that the person who was ordered into counseling is not "mentally defective," the person is still prohibited from possessing firearms. S. 436 makes the order to get counseling, and *not* the actual determination of a personal's mental condition, the trigger for the gun ban.

One certain effect of S. 436 will be to make people more reluctant to order individuals to get counseling. After all, it's one thing to order counseling when the only immediate result is to force someone to get counseling. It's very different if the immediate effect of the order is to strip the recipient of her constitutional rights, for life. Mental health professionals have repeatedly made the point that if the consequence of diagnosis (or order to get a diagnosis) is the loss of constitutional rights, then mental health professionals and other persons in authority will become less willing to order treatment.

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[19] I8 U.S.C. § 922(g)(4).
[20] 27 C.F.R. § 478.11.

This is why the original statutory language of the Gun Control Act of 1968 got things right. The language made the loss of rights dependent upon an adjudication—not a mere order to get counseling, or a get diagnosis. Judges, who make adjudications, are in a job which requires them to be neutral fact-finders, and to frequently make decisions which will cause someone to lose his rights. School administrators and mental health professionals are *not* in a job where they are used to making decisions to deprive people of constitutional rights. Because S. 436 make the loss of rights dependent on the decisions of school administrators, it may have the perverse effect of reducing the willingness of administrators to issue counseling orders.

b. Expanding the ban to people who are not dangerous

The current regulation requires a determination that the person "(1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs."

S. 436 eliminates the requirement for a finding of potential danger. Instead, *any* order to receive counseling for *any* "mental illness" becomes a lifetime gun ban. As detailed below, there are an enormous number of things which are or have been classified as "mental illnesses" (e.g., being a sexual minority, not being capable of achieving orgasms, being addicted to nicotine, and many more) which cannot possibly to construed to mean that the person's possession of a gun might pose a threat to anyone.

c. "Other lawful authority" will include school officials and employment supervisors with no expertise in mental health issues

The current regulation requires that the mental determination be made by "a court, board, commission, or other lawful authority."[21] Who exactly qualifies as an "other lawful authority" is not specified. Is "other lawful authority" something which is like a "court, board, commission"? Or is "other lawful

[21] 27 C.F.R. § 478.11. This language tracks mental health language in the NICS Improvement Act of 2007. The language from that Act does not directly use "other lawful authority" in terms of how a person can lose Second Amendment rights, but it comes close. The Act uses "other lawful authority" for restoration of rights (see section 6 of this Testimony, below) and for what kinds of records should not be reported to NICS.

authority" simply anyone who has legal power to order someone to get counseling? If so, then "other lawful authority" would include most school officials, as well as most employers.

S. 436 answer the question. S. 436 explicitly gives school staff the power to impose a lifetime gun ban. Section 124 of the bill requires all colleges and universities that receive federal funding (that is, nearly all of them) to create a "team" that will make "involuntary referrals" of students to "State or local mental health authorities for mandatory evaluation."[22] The school must then report the names of the persons referred to the state agency which reports the names of prohibited persons to the federal government.[23]

So under S. 436, what gets reported to the federal government—and thus puts an individual on the prohibited persons list—is *not* a diagnosis that the individual actually is a threat to himself or others. Rather, what gets reported is that fact that person was *referred* to a professional to evaluate whether she *might* be.

Thus, S. 436 makes it clear that a "lawful authority" whose decision can strip a person of her Second Amendment rights is something that can, for example, consist of "educator, administrators, counselors, and other qualified members of the educational community."[24]

So under S. 436, "lawful authority" includes educational administrators. S. As detailed in the previous section of this Testimony, when the "lawful authority" orders a person to get counseling for *any* reason (including reasons that have nothing to do with dangerousness), then the person is automatically prohibited from possessing firearms.

