

**THE FIX GUN CHECKS ACT: BETTER STATE AND
FEDERAL COMPLIANCE, SMARTER ENFORCEMENT**

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIME AND TERRORISM
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

NOVEMBER 15, 2011

Serial No. J-112-52

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PUBLISHING OFFICE

20-269 PDF

WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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AND FEDERAL COMPLIANCE, SMARTER
ENFORCEMENT**

TUESDAY, NOVEMBER 15, 2011

UNITED STATES SENATE,
SUBCOMMITTEE ON CRIME AND TERRORISM,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:34 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Chuck Schumer, presiding.

Present: Senators Schumer, Whitehouse, Grassley, Sessions, and Hatch.

**OPENING STATEMENT OF HON. CHUCK SCHUMER,
A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator SCHUMER. The hearing will come to order. I want to welcome the witnesses, and there are many gun violence victims and family members in the audience. I would like to thank you all for being here. Maybe you can stand up—no applause, please—so we can acknowledge you. Please stand if you are here. Thank you all very much for being here.

First, I want to thank my friend and colleague Senator Whitehouse. He is the Chair of this Committee. He convened this hearing, and he is allowing me as sponsor of the bill to serve as Chairman for the day.

Making sure that guns stay out of the hands of criminals, drug addicts, violent abusers, and the mentally ill has been important to me as long as I have been in Congress. I believe there is a right to bear arms, but I also believe it is not absolute, just like the First, Third, Fourth, Fifth, Sixth, et cetera, Amendments are not absolute. And just as we have limits on the First Amendment—anti-pornographic laws, laws that say cannot falsely scream “Fire” in a crowded theater, libel laws—there are reasonable limits on the Second Amendment. I do not believe it should be through a pinhole and then see the First, Third, Fourth, Fifth, and Sixth Amendments expansively, but I also believe that limits are very reasonable, and we are talking among the most reasonable limits here in the bill that we have professed. And that is why I have worked hard to make sure that the National Instant Criminal Background Check System was enacted, implemented, and in place. Since it went online in 1998, the background check system has stopped

more than 1.6 million people who are prohibited by law from owning guns from going through with their purchases.

I want to say that again. That is 1.6 million people, criminals, fugitives from justice, domestic abusers, drug addicts, might not have been prohibited from buying guns if not for this system.

And it is my belief that NICS is the textbook example of a law that is well balanced and well tailored. It poses no threat to millions and millions of law-abiding gun owners across the country who do have the right to bear arms, while keeping guns out of the hands of those who are most likely to misuse them to terrible ends.

Now, let me be clear about this. I understand that in large parts of my State of New York and across the country gun ownership is a way of life, and I respect that. The *Heller* decision, unlike some of my colleagues on this side of the aisle, was a decision I welcomed because I have consistently, as I mentioned, talked about the right to bear arms in the Constitution. I believed it in before *Heller*, but as I mentioned, no amendment is absolute. Reasonable limitations are placed on the First, Third, Fourth, Fifth, and Sixth Amendments, and should be. So should they be on the Second Amendment. And some of my friends on the other side of the aisle who simply believe that there should be no limit whatsoever—we once had a witness come before a House Subcommittee on Judiciary who said people should have the right to buy bazookas or tanks—go a little far.

So NICS has consistently been viewed as an appropriate way to carry out the Government's aim of protecting individuals' rights and keeping people safe. It meets the balancing test, that there is a constitutional right but it has to be balanced. Ever since it replaced State-led checks that were struck down by the Supreme Court in *U.S. v. Printz*, getting NICS in place was a major watershed event in public safety. I am proud of my role in crafting it when I was in the House of Representatives.

But just having it in place and on the statute books is not enough. We have to make sure that States and Federal agencies are actually turning in the records that they need to turn in. The background check database is only as good as the records it stores.

Today we are going to examine NICS' successes and failures so far and examine how we can close gaps in our system. Here are some facts from the FBI: 52 out of 61 Federal agencies have reported no mental health records into NICS; 58 agencies have reported zero records of drug abusers, including the DEA, the Department of Defense, and ICE; 47 out of 61 have reported no records at all, although I understand that some have reported to another database, the Interstate Identification Index, or the III; 23 States and the District of Columbia have submitted fewer than 100 mental health records to the NICS database; 17 States have submitted fewer than 10 records and 4 States have submitted none at all.

GAO estimates that there are still 1.5 million relevant mental health records outstanding, so the data suggests that our gun background check system is still riddled with loopholes, and this is only the beginning.

The truth is we do not even know the full extent of the non-compliance with the NICS law. That is because many States have

failed to even give an estimate to the Federal authorities on how many relevant records exist, let alone turn these records over to the national database. This has apparently prevented the Attorney General from being able to provide a comprehensive list of which States are in compliance with the NICS reporting requirement and which are not.

This lack of accountability is totally unacceptable. 2011 was the first year that the Attorney General could withhold 3 percent of a State's Byrne/JAG funding at his discretion for having fewer than 50 percent of its relevant records in the NICS database. So far the Attorney General has declined to do this.

So today I am calling on Attorney General Holder to fully enforce the law and begin cutting funds for States that fail to meet the reporting requirements. We will never get States to comply with the reporting requirements if the Federal Government is not following through and imposing the penalties. Right now, based on numbers that we do have so far, at least eight States would risk losing dollars if the Justice Department were fully enforcing the law. They are—since it is not Iowa, I will be happy to read the list—Alaska, Delaware, Georgia, Kentucky, Louisiana, New Hampshire, Vermont, and Wyoming. There are likely to be many more.

We cannot continue to turn a blind eye on this failure to comply with the law. If we do, we'll be continuing a very bad trend. As a Nation, it seems we are moving backward when it comes to this area of protecting people from people who should not have guns.

Earlier this week, the New York Times reported on how many States are actively taking steps to make it easier for felons to regain their right to own a gun. In some States it is now easier for a felon to legally reacquire a gun than to regain his or her right to vote.

In addition, as soon as tomorrow, the House of Representatives is expected to approve a concealed-carry measure. After that it would be sent to the Senate. Two years ago, we defeated this measure on a very close vote. This time I am not so sure what will happen. The legislation would take the carefully crafted gun laws in New York and other States and basically tear them up. It seems perverse that the first gun-related measure that this Congress plans to pass since the Tucson shooting is one that seeks to dismantle States' abilities to protect their own citizens. It is like a bad dream.

Clearly, our Nation's gun laws are under assault enough as it is, so we should not make matters worse by shrinking from the full enforcement of the laws that remain on the books. That is why it is time to toughen our approach when it comes to NICS.

In 2007, we responded to the horrible tragedy at Virginia Tech in which 32 people were killed by a gunman who had been adjudicated mentally ill, but whose records never made it into the background check system. I took the lead in drafting improvements to NICS to increase incentives of States to get their records into the system and to allow the Attorney General to withhold benefits from States that did not. This law, the NICS Improvement Amendments Act, also incentivizes States to give those who have been adjudicated to be mentally disabled to have that judgment removed

from their record if they are no longer dangerous to themselves or others.

The law is well balanced. I actually negotiated many provisions of it with Senator Coburn from Oklahoma, who generally does not agree on the issue of gun control with me, and it was passed with the support of the National Rifle Association. Most important, the NICS Improvement Amendments Act had a palpable impact on the quality of the Federal background check process. For years after the mass shooting at Virginia Tech, the total number of Federal and State mental health records in the NICS Index has roughly tripled, from 500,000 to 1.3 million. However, there are still about 1.5 million mental health records missing, according to GAO estimates.

In addition, it remains the case that very few Federal agencies have reported any relevant records into the NICS database. I am very sorry to say that, despite its successes, the NICS database, despite improvements, remains dangerously incomplete.

For example, it is entirely possible that Jared Loughner might not have bought the Glock that so tragically killed six people and wounded 13 others, including Congresswoman Gabrielle Giffords that horrible day in Tucson, almost 11 months ago, if the army had reported the fact that he admitted drug use and was denied enlistment into the army. If that had been in the NICS database, he would have been denied the right to purchase a gun.

I do not want there to be any more "what ifs." We want to make sure that we marshal every resource we have at our disposal to make the background check database, which we all agree should exist, complete once and for all.

Gun violence is irrevocable and tragic, but it seems even less understandable when there is a chance that it could have been prevented. That is why we have introduced the Fix Gun Checks Act here in the Senate. The bill would improve incentives for the States to report records that they have into the NICS database and require the Attorney General to start withholding funds from those that do not.

Specifically, the bill would require DOJ to withhold 15 percent of a State's Byrne/JAG money rather than allowing DOJ to withhold 4 percent of the money, beginning in 2013.