Can a "lawful authority" also include people who have "authority" in occupational settings, such as an employer? Probably yes. S. 436 makes it clear that "lawful authority" means more than just judges or mental health boards; it also includes school administrators. So employers (or administrators in a corporation's human resources department) would also seem to be included by logical implication. Certainly S. 436 would provide support if the Bureau of Alcohol, Tobacco, Firearms and Explosives decided to

[22] S. 463, § 124 (a)(5).
[23] S. 463, § 124 (a)(5).
[24] S. 463, § 124 (2)(2).

interpret "other lawful authority" to include employers, since the statute makes it clear that "other lawful authority" does include schools.[25]

So in sum, S. 436 makes three key changes in the law for prohibited persons and mental health:

- Keys the ban to any mental illness, rather than those involving danger to self or others.
- Bases the ban on an order to receive counseling, rather than upon a factual finding that the person has a particular condition.
- Specifies that the "other lawful authority" whose order will cause the ban to take effect includes school officials. By implication, the "other lawful authority" might be construed to include employment officials.

Now let us consider how these three changes would work together.

2. Gun bans for academic dissidents and other non-dangerous students

S. 436. would impose a lifetime gun ban on people such as the following:

- Hamline University graduate student Troy Scheffler was ordered to undergo psychological counseling because he wrote two emails suggesting that the Virginia Tech ban on licensed firearm carry may have helped the murderer on that campus kill so many people.
- Valdosta State student T. Hayden Barnes was ordered into undergo mental counseling because he wrote a Facebook post criticizing the school's to build a parking garage.

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[25] Whether the order comes from a judge, a dean, or from a supervisor at work, a counseling order is almost always optional, in the sense that a recipient may avoid the counseling by instead receiving some other harsh penalty. E.g., A judge says, "If you do not receive counseling, I will strongly take that fact into consideration when I make my child custody determination." Or a dean says, "You may only remain at this school if you receive the counseling I ordered." Or a military officer says, "Private, if you do not go the counselor, you will be discharged from the army." That an order may be accompanied by some other harsh alternative does not make it any less of an order. Indeed, except for persons who are already institutionalized, a counseling order would very rarely not include some alternative.

S. 436 has language about "involuntary referrals" but this is not exactly accurate. If a college makes an "involuntary referral" that a student get mental health evaluation, the student can simply refuse, and withdraw from the school. So again, whether counseling orders are described as voluntary or involuntary is irrelevant, as practical matter. They are always voluntary, in that the recipient of the order can choose to pay price of refusing the order, by leaving the school, or the place or employment.

- The University of New Hampshire ordered a student into counseling because he posted fliers saying that freshmen women could avoid the "Freshman 15" by taking the stairs.[26]
- Brandeis University ordered undergraduate David Arlen Schaer to "undergo appropriate professional counseling" because he had sex with a friend who called him on the phone to invite him to her apartment to have sex, engaged in consensual sex with him, and later regretted it.[27]

3. Gun bans for persons with subnormal intelligence, other difficulties, or stuttering

Current law bans gun possession for a person who has been *determined* to have such low intelligence that he "Lacks the mental capacity to contract or manage his own affairs."

S. 436 would override this regulation. It would impose a lifetime gun ban on people who have intellectual or mental challenges and who are capable of managing their own affairs, and are *no* danger to themselves are others. The statute impose a lifetime ban on gun ownership the moment that a person "in response to marked subnormal intelligence, mental illness or incompetency," is "compelled to receive services."

These days, America's K-12 schools work very hard to provide help to all sorts of special needs students, including those who have Attention Deficit/Hyperactivity Disorder, or other conditions. These conditions include "Stuttering," "Reading Disorder," "Mathematics Disorder," "Disorder of Written Expression," and "Expressive Language Disorder." All of these are recognized as mental disorders in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the standard professional reference book for the definitions of mental illness.[28]

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[26] These cases are detailed on the website for the Foundation for Individual Rights in Education.

[27] Dorothy Rabinowitz, *Charged with "unwanted sex," a Brandeis student gets an expensive education*, WALL STREET JOURNAL, Dec. 19, 2000.

[28] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., "text revision") (Arlington, Vir.: American Psychiatric Association, 2000).

The *DSM* itself eschews the phrases "mental illness" or "mentally defective," and instead uses the term "mental disorder."