The Fix Gun Checks Act would require everyone to redouble their efforts if States want to continue to receive grant money. In addition, this bill would also close the private sales loophole once and for all. An estimated 40 percent of gun sales are conducted by private sellers which are not licensed by the Federal Government. Our bill would require these sales to be subject to background checks as well.

Finally, the bill would require each Federal agency to report to the Attorney General twice a year the relevant records it has in its possession.

I know that a lot of you in this room have been deeply affected by this issue. I know the pain in your hearts. And I want to thank all of you for doing what is really the noble thing. Instead of simply cursing the darkness that I know envelops your life because of the losses that you have sustained, the injuries you have sustained as well, but instead you are trying to light a candle, and that is a noble thing.

So we are looking forward to hearing from the witnesses today to get to the bottom of how we can improve the background check system and get it working better for law-abiding citizens, and with that let me turn it over to Senator Grassley.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Like you, Mr. Chairman, substituting for another Senator, I am substituting for Senator Kyl, who is a Member of the Committee on Debt Reduction, and they are working very hard these next few days to get a recommendation to the Senate.

I would ask consent that a number of documents I am going to refer to be placed in the record, and then I was going to refer to the—I was asking for permission to put some things in the record that I am going to refer to.

Senator SCHUMER. Without objection, all of Senator Grassley's materials will be put in the record at this point.

[The information appears as a submission for the record.]

Senator GRASSLEY. And I am not going to repeat what you said about the Virginia Tech thing because it was the genesis of legislation that passed both the House and Senate by unanimous consent. So, obviously, there was a strong feeling at that time of a need.

Despite the strong bipartisan support, the NICS Improvement Act was, in fact, not a perfect bill, and I will give you a good example. It stripped thousands of veterans and their beneficiaries of their Second Amendment rights simply because they have a fiduciary appointed on their behalf. Oftentimes a fiduciary is appointed simply for managing disability compensation pensions or survivors. Under an interpretation by the Department of Veterans Affairs, veterans who have a fiduciary appointed are deemed "mentally defective," are reported to the FBI's NICS system and prohibited from purchasing firearms. Under the NICS Improvement Act, a bipartisan bill, we have around 114,000 veterans and their beneficiaries have been automatically denied Second Amendment rights. It is a terrible irony that veterans who have served their country on the battlefield, have been entrusted with our national security, and have been provided firearms by their very own Government while they were in uniform are the same people that this Improvements Act harmed by taking away Second Amendment rights, all without a hearing or formal adjudication.

We just honored and celebrated Veterans Day last Friday, yet we are here debating new legislation to restrict Second Amendment rights of citizens without fixing the unintended consequences of our last major gun law.

While the horrific events in Tucson are still fresh in our memories, as we discuss new gun control laws we also need to move forward on bipartisan legislation such as the Veterans Second Amendment Protection Act. Introduced by Senators Burr and Webb, this bill would fix the unintended consequences to the thousands of veterans caused by the Improvement Act.

Today's hearing offers us another opportunity to discuss illegal firearms trafficking and the Government's efforts to stop it. At the forefront of this is the Department of Justice's failed Operation Fast and Furious where the ATF knowingly allowed illegal pur-

chasers to buy guns. The more that we learn about Fast and Furious, the more we have discovered that senior Justice Department officials knew or should have known about nearly 2,000 funds ending up in the hands of criminals, including drug cartels in Mexico.

At the first House oversight hearing on Operation Fast and Furious, multiple ATF agents testified that fear spread through the Phoenix Field Division every time there was news of a major shooting incident. Specifically with regard to Congresswoman Giffords' shooting, one agent said, "There was a state of panic, like 'Let's hope this is not a weapon from that case,'—'that case' meaning Fast and Furious."

The Fast and Furious operation was failed in concept design and execution. As the Attorney General said last week, it should never have happened, and the Justice Department officials that knew about this program, including those who allowed false statements to Congress, need to be held accountable. I thought it was fitting that late last week Attorney General Holder finally wrote the family of Agent Terry. In his letter, he stated he was sorry for their loss, although he refused to take responsibility for the Department's role in Agent Terry's death.

At the root of Fast and Furious and a lot of rhetoric surrounding gun control legislation has been the gun-trafficking statistics provided by ATF. These unclear statistics have fueled the debate and contributed to undertaking such a reckless operation as Fast and Furious.

For example, in 2009, both President Obama and Secretary of State Clinton stated that 90 percent of the guns in Mexico were from the United States, but that statistic later changed to 90 percent of the guns that Mexico submitted for tracing to ATF were from the United States. And now this year that number has become 70 percent of the guns submitted by the Mexican Government for tracing were from the United States. So you can reasonably ask: What are the real numbers?

Articles discussing the 70-percent number misrepresent the facts. As I pointed out in a letter to then-ATF Acting Director Melson in June 2011. First, there are tens of thousands of guns confiscated at crime scenes annually in Mexico. The Associated Press stated in 2009 that over 305,424 confiscated weapons are locked in vaults in Mexico. However, the ATF acknowledged to my staff in a briefing on July 29, 2011, that ATF does not have access to the vault in Mexico described in the story.

ATF also acknowledges that only a portion of the guns recovered in Mexico are actually submitted to the U.S. for tracing. In a November 8, 2011, court filing, the chief of ATF's Firearms Operations Division made a declaration saying, "It is important to note, however, that ATF's e-trace data is based only on gun trace requests actually submitted to ATF by law enforcement officials in Mexico and not on all of the guns seized in Mexico."

That court filing further states that, "In 2008, of the approximately 30,000 firearms that the Mexican attorney general's office informed ATF that it had seized, only 7,200, or about one-fourth, of those firearms were submitted to the ATF for tracing." So if Mexico submits only 25 percent of the guns for tracing, then the statistics could be grossly inaccurate one way or the other.

The discrepancies in number do not stop there. The ATF also informed my staff that the e-trace-based statistics could vary drastically by a single word's definition. For example, the 70-percent number was generated using a definition of "U.S.-sourced firearms" that includes guns manufactured in the United States or imported through the U.S. Thus, the 70-percent number does not mean that all the guns were purchased at a U.S. gun dealer and then smuggled across the border. It could simply mean that the firearms was manufactured in the United States.

So when my staff asked ATF how many guns traced in 2009 and 2010 were traced to the United States gun dealers, the numbers were quite shocking in comparison to the statistics we always hear. In 2009, of the 21,313 guns recovered in Mexico and submitted for tracing, only 5,444 were sourced to U.S. gun dealers. That is around 25 percent. For 2010, of the 7,971 guns recovered in Mexico submitted for tracing, only 2,945 were sourced to U.S. gun dealers. That is 37 percent. Either way, both are a far cry from the 70 percent we keep using, not to mention that guns in 2009 and 2010 from gun dealers could include some of the nearly 2,000 firearms walked as a part of the Justice Department's Operation Fast and Furious.

So we need clearer data from ATF and from Mexico. Mexico needs to open up the gun vaults and allow more guns to be traced, not just the ones that they select. We need to know if military arsenals are being pilfered as a source, as media articles have claimed the State Department points to in diplomatic cables.

To that end, I sent a letter today to Secretary of State Clinton seeking all diplomatic cables discussing the sources of arms from Mexico and Central and South America. I believe this information is relevant to Congress given I discovered a July 2010 cable as part of my Fast and Furious investigation. That cable, titled "Mexico's Weapons Trafficking: The Blame Game," seeks to dispel myths about weapons trafficking. Among other things, the State Department authors discussed what they perceived as "myth, an iron highway of weapons flows from the United States." These cables are vitally important to Congress' understanding of this problem. Further, given they appear in documents that ATF submitted to the Congress as part of Fast and Furious, there should be no reason for the State Department to withhold them as part of our legitimate oversight even if they are classified.

There is a lot more to be said about the specific problem with the legislation that we are discussing today. I plan to ask some questions to flesh out some of these problems and make sure that we pass a bill that is more perfect than what we passed last time by a unanimous vote denying 114,000 veterans the right to bear arms.

Senator SCHUMER. Thank you. I want to thank you, Senator Grassley, and we would welcome working with you. The last bill I think was a large improvement. It was bipartisan, as you mentioned, passed unanimously. I worked with Senator Coburn on it. But there are certainly ways it can be improved, both from the ways I am talking about and perhaps the ways you are talking about as well. So I would like to work with you on it.

Senator GRASSLEY. Thank you.

Senator SCHUMER. Great. Now let me introduce our witnesses, and I want to welcome Senator Hatch to the hearing and thank him for attending.

Our first witness is Assistant Director David Cuthbertson from the Federal Bureau of Investigation, where he leads its Criminal Justice Information Services Division and oversees the National Instant Criminal Background Check System, the NICS system. Prior to this position, he served as special agent in charge of the El Paso Division. He has investigated Mexican drug-trafficking organizations, white-collar crime, drug trafficking, and violent crime. Mr. Cuthbertson graduated magna cum laude from William Jewell College, where he earned a bachelor of science in business administration and economics.

John Feinblatt is the chief advisor for policy and strategic planning for Mayor Michael Bloomberg of New York City. He previously served as New York's criminal justice coordinator and in his current position leads the mayor's efforts in national coalitions such as Mayors Against Illegal Guns to prevent access to illegal firearms in cities around the country, and Mayor Bloomberg was planning to attend but could not at the last minute because of the things people have read in the newspapers. And so we want to welcome Mr. Feinblatt and thank Mayor Bloomberg for his interest, which I know continues.

Heather Anderson is the section manager for access and collision record system of the Washington State Patrol where she oversees efforts of the State to participate in the NICS database. She has worked in the law enforcement support field for 18 years and spent 13 years with the Washington State Patrol.

We are really honored to have Patricia Maisch, a survivor of the recent shooting in Tucson, Arizona. As you may remember, she wrestled a semiautomatic clip of ammunition out of Jared Loughner's hands, the alleged shooter, thereby helping to end an already awful day, and almost certainly saving countless lives. She is from Tucson, Arizona, where she currently owns her own business as a heating and air conditioning contractor, and we particularly want to thank you for being here, Ms. Maisch, and for your heroism.

Finally, David Kopel is an adjunct professor of advanced constitutional law at Denver University, Strum College of Law, the research director of the Independence Institute, and an associate policy analyst with the Cato Institute. He went to Brown University and received his J.D. from the University of Michigan Law School.

Witnesses, your entire statements will be read into the record. I would ask each of you to keep your statements to 5 minutes.

David Cuthbertson will lead off, and then we will go from his left to the end of the panel. Thank you.

**STATEMENT OF DAVID CUTHBERTSON, ASSISTANT DIRECTOR,
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION,
FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, DC**

Mr. CUTHBERTSON. Good afternoon, Chairman Schumer, Senator Grassley, and Members of the Committee. It is my privilege to address you today regarding the role that record availability and completeness play in the operation of the National Instant Criminal

Background Check System, or NICS, and the continuing efforts of the FBI to increase the quality and quantity of information available to the NICS.

Since it became operational in 1998, the NICS has been essential in ensuring that individuals prohibited from possessing firearms under Federal or State law do not acquire them from Federal firearms licensees. The ability of the NICS to effectively and efficiently determine firearm eligibility depends on the accuracy and completeness of the information made available to it.

To strengthen the NICS, the NICS Improvement Amendments Act, or NIAA, was signed into law on January 8, 2008. Upon its passage, the FBI implemented a number of initiatives to intensify existing outreach efforts to assist States, tribes, Federal agencies, and departments in their efforts to identify and make available to the NICS firearms-prohibiting information.

The FBI developed numerous resource and training materials, coordinated NIAA efforts with our Federal agency counterparts regarding administration of the NIAA, and has conducted internal outreach throughout the FBI regarding disposition and record reporting to the Interstate Identification Index, or III, and the National Crime Information Center, or NCIC.

From May 2008 to September 2011, the FBI coordinated 15 external meetings with Federal agencies and departments, including the Department of Defense and branches of the military, regarding agency-held information needed by the NICS. Through extensive outreach efforts, the FBI has also provided over 30 NIAA training opportunities; participated in mental health conferences at the State and national level; dedicated staff to address technology, legal, and audit concerns; conducted approximately 25 meetings with State NIAA task forces, in addition to three regional meetings with numerous State agencies; and offered guidance on a variety of matters, including the development of a qualifying relief from mental health disabilities program.

Comprehensive and ongoing outreach efforts to educate local, State, Tribal, and Federal agencies about the NICS and the overall importance of the NIAA efforts are producing success and strengthening partnerships. Since 2009, 14 States have been awarded grant funding under the NIAA. Since the passage of the NIAA to the current date, the number of State-submitted records to the NICS Index has more than doubled and the number of States with less than 100 records has decreased.

On the Federal side, more recent advancements in enhancing the electronic submission of records to the NICS include the efforts of several Federal agencies. The FBI is currently working with DOJ components and the Department of State toward record identification and electronic submission to the NICS.

However, many State systems lack adequate infrastructure to allow for the effective and efficient sharing of data between local, county, and State-level agencies. Providing technical guidance to address the needs of 50 different State systems is a challenge. In addition to obtaining grant funding under the NIAA, all States have the added requirement of creating and implementing a qualifying relief from mental health disabilities program, which is time and labor intensive.

Despite the FBI's intense outreach efforts and resulting successes, many records, such as mental health records, are still unavailable to the NICS. Many States are challenged by existing privacy laws that bar the sharing of mental health information. The FBI in a consulting capacity assists States seeking to draft legislation permitting the sharing of mental health information with the NICS. A limited number of States have overcome this information-sharing obstacle, and others are in the process.

Progress has been made in advancing awareness of the NIAA and its purpose. The amount of records submissions to the NICS Index continues to rise. Just prior to the passage of the NIAA, approximately 5.1 million records were maintained in the NICS Index. Approximately 500,000 were mental health records.

Currently, the records maintained in the NICS Index have increased by approximately 41 percent, and mental health records have increased by approximately 153 percent. However, the improvements are not spread equally across the board. Several States have significantly increased the number of records submitted to the NICS Index, yet some Federal agencies have only recently begun submission.

I appreciate the opportunity to review some of the FBI's recent work to improve the completeness and accuracy of the information made available to the NICS. Through these efforts the FBI continues to ensure that persons prohibited from possessing firearms pursuant to State or Federal law do not acquire them from an FFL and that law-abiding citizens are able to acquire them without undue delay. Thank you.

[The prepared statement of David Cuthbertson appears as a submission for the record.]

Senator SCHUMER. Well, thank you, Mr. Cuthbertson, Assistant Director, not only for your excellent testimony but for staying within the 5 minutes. That is a good starting example.

And now I am going to break that example by calling on—I mentioned earlier today that Chairman Whitehouse was generous enough to let us have this hearing and allow me because of my interest in this issue to chair it, and he has been nice enough to come by, and I am just going to interrupt our panel to let him say a few words since, after all, he is the Chairman.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you very much, Senator Schumer.

I just wanted to compliment Senator Schumer on his vigorous pursuit of these issues which are so important to New York and to Rhode Island and to the rest of the country. Many of our communities continue to be plagued by gun violence. Congress recently has suffered a real tragedy as a result of gun violence, and too often it is enabled by loopholes in our gun laws that allow the purchase of military-style weapons in great bulk or that deny law enforcement officers the information they need to go about doing their jobs in a responsible way. And I think it is important that we work to close those loopholes. We can have different ideas of the extent to which various gun laws should or should not be extended, but

there really should be a bipartisan agreement that we should effectively and sensibly enforce the gun laws that we have.

So we look forward to continuing to work with you in this Subcommittee, Senator Schumer. We thank you for taking the lead on this issue, and I am very happy to have you be the Chair of the day in this Subcommittee, and I thank Senator Hatch for being here and for attending and for being gracious about my little interruption of the order of proceeding here.

Thank you, Senator Schumer.

Senator SCHUMER. Thank you, Senator Whitehouse. Chairman Whitehouse has certainly stayed within the 5 minutes.

Mr. Feinblatt.

STATEMENT OF JOHN FEINBLATT, CHIEF ADVISOR TO MAYOR MICHAEL R. BLOOMBERG FOR POLICY AND STRATEGIC PLANNING, NEW YORK, NEW YORK

Mr. FEINBLATT. Good morning, Chairman Schumer, Senator Grassley, Members of the Subcommittee. Thank you for the opportunity to be here today. I am John Feinblatt, chief policy advisor to Mayor Michael Bloomberg, who very much regrets that he cannot be here with us today.

Ten months ago, the Nation turned its attention to Tucson, Arizona, and watched in horror as 6 people were gunned down and 13 others were seriously injured, including Congresswoman Giffords. Since that day, more than 10,500 Americans have been shot to death in senseless crimes. That is 34 Americans a day, and that means on a daily basis we experience a tragedy larger than the one we had at Virginia Tech.

Even more tragic is that we could have prevented some of these deaths.

Over the past 5 years, Mayor Bloomberg and Mayor Tom Menino of Boston have worked to build a bipartisan coalition of more than 600 mayors dedicated to honoring the Second Amendment and also dedicated to fighting gun crime by strengthening enforcement of existing laws and closing loopholes that are a criminal's best friend.