In short, if a public, religious, or independent school assistant principal orders that a student orders that a fifth grader receive counseling for stuttering or for "Mathematics Disorder," then the assistant principal has just barred the student from possessing a firearm for the rest of her life.

4. Gun bans for sexual minorities

Until 1973, the *Diagnostic and Statistical Manual of Mental Disorders*, classified homosexuality as a mental disorder.

Yet even if a high school principal in 1972 ordered a homosexual student to under counseling for her supposed mental illness, that student would not have suffered a lifetime ban on gun ownership, because there would have been no "determination" by a mental health expert that the person posed a threat to herself or others. But S. 436 removes the threat prong from the prohibited persons test.

For that matter, the counselor might also have determined that the student was not actually a homosexual—for example, that a single experiment with kissing another girl was not the kind of long-term (over six months) same-sex attraction that constituted the clinical definition of homosexuality. But under S. 436, this would not matter. S. 436 makes the gun ban depend on the existence of an order to receive counseling, and not on the actual determination by the counselor.

Significantly, S. 436 operates retroactively. So the person who was ordered into counseling in 1972 for homosexuality (which was at the time considered a mental disorder) would retroactively become a prohibited person upon enactment of S. 436, and the person's continuing possession of a firearm would be a federal felony.

Still in the current DSM (DSM-IV, revised in 2000) is Gender Identity Disorder (a/k/a gender dysphoria) for persons who are very discontent with their biological gender. This of course is why some people have sex change operations. People can argue all day about whether this condition is really a mental illness. But it is unarguable that there is no good reason why a person who is ordered to get counseling because of gender discontent should suffer a lifetime deprivation of constitutional rights, when there is not a shred of evidence that the alleged illness makes the person dangerous.

It is well-known that transgender people are at especially high risk of being violently attacked, so a lifetime gun ban on people with the mental "illness" of gender dysphoria is especially harmful.

Many other sexual minority attractions remain part of the *DSM*, including "Fetishism," "Sexual Masochism," and "Transvestic Fetishism." So are many sexual problems, such as "Hypoactive Sexual Desire Disorder" (lack of sexual fantasies and desires), "Orgasmic Disorder," and "Premature Ejaculation."

Counseling orders for the above conditions might be made in the context of many high schools, and some colleges with strict rules on student behavior (e.g., an assistant dean finds out about a student's Facebook posting about cross-dressing), or in situations where a couple's sexual problems come before the judicial system (e.g., in a petition for divorce, one party does not consent to the divorce; the judge orders that he will grant the divorce unless the non-consenting party receives sexual counseling, because that party's sexual problems are causing severe marital problems).

5. Gun bans for other non-violent persons

Here are some more people who would be the subject of lifetime gun bans under S. 436: A woman has acute stress disorder or post-traumatic stress syndrome because she was raped. Or because she was raped in an elevator, she develops a specific phobia about elevators.

Many people who have a general phobia (a/k/a "anxiety disorder"), or a "specific phobia" of various sorts, such as aviatophobia (fear of flying) or nosophobia (fear of contracting a disease). For a person whose job requires lots of travel and contact with other people (e.g., a salesman, a lobbyist), the person's boss (a person with lawful authority) might order them to get counseling. And therefore unintentionally ban them from possessing a firearm for the rest of their lives.

There are many, many, other "mental disorders" in the DSM, including Body Dysmorphic Disorder (obsession that part or all of one's body is unattractive), Premenstrual dysphoric disorder (pre-menstrual depression, mood changeability, or anxiety, which "markedly" interferes with work, school, or other activities), Anorexia Nervosa, Caffeine Intoxication, Caffeine-Induced Sleep Disorder, Nicotine Dependence, Nicotine Withdrawal, Primary

Insomnia, Breathing-Related Sleep Disorder, Circadian Rhythm Sleep Disorder (including sub-types for "Jet Lag" and "Shift Work"), and Trichotillomania (pulling one's hair out).

There are innumerable situations in which a person may be ordered to receive counseling for these conditions. Schools, which operate *in loco parentis*, might order counseling for any of these mental disorders, for the student's own good.