The tragic fact is that often background checks just do not happen or they do not work because the information that should be in the background check system just is not.

After the Virginia Tech massacre, both Houses of Congress unanimously passed a law designed to ensure that Federal agencies and States submit the necessary mental health, domestic violence, and drug abuse records to the background check system. And as a result, the number of records in the background check system has risen substantially.

Still, according to a new analysis released today by Mayors Against Illegal Guns, 23 States have contributed fewer than 100 mental health records. Seventeen of those States have submitted fewer than ten records; four have not shared any at all.

Federal agencies are not doing much better: 52 out of 61 Federal agencies have reported zero mental health records; 58 Federal agencies have reported zero records of drug abusers, including agencies such as the DEA, the Department of Defense, and ICE.

To understand why some States are succeeding and others are failing, our coalition talked to more than 60 officials in 49 different

States. We found that States face a complex set of challenges. But we also learned that a few common themes united those States that are successfully sharing information.

First, it is clear that leadership matters. Nine out of the 10 States with the highest submission rates have taken active steps to overcome logistical and legal barriers by passing record-reporting laws.

Second, funding matters. States with access to Federal grant funds are reporting on average nearly twice as many records as States that do not receive those funds. And yet Congress has appropriated less than 5 percent of the funds it authorized for this vital grant program.

Third, it is clear that Congress needs to impose penalties with real teeth for States that are failing to submit records. Today States stand to lose only a combined \$12.7 million in Federal funding if they do not meet their reporting requirements.

And, fourth, we learned that many States still do not know what mental health and drug abuse records should be sent to NICS. The Justice Department should issue clear guidance and make it easily accessible.

In addition, the President should issue an Executive order requiring all Federal agency heads to certify to the Attorney General, in writing, that their agencies have submitted all the necessary records to the national background check system.

This is about enforcing the law, plain and simple, and nothing else. Both Congress and the President have a responsibility to do that and must take action if our laws are to be upheld and our public is to be protected.

These four steps are all necessary and urgent. But, unfortunately, they are not enough, because if you buy a gun from a so-called occasional seller at a gun show or online or in the parking lot of a supermarket, Federal law does not require a background check, no matter if you buy one gun or 20. This loophole feeds the voracious market for illegal guns, and an estimated 40 percent of all U.S. gun sales are not subject to a Federal background check.

Passing the Fix Gun Checks Act Senator Schumer introduced earlier this year would increase the incentives for States to ensure that all records that should be in NICS are. It would also close the private sale loophole once and for all. A bipartisan poll commissioned by our mayors showed that 86 percent of the public and 81 percent of gun owners want every gun purchase to go through a background check system.

Last spring, our coalition launched the National Drive to Fix Gun Checks. Today the number of Americans who have signed our petition in support of that effort has passed 400,000. I would like those names to be included in the record today.

Senator SCHUMER. Did you say 400,000?

Mr. FEINBLATT. 400,000.

Senator SCHUMER. Could we just have a summary of what was put in?

[Laughter.]

Senator SCHUMER. Because it is a lot of names to put in the record.

Mr. FEINBLATT. It is a lot of names, and we took—

Senator SCHUMER. We will take that under advisement, but somehow we will work something out so we certainly put into the record what you have talked about.

Mr. FEINBLATT. A few of those of the 400,000 are with us today. All of them have lost loved ones to gun violence, and I hope that this Committee listens to their stories and acts swiftly to pass the Fix Gun Checks Act to prevent future tragedies. Thank you.

[The prepared statement of John Feinblatt appears as a submission for the record.]

Senator SCHUMER. Thank you, Mr. Feinblatt, and thank you for the good job you do in New York City helping us fight crime.

Ms. Anderson.

**STATEMENT OF HEATHER A. ANDERSON, SECTION MANAGER,
CRIMINAL RECORDS DIVISION, WASHINGTON STATE
PATROL, OLYMPIA, WASHINGTON**

Ms. ANDERSON. Good afternoon, Senators and Members of the Subcommittee. Thank you for this opportunity to testify today. For the past 10 years, the Washington State Patrol has maintained the responsibility of management, training, support, and audits of our local law enforcement agencies that conduct NICS checks for gun transfers and issuance of State concealed pistol licenses.

WSP oversees the NICS program within Washington State, ensuring agencies understand the processes. Agencies conduct NICS checks according to the rules set forth by the FBI and applicable State and Federal laws. WSP verifies appropriate usage of NICS and proper retention and destruction of the checks. They also work with other State and local entities to ensure submission of records into the NICS Index. In carrying out this role, WSP has experienced a litany of obstacles, particularly in the context of mental health record sharing. These include a coordination with other State agencies, logistical hurdles, technical hurdles, data issues, training, and funding, just to name a few.

That said, Washington has been very successful in moving more records into NICS. Currently, WSP works with NICS, the Department of Social and Health Services, and the Administrative Office of the Courts to ensure mental health records are submitted, validated, and canceled as necessary. In 2004, DSHS provided NICS with all of the historical mental health committal information in an initial transfer of over 30,000 records. They continued to provide monthly submissions thereafter via a CD in the mail.

In working with Social Services, we found pockets of information that were missing. If a person had private insurance, Social Services may not have a mental health record. Additionally, not all records provided to us met the criteria to deny a person a gun. WSP continues to work with the State and local entities to clean the existing records that have already been submitted to the NICS Index.

In 2009, the courts took over data submittal for mental health records. This was a better fit. Court databases contain most committal records regardless of insurance types. Unfortunately, the court was only able to provide day-forward information. They have a legacy database. So between the existing data provided up to 2009 by the Social Services and the new data provided by the

courts, Washington is providing as much information as possible, but we still enter missing records provided by State and local entities upon request. The court set up an electronic data transfer process with NICS, and that is getting us closer to real-time data.

Another large issue for Washington is the overall understanding for agencies that conduct background checks. The process is not always clear to them. Ongoing training by the NICS staff over the years has educated our decentralized State, but the need for training remains a priority due to turnover in personnel at local law enforcement and changes in interpretations. The commitment of NICS to partner with the State Patrol is providing the best possible service despite the obstacles and continued issues that we face.

WSP has reached out to various State and local entities to work as a united force to ensure compliance with State and Federal laws and to work together to improve data processes and requirements. Washington is hosting NICS and five other States on December 7th for a NICS Improvement Amendments Act discussion.

We are also working with the courts, prosecutors, and judges on a number of issues pertaining to NICS to better our forms and consistency and provide more education.

Lastly, because of the efforts of so many within Washington, there is continued improvement during our State's NICS triennial audits with the FBI. We have a long way to go. We still need to find good solutions for the fact that many misdemeanor crimes of domestic violence are not all entered into our State criminal history repository because the courts have reported that many of these charges are not followed up with fingerprints due to their workload. If a person is not fingerprinted, the information is not in the criminal history repository. WSP is not connected to the court database to pull data from. These are legacy databases. The court information is name based, and the State Patrol data results from fingerprint cards.

State misdemeanor and felony warrants are not all forwarded to the National Crime Information Center. There is much stakeholder work to accomplish this move of, on average, 165,000 misdemeanor warrants and 19,000 felony warrants, and we are currently working on this issue.

The ATF has determined that Washington does not meet the requirements of the NIAA for firearm restoration of rights and a relief program. This has been something we have worked on with other State agencies, and we are not there yet. We have not been able to obtain the funding or any opportunities for grant funding because of that.

I am honored to be here today to talk about Washington's successes and the roads that we still need to travel. Continued Federal funding of the NIAA for years to come will enable States to improve technology for more accurate and faster reporting to the NICS Index. The funding will allow States to bridge legacy data systems not unlike ours and ensure information can be made available. The power of more information can be measured in lessened

Thank you.

[The prepared statement of Heather A. Anderson appears as a submission for the record.]

Senator SCHUMER. Thank you, Ms. Anderson.
Ms. Maisch.

STATEMENT OF PATRICIA MAISCH, TUCSON, ARIZONA

Ms. MAISCH. Good afternoon, Chairman Schumer and distinguished Members of this Committee. Thank you for inviting me to testify.

It is an honor, and humbling, for me to speak about a very personal issue: fixing our country's firearms background check system and keeping illegal guns away from dangerous persons.

On January 8th—a beautiful, crystal-clear Saturday morning in Tucson—my life and the lives of so many other people changed forever. Words cannot describe the horrific acts I witnessed that morning or the sorrow we have all suffered. Luck was with me that day. I survived, physically uninjured.

Six other innocents were not so fortunate. Their lives ended violently in a matter of 30 seconds. I want you to know who they are:

Dorothy Morris, wife of George Morris. He was shot and survived that day; high school sweethearts married more than half a century; mother of two daughters.

Dorwin Stoddard died shielding his wife, Mavy. Mavy and Dorwin, grade school sweethearts, found each other again after both their spouses had passed away. Mavy tells me that the last 15 years have been a wonderful journey and that she misses Dorwin every waking minute. Mavy, who was wounded that day, is here today with one of her daughters.

Phyllis Schneck, a widow with three adult children, grandchildren, and one great-grandchild; a Tucson snowbird from New Jersey; an avid crafter; cherished winter member of the North Minster Presbyterian Church.

Some of you might recognize Judge John Roll, father, husband, grandfather; attended mass daily; served the great State of Arizona for over 30 years; friend of Congresswoman Giffords.

Gabe Zimmerman. Gabby Giffords' staffer loved Tucson, hiking, and social concerns; fiance to Kelly O'Brien; son of Emily Nottingham and Ross Zimmerman; brother to Ben; friend to everyone he met, I am told. I am so sorry I did not have the opportunity to be his friend.

Christina-Taylor Green. Beautiful little Christina-Taylor Green, only 9 years old; born on the day of our national tragedy—9/11/2001; newly elected to the Mesa Verde Elementary School student council; potential for future political service gone; loved butterflies; was a budding artist; loved playing baseball with the boys in Little League; doting sister of Dallas; cherished daughter of Roxanna and John.

Thirteen more were physically injured that morning and untold numbers emotionally hurt. Colonel Bill Badger, Ken Dorushka, Randy Gardner, and Mavy Stoddard were among those physically wounded, and they are here with us today.

Faith and Roger Salzgerber are also here. They stopped by that morning to talk to Gabby. Roger volunteered many hours to help re-elect Gabby. It is incredible that they escaped physical injury that day. Faith covered Christina-Taylor to keep her warm and comfort her while waiting for medical assistance to arrive.

That morning, Roger had the courage to chase in behind the shooter, along with Bill Badger, who suffered a bullet graze wound to the head. Together they took the shooter down. Their courage and heroism gave me the opportunity to take an ammunition magazine from the shooter.

Nurse Nancy Bowman is here today, too. She and her husband, Dr. David Bowman, were buying Brussels sprouts at the Safeway that morning. They provided triage service and immediate life-saving care to the wounded. I shudder at the thought of what might have happened had they not been there that day.

Tucson, unfortunately, is not the only tragedy represented here today. Joining us are more than 50 other survivors from across our great land whose lives are forever altered by gun violence. Mass murders with guns garner the most headlines, but each gun murder holds its own horrific details. Different places, different names, different circumstances; each somewhat different, but each all too similar. All tragic, all so very unnecessary.

Chairman Schumer, I am definitely here to remember those that were killed that day as well as to honor each survivor. But my primary mission today is to remind all of you that Tucson is yet another extremely tragic example of what is at stake each and every time a gun falls—or is placed—into the wrong hands.

Changing the past is impossible, no matter how desperately we want to change it, but it would be a pitiful shame if no action were taken to change the future.

You can take action to improve our broken gun background check system, and I truly believe with all my heart that your actions can save lives.

If I can try to make this as personal to you as it is to me, I feel that we can make progress. So forgive me if you find this offensive, but I want you to take a moment to do something. Imagine the headlines you have seen. Now replace the names of Dorothy Morris, Dorwin Stoddard, Phyllis Schneck, Judge John Roll, Gabe Zimmerman, and Christina-Taylor Green with one of your loved one's names.

So that is why I am here today: to ask that you pass the Fix Gun Checks bill, which will save lives, maybe the life of someone you love.

Your support for this legislation would help families and communities across our great country be more hopeful that they will be spared the pain, sorrow, and tragedy of Tucson.

Since the day of the shooting, I have been sincerely touched by the outpouring of prayers and good wishes that Americans from across the county have shared with the victims' families as well as with fellow survivors, our community, and myself. These offerings continue to comfort and sustain me.

That outpouring of support reminds me of our fundamental unity as a country. We all know that polarized debates that stifle policy-making prevent us from solving real-life problems. And when it comes to guns, the majority of Americans, the majority of Tucsonans, and the majority of gun owners want common-sense laws that protect Second Amendment rights and that protect us by helping stop the supply of illegal guns to dangerous people.

This law will do that.

Hopefully, the debate we have today will be different. I am here, we are all here, to ask you to recognize the common ground we share and to take two common-sense steps.

First, make sure the records of all persons who should not be allowed to buy guns are in the background check system.

Second, require every gun buyer to pass a background check, no matter where he or she buys the gun, or whom he or she buys it from. Background checks are simple, quick, and inexpensive.

The American people support these proposals. According to a recent poll, 90 percent of all Americans and 90 percent of all gun owners support fixing gaps in the background system; 86 percent of all Americans and 81 percent of gun owners support universal background checks.

Please take these two steps by enacting the Fix Gun Checks bill. This bill could help prevent the murders of some 34 Americans killed with guns each day. Thirty-four Americans killed every day. Five times the number of people murdered in Tucson. I cannot sit idly by while that happens each day, and I know that you will not either.

The shooting in Tucson brought Americans together. Please honor that unity by putting politics aside and working together to fix our broken background check system.

Please take action. Please prevent the next mass shooting. Please pass the Fix Gun Checks Act.

I want to thank you again, all Members of the Committee, for giving me the opportunity to appear before you today, and I have just one last question for you:

How much more pain, how much more sorrow, how many more deaths by guns must we endure before we do something?

Thank you.

[The prepared statement of Patricia Maisch appears as a submission for the record.]

Senator SCHUMER. Well, thank you, Ms. Maisch, for your riveting and powerful testimony.

Ms. MAISCH. Thank you.

Senator SCHUMER. It takes a lot of courage for you to be here. I had earlier, before my colleagues came in, asked the people who are here who were injured by gun violence or have family members who were killed or injured by gun violence to stand, but I am just going to ask—you mentioned a whole bunch of people who came here from Tucson with you, and I would just ask them to stand so we could recognize them separately.

[Applause.]

Senator SCHUMER. Thank you.

Professor Kopel. You have a tough act to follow.

**STATEMENT OF DAVID B. KOPEL, ADJUNCT PROFESSOR,
ADVANCED CONSTITUTIONAL LAW, DENVER UNIVERSITY,
STRUM COLLEGE OF LAW, DENVER, COLORADO**

Professor KOPEL. Thank you, Senator Schumer and Members of the Subcommittee. The Subcommittee has heard about concepts which are said to be in S. 436. I would like to address the actual contents of the bill.

According to the Fifth Amendment, no one may be deprived of life, liberty, or property without due process of law, but S. 436 violates the constitutional standards of due process and fair trial.

S. 436 prohibits gun ownership based on an arrest rather than a conviction. For example, suppose a person was arrested for marijuana possession and was later found innocent because the police officer mistook tobacco for marijuana. S. 436 would make it a Federal felony for the innocent person to possess a firearm.

At the press conference level, S. 436 is said to be about background checks on gun sales, but the bill is far more extreme than that. Under S. 436, it would be a Federal felony to temporarily allow someone to use or hold one's firearm in the following circumstances: while a friend visits your home; while taking a friend target shooting on your property or 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 eliminates the requirement for a fair determination and eliminates the requirement for 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 is ordered to get counseling because the school administration was retaliating against him for criticizing the administration; a person who was once ordered to receive counseling for homosexuality, cross-dressing, or being transgender; a woman who was raped and now has post-traumatic stress.

S. 436 explicitly strips people of their Second Amendment rights based on a mere order from a college administrator rather than based on an actual determination by a court or a commission that an individual actually is dangerous.

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 national gun registration. Several years ago, national gun registration was enacted in Canada. Canada's parliament is expected to repeal the national gun registration soon. As Canadians have realized, national gun registration is a waste of taxpayer dollars and contributes nothing to public safety.

Congress does not have the constitutional authority to enact S. 436. The bill is apparently based on Congress' constitutional power to regulate commerce among the several States—the Interstate Commerce Clause; yet S. 436 applies to gun transfers that are purely intrastate, not interstate. It applies to activities that have nothing to do with commerce such as simply letting a friend examine your firearms collection. Thus, S. 436 violates 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.

Whatever good intentions might lie behind S. 436, the actual bill as written is unconstitutionally overbroad. It is a Pandora's box filled with the dangerous consequences that are the inevitable re-

sult of making it a felony for law-abiding Americans to possess and use firearms.

Thank you.

[The prepared statement of Prof. David B. Kopel appears as a submission for the record.]

Senator SCHUMER. Thank you, Professor Kopel.