Or the school might be considering its own interests. A student whose scholarship-related job requires constant alertness (e.g., a night guard at the library) may be ordered to receive counseling for Insomnia. A student who repeatedly drinks too much coffee and then disturbs other students by talking too much in class may be ordered to receive counseling for caffeine intoxication. And on and on, with every order having the secondary effect of becoming a lifetime ban on gun possession.

What all these cases have in common is that in *none* of them has anyone ever made a determination that the person is a threat to herself or others.

It's true that for most of the above scenarios, there is no mechanism for the counseling order to go into the NICS database. But that does not change the fact that the law has made the individual into a prohibited person, so that her gun possession is, in itself, a federal felony.

Moreover, another provision of S. 436 sets up a program for harvesting danger-related counseling orders from all colleges and universities that receive federal funding. (That is, almost all of them, since student loans count as federal funding.) It would not be difficult to change this by regulation into harvesting all counseling orders.

As for the rest of the United States, it would only take small regulatory changes (with no need for a congressional vote) to require NICS reporting by all K-12 schools that receive federal funding, all employers who a federal contractors, and all employers whose health plan is controlled by federal law (again, virtually all of them).

6. Relief from disabilities

The Gun Control Act provides for "relief from disabilities" for all "prohibited persons." For example, a person who in 1968 became a prohibited person because he had been found guilty of tax evasion in 1959 could, in 1981, petition the Bureau of Alcohol, Tobacco, Firearms, and Explosives for a discretionary grant of relief—if the Bureau found that the person had reformed, and was no danger. However, beginning the in the 1990s, appropriations riders have prevented the Bureau from carrying out its statutory functions under the safety valve.

For prohibitions based on mental conditions (and only for those), the problem was partially addressed by the NICS Improvement Amendments Act, which became law in 2008. It provides funding for state agencies to report determinations of restoration of rights, for mental health issues only.

However, if S. 436 became law, the relief from disability provisions would have to be entirely rewritten. Presently, state agencies can, in their discretion, restore Second Amendment rights if they determine that the person "will not be likely to act in a manner dangerous to public safety" and that "the granting of the relief would not be contrary to the public interest."

So, for example, a person who was involuntarily institutionalized for several weeks in 1973, and who has been mentally healthy since then, could petition for a restoration of Second Amendment rights.

But how would this work in conjunction with S. 436? The persons who are currently on the prohibited list are there because there was a "determination" that at one time, those persons *were* a threat to themselves or others. What about the people whom S. 436 puts onto the prohibited list because they are homosexuals, transvestites, have insomnia, nicotine dependence, and so on? They have *never* been a threat to anyone. So should the state agencies automatically grant relief to any such person who petitions? Should they conduct their own investigation to find out whether the person might be a threat for any other reason (even though the reason that the person was put on the prohibited list, such as caffeine intoxication, or gender identity disorder were never a threat in the first place)?

In short, the best that can be said about S. 436's enormous expansion of who is a prohibited person is that the drafters and supporters not thought through the full consequences of their proposed language. They drafted a

provision with the Tucson murderer in mind, and they never considered how the provision would apply to literally millions of innocent people. As for people who actually do understand the consequences of S. 436, and favor the bill anyway, it might that some of them suffer from hoplophobia (abnormal fear of guns).[29]

B. Punishing people who were never found guilty

Summary: Federal law bans gun possession by persons who are presently drug users or drug addicts. S. 436 would expand the ban to anyone with a drug arrest *(not conviction) in past five years. S. 436 would also apply the five-year ban for anyone who made any "admission" of drug use—such as in casual conversation, or a Facebook posting.*

> SEC. 104. CLARIFICATION OF THE DEFINITION OF DRUG ABUSERS AND DRUG ADDICTS WHO ARE PROHIBITED FROM POSSESSING FIREARMS.
> (a) INFERENCES OF ABUSE.—Section 921 of title 18, United States Code, is amended by adding at the end the following:
> "(c) UNLAWFUL USER OF ANY CONTROLLED SUBSTANCE.—
> "(1) IN GENERAL.—An inference that a person is an unlawful user of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) may be drawn based on—
> "(A) a conviction for the use or possession of a controlled substance within the past 5 years;
> "(B) an arrest for the use or possession of a controlled substance within the past 5 years;