Now we will go on to the questions. We are going to try to limit ourselves to the same amount we limited you, 5 minutes.

My first series of questions are for Assistant Director Cuthbertson, and as you know, Director, the NICS Improvement Act requires the Department of Justice to “assess the total percentage of records provided by each State in order to determine whether a given State is eligible for certain grants or, as of January 2011, eligible to have 3 percent of its DOJ money taken away.” Isn’t that right?

Mr. CUTHBERTSON. I believe that is accurate, sir.

Senator SCHUMER. Now, it is my understanding DOJ has decided not to penalize any States this year for providing fewer than 50 percent of their relevant records to NICS, and I am not sure I agree with this decision. I intend to push to make sure the penalties available under NICS are not viewed as empty threats. But the bottom line is we need to know which States are reporting and which States are not.

To your knowledge, were estimates actually made as to the percentage of records that each State made available for background checks? If no estimates were made, do you know why that was?

Mr. CUTHBERTSON. Sir, although the responsibility for the State estimates and the evaluation of the grants is the responsibility of the Department, I am aware from BJS that most States submitted estimates on some categories. However, that was not consistent throughout, and it is suspected that the estimates varied in reliability from State to State.

Senator SCHUMER. So that is why they did not do it.

Mr. CUTHBERTSON. I am not aware of why they did or did not.

Senator SCHUMER. Okay. Well, I know you do not represent the Bureau of Justice Statistics today, and I appreciate that. But I am concerned about how we are going to get from here, where we have no estimates and they seem difficult to come by, to where we need to be, specific estimates to enable the Department to make an informed determination about which States are in compliance and which are not.

I am troubled, to say the least, that the Department has not been able to do this yet, so today I am sending a letter to DOJ’s Office of Justice Programs asking them to come up with a solution to the problem.

In the meantime, since you are here today, I want to ask you this: By the time that DOJ issues its report to the Judiciary Committee next year, I would like for DOJ to be able to come up with estimates, even if they have to be explained and qualified, of compliance by State. This does not seem to be unreasonable to me 4 years after the passage of NIAA. Can you commit to doing that or take this message back to DOJ? I do not want a bureaucratic answer. I think this is part of the problem. Can you and your colleagues at DOJ please get this done?

Mr. CUTHBERTSON. Sir, I will certainly take that back to the Department. The FBI has committed to work with all of our State, local, and Federal agencies to increase the completeness and accuracy of the records, provide them with whatever assistance we can, understanding it is a daunting problem to collect the estimates of records held in county courthouses throughout the country.

Senator SCHUMER. Okay. Now, next, have you been able to make rough estimates for any of the categories of prohibited users? Are there any in which States appear to be, by and large, above 50 percent?

Mr. CUTHBERTSON. Sir, the FBI has not made estimates since that is under the purview of BJS. What we do look at are the completeness of the criminal history records in the III in which, in general, the number of dispositions for the arrests are about 50 percent. We work very hard in trying to increase the completeness of those so that arrests will contain the corresponding court outcome, whether that is a conviction or otherwise.

Senator SCHUMER. Okay, and that is on the felonies. So you have an easier time with that, I presume.

Mr. CUTHBERTSON. Felonies or misdemeanors, sir.

Senator SCHUMER. Okay. Now, I understand you have made some progress in getting Federal agencies to improve their reporting to the NICS database. The negative side is that 52 out of 61 Federal agencies have reported zero mental health records. What concrete steps have you taken to assess the number of records out there and increase reporting?

Mr. CUTHBERTSON. Sir, we have had a tremendous amount of correspondence with the Federal agencies, both at the FBI and the Department level, to work with them to try to have them discover what records would be responsive. I think when you look at the list of Federal agencies, there are a good number, however, who would not have responsive records to some of the categories, including mental health records.

Senator SCHUMER. Now, shortly after the Tucson shooting, several media outlets reported DOJ has an effective policy of not requiring Federal agencies to report the results of voluntary drug tests to the NICS database. I would like to know whether you and the Department are working on this policy to make sure all relevant records from Federal agencies are, in fact, getting into the NICS. Jared Loughner, as you know, failed a drug test when he applied to enlist in the army. So it is clearly relevant, particularly to Ms. Maisch's testimony.

Mr. CUTHBERTSON. Sir, as I understand it, the Reno memo, which you are referencing, is still in force. The Department is aware of your concerns regarding that existing policy, and any further discussions regarding policy of the Department would have to be referred to them.

Senator SCHUMER. Is there a chance we can get this Reno memo undone?

Mr. CUTHBERTSON. I would have to defer that question to the Department, sir.

Senator SCHUMER. Okay. We will ask the Department in writing and add it to the record, without objection.

[The information appears as a submission for the record.]

Senator SCHUMER. My time has expired. I may be able to come back to a second round, but I am not going to call on Senator Grassley.

Senator GRASSLEY. For my investigation of Fast and Furious, Mr. Cuthbertson, I have written a letter to the FBI, including you in your previous position as head of the El Paso Field Office, for some documents. Have you done anything to search documents in response to our request?

Mr. CUTHBERTSON. I have not done so personally, sir. That is being done by FBI headquarters in conjunction with the Department.

Senator GRASSLEY. We have not gotten any documents. When did you first hear about ATF walking guns? And when did you hear it?

Mr. CUTHBERTSON. Sir, the only knowledge I have, personal knowledge, regarding ATF's investigation commonly known as Fast and Furious are from media accounts that we all read.

Senator GRASSLEY. Okay. Did you ever receive any emails related to Operation Fast and Furious?

Mr. CUTHBERTSON. Sir, I would respectfully ask that any particular questions regarding Fast and Furious be directed to the Department, who is coordinating all responses.

Senator GRASSLEY. At least you can—I am going to ask the questions, anyway. Do you have any knowledge of any emails involving FBI employees that are related to ATF's Operation Fast and Furious?

Mr. CUTHBERTSON. No, sir, I do not have any direct knowledge, and any knowledge I would have would not be comprehensive, so I would defer the question to the Department of Justice.

Senator GRASSLEY. Are you aware of any other investigations involving gun walking by any Federal agency in Texas?

Mr. CUTHBERTSON. No, I am unaware of any of those.

Senator GRASSLEY. I am sure you can answer this question: Regarding the legislation we are addressing today, has the President and the administration taken a formal position in support of it?

Mr. CUTHBERTSON. Sir, I am going to respectfully ask you to repeat the question. I did not hear it.

Senator GRASSLEY. Regarding this legislation that we're addressing today, has the President and the administration taken a formal position in support of it?

Mr. CUTHBERTSON. Sir, I am unaware of any position taken by the President and administration, and I am not in a position to comment on any position of the FBI or the Department.

Senator GRASSLEY. Okay. Mr. Kopel, the Improvement Act was signed into law in 2008 as a result of the tragedy at Virginia Tech. As I indicated in my statement, that has affected some veterans. The legislation we are discussing here today makes similar changes to Federal gun laws that could have serious side effects.

In your testimony you discussed how the bill's definition of "adjudicated as mentally defective" is problematic. Notably, the bill states that if a court, board, commission, or other lawful authority determines that the mental health of an individual is an issue and compels or mandates "counseling, medication, or testing to deter-

mine compliance with prescribed medication,” a person will be prohibited from owning a weapon.

Question: Many police forces across the country, including the New York Police Department, require mandatory mental health counseling for officers that discharge their weapons in the line of duty. Under this provision could these officers now be barred from owning, purchasing, or possessing firearms?

Professor KOPEL. That would seem to be the result. An important change that this bill would make is that it makes it clear that the language about other lawful authority is not just a board or a commission or some kind of mental health expert. It includes explicitly university administrations, and I think by implications it would likewise include the lawful authority of a police commander ordering a police officer to get mental health counseling. And, again, it makes the disarmament provision triggered not by any finding that a person has a mental problem. It is simply the order to get counseling that triggers the gun ban.

Senator GRASSLEY. What about a family member of a 9/11 victim that is grieving from the loss of a loved one? If they were ordered to receive mental health counseling to deal with their loss, would they be barred from exercising their Second Amendment right under the bill?

Professor KOPEL. Yes, because it takes away—the bill takes away the current language that says people lose their gun rights on mental health issues only if they are either incompetent to take care of themselves or they have been found to be dangerous to themselves or others. That would be eliminated, and instead the bill would impose the gun prohibition on anyone who has been ordered into counseling for any mental illness.

Senator GRASSLEY. This will have to be my last question for this round. A 2008 article in the New York Times entitled, “Worried about stigma, officers often opt out of police counseling,” and then to quote from the article, it states, “Counseling remains among the most underused tools in the police officer’s arsenal, the result of an age-old stigma within the department against psychiatry in general.”