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[29] PHILIP T. NINAN & W. DUNLOP BOADIE, CONTEMPORARY DIAGNOSIS AND MANAGEMENT OF ANXIETY DISORDERS 107 (2006) ("Hoplophobia" is a phobic fear of firearms). Hoplophobia is a type of "specific phobia," that is, "a persistent and unreasonable fear of an object or situation coupled with a strong desire to avoid it." A "common" specific phobia is "aviatophobia," the fear of flying. Hoplophobia is an "unusual" specific phobia; examples of other unusual specific phobias include pyrophobia (fear of fire), iatrophobia (fear of doctors), and entomophobia (fear of insects.) *Id.* at 106-07.

Merely disliking or fearing something is not in itself phobic. To be a phobia, clinically speaking, the fear must significantly interfere with ordinary life activities, or cause the person serious personal distress. If a person has a phobia about snakes, but lives in Manhattan, where she never sees snakes, and the person is not unhappy about her fear of snakes, then the person would not be classified as having a phobia. On other hand, if the person refused an offer for a great job in Montgomery, Alabama, solely because the person was afraid of seeing a snake there, then the person would have a specific phobia.

The DSM itself does not attempt to list all specific phobias, but instead simply supplies a few by way of illustration. Lists of specific phobias can be found in other professional reference books.

> "(C) an arrest for the possession of drug paraphernalia within the past 5 years, if testing has demonstrated the paraphernalia contained traces of a controlled substance;
> "(D) a drug test administered within the past 5 years demonstrating that the person had used a controlled substance unlawfully; or
> "(E) an admission to using or possessing a controlled substance unlawfully within the past 5 years.

The right to keep and bear arms is a fundamental constitutional right.[30] S. 436 would prohibit gun possession by people who were arrested but not convicted of a crime. This is a grotesque violation of the Fifth Amendment, which provides that no person shall "be deprived of life, liberty, or property, without due process of law."

S. 436 purports to override the Fifth Amendment, by treating arrests as if they were convictions. If S. 436 were to be found constitutional, so could the deprivation of any other fundamental constitution right on the basis of arrests, rather than convictions.[31]

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[30] *McDonald v. Chicago*, 130 S.Ct. 3020 (2010).

[31] According to the current regulations, 27 C.F.R. § 478.11, a person is prohibited under the category of being an "Unlawful user of or addicted to any controlled substance" under the following criteria:

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

So the current regulations rely, among other things, including "multiple arrests" in the last five years, of which one of them must be within the last year. The use of arrests is

Moreover, even assuming that S. 436 were limited to convictions only, it goes far beyond any plausible connection to public safety. The fact that a 19-year was convicted of smoking marijuana at a rock concert does not mean that the person is any danger to public safety when she is 23.

S. 436's use of "an admission" as the basis for a gun ban is just ridiculous. Is the National Instant Check System supposed to start data harvesting from Facebook, so it can keep a list of all the 17-year-olds who admit to one-time use of marijuana, so that they can be banned from gun possession when they are 21?

Even worse, the S. 436 felonization of Facebook postings—or any other "admission"—operates by its own force. Consider a hypothetical college student (let's call him "Will Flinton.") When he is 21, he tries marijuana a few times, and doesn't like it. When he is 23, he tells a friend about the experience ("an admission"). After graduating from law school at age 25, he moves back home to Arkansas, goes hunting with a friend, and borrows the friend's gun. Young Mr. Flinton is now a federal felon.

Indeed, he would still be a federal felon if his "admission" were a speech to high school students in which he urged them not to use drugs.

Again, none of this has a realistic connection to public safety, let alone such a strong connection as to justify stripping a person of a fundamental constitutional right.

IV. National Gun Registration

Summary: S. 436 would create a national gun registry. This would be a dramatic change from historical practice, and would repudiate Congress's repeated actions to forbid such a registry.

The Gun Control Act of 1968 involved a thoughtful compromise. The GCA rejected the calls of persons who were calling for national gun registration. At the same time, the GCA set up a system of record-keeping that could be used by law enforcement for bona fide criminal investigations. Under the GCA, the licensed firearms seller keep a form (ATF F 4473) which records information

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constitutionally dubious, but S. 436 exacerbates the problem, by turning a lone malicious or mistaken arrest into a ban.

about the buyer, and the particular gun sold. The dealer must retain the record for 20 years.[32] The form may be inspected by the Bureau of Alcohol, Tobacco, Firearms and Explosives as part of an annual compliance inspection of the dealer, and whenever needed in the course of a bona fide criminal investigation.

The GCA system is reinforced by the federal statute specifically forbidding the compilation of a national registry of guns, or of gun owners.[33]

When Congress enacted the National Instant Check System, Congress ensured that NICS would be congruent with the registration ban. If a buyer is approved by NICS, the FBI must "destroy" the record of the transaction.[34]

S. 436 would upset the decades-old compromise. Licensed dealers or law enforcement which conduct the NICS check for a private sale would be *required* to transmit the information to the federal government, where it could be permanently stored as a national gun registration database. In other words, private, non-dealer transfers would actually have significantly *fewer* privacy protections than purchases from retail stores.

The required information to be put in the federal registry can include every bit of information about the sale *except* the names of the buyer and seller. Realistically speaking, one can expect that shortly after S. 436 became law, its advocates would be complaining about the "name loophole," and applying pressure to begin registration of the names.

Second, these same supporters will also start applying pressure for forcing licensed dealers to report the same information. The advocates will point out, quite accurately, that it is anomalous that federal registration requirements for sales from licensed dealers are *less* than those for private sales.

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[32] 18 U.S.C. § 925(g).

[33] Firearms Owners Protection Act of 1986, 18 U.S.C. 926(a)(3): "No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation."

[34] 18 U.S.C. 922(t)(2)(C): "destroy all record of the system with respect to the call (other than the identifying number and the date the number was assigned") and all records of the system relating to the person or the transfer." Current regulations require destruction within 24 hours.

Even if we imagine that S. 436 would never be expanded, S. 436 is in itself national gun registration. Opponents of gun registration are opposed to registering guns, as well as to registering gun owners. That is why current federal law specifically forbids registration of gun owners *and* guns *and* gun transactions: "any system of registration of firearms, firearms owners, or firearms transactions or dispositions."[35]

Congress's historical opposition to gun registration is based on the accurate understanding that it often leads to gun confiscation. New York City, England, and Australia have already used gun registration lists to confiscate long guns, and the former California Attorney General made plans to do so.[36] They are following the strategy enunciated by Brady Campaign President Nelson "Pete" Shields, who explained in 1976:

> "The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of all handguns and all handgun ammunition--except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors--totally illegal." (Richard Harris, A *Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, p. 58.)[37]

While gun confiscation supporters have obvious reasons for promoting gun registration, Congress has historically recognized the danger.

For example, in 1941, Congress looked with horror at what gun confiscation had led to in Nazi-occupied Europe and in the Soviet Union. When Congress passed the Property Requisition Act to allow the federal government to take property needed for national defense against tyranny, Congress made sure that the American people would retain their ability to resist tyranny. The Act forbade the federal government "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law)," or "to impair or

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[35] 18 U.S.C. 926(a)(3).

[36] Since 1966, all firearms in New York City have been required to be registered by law. In 1991, then-Mayor David Dinkins pushed a so-called "assault-weapons" ban through the City Council. Then, the 1966 registration law was used by the members of the New York Police Department to confiscate previously registered and lawfully owned firearms.

In June 1999, leaked documents from California Attorney General Bill Lockyer revealed a plan to use registration lists to confiscate "assault-weapons"—firearms that had been registered under former Attorney General Dan Lungren. Lockyer's office promptly denied they were drafted for any purpose other than "for discussion."