Isn’t it a real possibility that this bill will become a new deterrent for those who need mental health counseling because they are afraid to seek it for fear of losing their Second Amendment rights? As this article points out, there is already a stigma for law enforcement seeking mental health counseling. Won’t this make that problem much worse?

Professor KOPEL. I think the problem of the stigma of people being reluctant to go to counseling is not just confined to police officers. It is something mental health professionals face all the time. And even the very discussion of this bill, frankly, makes the problem worse because the bill is retroactive, so somebody who got counseling in 2006 or, for that matter, in 1993, the day this bill became law it would be illegal for that person to possess a gun. So if they have three guns and the bill becomes law on December 1st, on December 2nd they are a Federal felon. And when you talk about this kind of retroactive felonization of people for getting mental health counseling, I would think it would only worsen the reluctance of many people to go to counseling.

Senator GRASSLEY. Thank you.

Senator SCHUMER. Thank you, Senator Grassley.

Senator SESSIONS.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Cuthbertson, with regard to the reporting for the purposes of the National Crime Information Center, every State and local government is required, I believe is the right word, to submit all convictions that occur in their courts, and they are requested to submit records for arrest to the NCIC. Is that correct?

Mr. CUTHBERTSON. Sir, all information provided to the FBI through the States is voluntary. The III, or Interstate Identification Index, is the criminal history repository in which arrests and convictions are reported via fingerprints to the FBI.

Senator SESSIONS. Is there any discipline to a State that accesses the NCIC for their benefit, or a local jurisdiction, but will not bother to put their information in concerning convictions, some of which may be very serious convictions?

Mr. CUTHBERTSON. There is no process in which we fine people or have any negative effects because all the information provided to the FBI is voluntary. We have an audit procedure to make sure that information is used, stored correctly, and accessed correctly, but it is a voluntary system.

Senator SESSIONS. Okay. So now we have this new requirement that mental health counseling be reported, and if you do not do that, you lose money?

Mr. CUTHBERTSON. I would have to defer that to the Department since they are the ones that judge the grant applications.

Senator SESSIONS. Well, I would just say, for people who are concerned about public safety, the greatest likelihood of apprehending serious criminals, people who actually commit crimes and murders, based on my 15-plus years of prosecuting—and I prosecuted these Federal gun cases by the hundreds. I personally tried lots of them. As a matter of fact, I see in the report my district is one of the highest in the Nation in prosecutions still, my old district. But we made it a high priority.

Senator SCHUMER. You set a very good example, Senator.

Senator SESSIONS. Well, I think they are following the example we set because we were at the top of the country. I just would say to you, what I am trying to get at is, would you not as an experienced person in this, dealing with these issues, say that a failure to enter felony convictions would be far more numerous than maybe a counseling question would be?

Mr. CUTHBERTSON. Sir, as we have seen, although submission to the III is voluntary, it is widely used by law enforcement agencies—

Senator SESSIONS. III is?

Mr. CUTHBERTSON. The criminal history repository, Interstate Identification Index. Although it is widely used and it is the Nation's criminal history repository, we have traditionally seen the dispositions of arrests run at about 50 percent or a little bit more. And there are a variety of reasons for that, because the records have to come from the courts, and that seems to have been the weak point in getting those records from the courts into the Fed-

eral system so that those dispositions can be attached to the arrests that caused either those convictions or acquittals.

Senator SESSIONS. Mr. Chairman, one of the greatest advancements in criminal justice is the ability to arrest someone in New York who was convicted of a felony in Alabama and the arresting officer know it immediately because it is in the NCIC, and they know they have got a dangerous criminal. It affects who is released on bail. So when you get half the jurisdictions not submitting routine felony convictions—is that what you were saying?

Mr. CUTHBERTSON. No, sir. It is not half the jurisdictions. It is about half the arrest cycles in NCIC.

Senator SESSIONS. Arrest cycles.

Mr. CUTHBERTSON. Right.

Senator SESSIONS. You mean arrests or convictions?

Mr. CUTHBERTSON. No, sir. One arrest can be for different criminal charges. So let us say you had a breaking and entering and an assault and a murder. Normally, that would be reported in three arrest cycles. As a prosecutor, you understand you may have a conviction on one of those charges. So one arrest cycle does not equal one arrest. Some arrests have more than one arrest cycle, and it is, in general, 50 percent of the arrest cycles in the III have a corresponding disposition associated with them. The NCIC is the part that is used for wants and warrants, active information that is very accurate and very up to date. But the criminal history information in and of itself is in the III. The NICS accesses both those databases in addition to the NICS Index.

Senator SESSIONS. I have trouble with this every time. It is so complex. But basically I would just say that when a prosecutor is prosecuting under—the most commonly used statute, I believe, is possessing of a firearm after conviction of a felony, if you do not know the person is convicted of a felony, then you do not have a conviction, and it may not have occurred in your district. It is a huge issue.

I would just wrap up, Mr. Chairman. My time is out. There are a lot of things I would ask, but—

Senator SCHUMER. We are going to have a second round.

Senator SESSIONS. I do have to excuse myself. If I could have one more question?

Senator SCHUMER. Sure.

Senator SESSIONS. It would deal with the overall trend of prosecutions. I have noticed in the last year of the Bush administration there were 8,480 prosecutions under the firearms statutes. That has dropped to 7,183 today, which is a rather substantial reduction in the number of prosecutions.

I would note, Mr. Feinblatt, that New York, at least the Eastern District, Brooklyn, is one of the lowest in the country. Maybe you ought to talk to the U.S. Attorney and Alcohol, Tobacco, and Firearms, because I am not dismissing the importance of the legislation you have offered, Mr. Chairman. I look forward to studying it. I do think it has some breadth issues that certainly need to be dealt with. But I would just say to you the bread-and-butter issues, the ones that put people in jail, are carrying a firearm during the commission of a crime and possessing of a firearm after having been

convicted of a felony. There are about 30 pages of firearms legislation here in small print. It is not as if we do not have firearm laws.

So we have had a lot of fights over gun shows and how to regulate that, and this issue is an important issue. But I would just say to you we need to be sure that the administration is actually prosecuting the criminals that use guns. A lot of these regulations that are pushed often by people who do not prosecute the cases are very seldom used and very seldom applicable to normal, routine prosecutions.

I thank the Chair.

Senator SCHUMER. Well, thank you. Again, I offered this to Senator Grassley. Certainly the legislation we passed unanimously in 2007 can be improved, and if there are people who are wrongfully being deprived of their right to bear arms, I would certainly look at that as well as, just as you correctly point out, making the records as strong as possible. We are not intending to add new crimes here in the part of the bill dealing with NICS but, rather, trying to just make it work.

Senator SESSIONS. One reason this code is complex on gun crimes is because there is a constitutional right to keep and bear arms. I believe the Constitution, if you respect it, you enforce it as written. I believe the Supreme Court is correct to say it is a personal right to keep and bear arms. And, therefore, when you constrict that right, you have to have a justification to constrict it. One of them is if you have been convicted of a felony. Another one is that you get an extra enhanced penalty if you are carrying a gun during the commission of a felony. If you lie on the form, if you are a dealer that does not have a license and sells contrary to the law and does not comply with the waiting period, all those things, hundreds of requirements on constricting the free flow of firearms in America, but there is a fundamental constitutional right to keep and bear arms, and so we get down to these little areas where we have disputes.

Senator SCHUMER. The Senator came in after I spoke, but not much different from what I said. There is a right to bear arms, but there is also a balancing test, and I think we would agree on that, and maybe we can work together. That is very encouraging.

Okay. I have a few quick questions that I had not been able to ask. One last one to Director Cuthbertson. Mayor Bloomberg testified that, according to his coalition, many States say they need more specific guidance in several of the prohibited categories, for example, in determining the scope of mental health and drug abuse records that qualify for inclusion to NICS. Now, I have looked at the frequently asked questions that are posted online. It is not covered by such as this. Would you consider developing more specific written guidance on the kind of records that do and do not qualify for inclusion by category?

Mr. CUTHBERTSON. We have worked extensively with the States, provided a tremendous amount of guidance. But if there are areas that we have not covered, we certainly would be willing to provide that guidance to the States.

Senator SCHUMER. Okay. Next I have a question for Mr. Feinblatt. I was going to ask this of Mayor Bloomberg, but perhaps you can speak for him. As you know, I have worked closely with

the mayor and your office on crime issues. I tend to be a tough-on-crime guy, and I think one of the great things that has happened to New York is crime rates are way, way down, and that has allowed our city to grow by 1.5 million people. Most people do not know that New York has grown by close 1.5 million people, and one of the main reasons is our much lower crime rates. I am proud to say that we are the lowest of the 25 largest metropolitan areas in violent crime and crime, and that is due to the good work of our police force and some of the Federal laws we passed over 15 years ago.