[37] At the time, the Brady Campaign was known as "Handgun Control, Inc."

infringe in any manner the right of any individual to keep and bear arms . . . ."[38]

In 1978, the Carter administration proposed that dealer records be used to create a limited federal gun registration database. The administration said that no additional funds would be needed, since the federal Bureau of Alcohol, Tobacco and Firearms could implement the five million dollar project from existing appropriations. The House of Representatives voted 314-80 to prohibit the expenditure of any federal funds on gun registration. For good measure, the House also cut BATF's appropriation by five million dollars.

Secretary of State Condoleezza Rice, a self-described "Second Amendment absolutist," grew up in segregated Birmingham, Alabama, where her father, a Presbyterian minister, was a community leader in the civil rights struggles. According to a Nov. 17, 2004, article in the *Montgomery Advertiser*:

> During the bombings of the summer of 1963, her father and other neighborhood men guarded the streets at night to keep white vigilantes at bay. Rice said her staunch defense of gun rights comes from those days. She has argued that if the guns her father and neighbors carried had been registered, they could have been confiscated by the authorities, leaving the black community defenseless.

At the least, national gun registration would be such a stark change from more than two centuries of American liberty that the topic ought to be fully discussed and debated. It should not be hidden in a bill whose title claims that it is only about background checks.

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[38] The Property Requisition Act, and other congressional laws enacted to protect Second Amendment rights, are discussed in Stephen P. Halbrook**,** *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

For historical details on the Nazis' use of gun registration lists to disarm their intended victims, see Stephen P. Halbrook, *"Arms in the Hands of Jews are a Danger to Public Safety": Nazism, Firearm Registration, and the Night of the Broken Glass*, 21 ST. THOMAS L. REV. 109 (2009); Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483 (2000). For a critique and response, see Bernard E. Harcourt, *On Gun Registration, The NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 FORDHAM L. REV. 653 (2004); Stephen P. Halbrook, *Nazism, the Second Amendment, and the NRA: A Reply to Professor Harcourt*, 11 TEX. REV. L. & POL. 113 (2006).

Conclusion

S. 436 violates the Second Amendment right to keep and bear arms, the Fifth Amendment guarantee of due of law, the Fifth Amendment guarantee of equal protection of the law, and the Tenth Amendment's reservation of state authority over purely intrastate activities. S. 436 further violates the Tenth Amendment by imposing on the vast majority of states an extremely repressive system of restrictions on law-abiding gun owners which those states have already rejected.

Ever since 1776, Congress has recognized that a national gun registry would be a dangerous violation of the right to keep and bear arms. S. 436 creates such a registry.

S. 436 has no legitimate constitutional basis of authority, because S. 436 attempts to twists Congress's real power to regulate interstate commerce into the power to regulate what is not interstate and not commercial.

S. 436 treats arrests as if they were convictions.

S. 436 takes the current gun ban for the criminally insane and applies it to non-dangerous people who have been ordered to get counseling for mental problems that have absolutely nothing to do with dangerousness—including stuttering, lack of sexual desire, and nicotine dependence.

Whatever good intentions might lie behind S. 436, the actual bill as drafted is grotesquely overbroad, and a Pandora's Box of the dangerous consequences that are the inevitable result of making it a felony for law-abiding Americans to possess and use firearms.

Appendix. Where to find material cited in this testimony

Almost all the law review articles are available at SSRN.com. Alternatively, try doing a web search with the article's title in quotes. E.g., "Commerce in the Commerce Clause." That will usually take you to a public web site with the article. *The Federalist* (a/k/a the Federalist Papers) can be found at http://www.foundingfathers.info/federalistpapers/. Supreme Court opinions from 2006 onwards are available at http://www.supremecourt.gov/. Supreme Court opinions for all years can be found at http://www.justia.com/, which also has the U.S. Code (federal statutes). The Federal Digital System (http://www.gpo.gov/fdsys/) has the Code of Federal Regulations, the U.S. Code, and many other federal legal documents. Many of state and lower federal court gun cases are available at http://www.guncite.com/.