But we are concerned, I am concerned about the resurgence of the efforts to make concealed-carry permits legal across State lines, making someone who obtained a permit to carry a concealed weapon in one State able to carry it in another like New York where we regulate concealed weapons.

Are the mayor and his coalition and you, Mr. Feinblatt, concerned about this renewed effort which the Senate defeated in 2009, but I believe the House will be voting for tomorrow? And, you know, it was very neck and neck in the Senate as to whether it passes or fails.

Mr. FEINBLATT. Yes, the Mayors Against Illegal Guns, made up of over 600 mayors as well as law enforcement organizations across the country, domestic violence advocates across the country, are all keenly concerned about national concealed-carry reciprocity. We believe that States ought to have the ability to regulate who gets a concealed-carry permit in their State and that there should be respect for States' rights.

New York has a set of regulations that are very different from Florida. We are not saying that New York's regulations should be what Florida's regulations are, but it is very important that each State gets to determine how to keep their citizens safe, and Mayors Against Illegal Guns is working very hard with you and others to hopefully defeat that legislation when it comes to the Senate.

Senator SCHUMER. Now, for Ms. Anderson, you mentioned in your testimony that you have not been able to obtain funding to improve your record reporting under the grants we created in 2007 because your law providing for restoration of gun rights did not meet ATF's criteria. Did you ultimately get the help you needed from ATF so you could draft an appropriate restoration of gun rights programs?

Ms. ANDERSON. It was not very clear to us in the beginning as we worked with our stakeholder agencies that we could lean on them for assistance for the legislation and to ensure the language that was necessary. They were helpful when we approached them and asked questions because it was not clear to us. However, this last round it did not pass, and so we have areas that are too permissive and areas that are less permissive that we need to work on.

Senator SCHUMER. And given the lack of grant money, what did enable your State Department of Social and Health Services to finally transfer 30,000 mental adjudication records to the database? What were your most effective strategies, both logistical and political?

Ms. ANDERSON. They were very helpful and very willing to work with us on those areas. It was tough because they are not a criminal justice agency. They understood our need to provide the information. However, they come from a different perspective than we do, and they do not have a connection to NICS. And so we worked with them, lots and lots of stakeholder work. It took over a year. But they were willing to provide information.

One of the bigger problems is that the information that we provided is not necessarily a set standard. They provided what they had. And so not all of that information that they had necessarily would stop somebody from having a gun. So it was initially dumped into the denied persons file.

Senator SCHUMER. We may have to look at a little more flexibility here because what the States have on file is not necessarily—we drafted our legislation one way, and the States have things on file in different ways, and I think that is something we will look at, and you bring that up.

Okay. I want to thank all of you for being here. I want to thank—yes, we are going to—do not worry. This is the last thing I am going to say except, “The hearing is adjourned.”

[Laughter.]

Senator SCHUMER. I want to thank Ms. Maisch for her powerful testimony, and I thank Professor Kopel for coming as well. With that, our last questioner will be Senator Grassley.

Senator GRASSLEY. I think mine will only take 5 minutes or less. Professor, I am going to start with you along the same scenario I was spelling out with you in my last two or three questions. In each of these scenarios, law-abiding citizens who were subject to life-changing circumstances not of their own fault could lose their Second Amendment rights. Under this bill what recourse would they have to reestablish their Second Amendment rights?

Professor KOPEL. Well, in some senses, none. If you take the example of the person who was incorrectly arrested for a drug offense, the law says that there is a ban for 5 years on the person simply because of the fact of the arrest. You cannot go into court and prove that you were never arrested. It was a fact that you were arrested, even if you can also show that you were later found to be innocent.

One of the real loopholes, I guess, in how the Federal gun laws currently exist is that when the Gun Control Act of 1968 was passed into law, Congress did prohibit many categories of people from having firearms, and it also put in a safety valve, which is called the restoration of rights. So, for example, someone who was convicted of cheating on his taxes in 1964, then in 1968 he became retroactively barred from owning a gun for the rest of his life, under the restoration-of-rights procedure he could do a discretionary petition to have his rights restored say in 2000 that he has gone straight since then, has lived an exemplary life, he just wants to have a gun for hunting, he is not a threat to anyone. And the Bureau of Alcohol, Tobacco, and Firearms could in its discretion restore his gun rights.

But since the 1990s, Congress has put in appropriations riders which have forbidden any restoration of rights. So these people who may well have been, say, properly barred at one time in their life

from having a gun have no way of ever getting their rights back, and that would apply to a lot of these people as well.

The NICS Improvement Act, which Senator Schumer talked about, did provide funding for States to restorations of rights only on the mental health issues, but that thing would have to be entirely rewritten because now we are not talking under the existing law. You are talking about a determination that someone is a threat to himself or others. But now the ban happens simply because the person was ordered into counseling. Well, you can say, gee, this person at one time was a threat to himself or others, but now it is 10 years later and he is mentally healthy. That is a changed circumstance. But the circumstance that a person was ordered into counseling is like the circumstance of an arrest. It is an unchangeable fact that it happened. So I am not sure what could ever happen for those people to have their rights restored.

Senator SCHUMER. With Senator Grassley's permission, I would just like to make a clarification. It will not come from your time.

Senator GRASSLEY. Yes, go ahead.

Senator SCHUMER. Under the provisions of the law, they have to be—and we worked this out with Senator Coburn. They have to be adjudicated mentally ill. Only after that can they be ordered for counseling. It is not just willy-nilly. It is an adjudication, like everything else. And if we want to try and change it so that the person's status is changed, there are laws on the State books that say you can go back and say, "I am no longer mentally ill." Now, maybe you think those are too tough and we could look at those, but isn't it true that the only way that you can be put on this database is an adjudication that you are mentally ill, you are not just ordered to counseling? That is secondary after the first step. Isn't that correct?

Professor KOPEL. Senator, you are correctly describing the law as it exists now, presuming that having—if you describe an adjudication as being something broad enough to include what a veteran—somebody the Veterans Department says. But your bill would change that. Your bill would change it so that the order into counseling is itself the trigger for the gun prohibition.

Senator SCHUMER. Yes, but there has to be—they cannot just willy-nilly order someone into counseling.

Professor KOPEL. Well, under your bill it—your bill under Section 124 orders colleges to set up a system to order people into counseling, and then what gets reported to NICS is the fact that they were ordered into counseling, not what any result of the counseling was. So your bill would—you have correctly described the existing law, but your bill would change that so that the counseling order becomes the trigger.

Senator SCHUMER. They still have to be adjudicated mentally ill.

Professor KOPEL. No, not under Section 124 of your bill.

Section 124 of your bill says that the—you put an order—

Senator SCHUMER. I will read it.

Professor KOPEL. Sure. It is on page 8. The order into counseling is itself what is supposed to be reported to NICS.

Senator SCHUMER. Let me just read it, okay? Yes, it is not just by a court, you are right, but there has to be—"The term 'adjudicated as mentally defective' includes an order by a court"—it is

an order—"board, commission, or other lawful authority that a person in response to marks of normal intelligence, mental illness, or incompetency be compelled to receive services." Now, as best I know, no State lightly does that. In fact, we have been through it in New York. I have had constituents who want very much their adult children to be ordered into some kind of counseling and other kinds of treatment of mental illness, and it is extremely difficult to get done. They are frustrated. They can do it for their minor children, but they cannot do it for their adult children. I have been through this.

Now, I do not know how easy it is in other States, and we will certainly look at that. But this is not just a whimsical decision. That is all I am saying.

Professor KOPEL. Senator, it is on pages 8 through 10 of the bill where you require that all federally funded universities have to set up this team which will order people to go to involuntary counseling. That is what the bill says.

Senator SCHUMER. That is a different part of the bill.

Professor KOPEL. Yes, and once they are ordered to go into involuntary counseling—and, of course, it is not really involuntary in the sense that you cannot drag them in. They could just drop out of school instead. But what your bill says, when the school orders somebody into involuntary counseling, that itself is what is supposed to be reported to NICS.

Senator SCHUMER. I understand that, but my point is that you cannot be ordered into involuntary counseling very easily. There is a whole procedure that has to be done certainly under New York State law and I believe under most State law.

Professor KOPEL. Well, not under your bill. Your bill says you—

Senator SCHUMER. My bill refers to the State's decision.

Professor KOPEL. No. Your bill refers to the university's decision. That is what Section 124 of the bill does.

Senator SCHUMER. Which is sanctioned by State law.

Mr. KOPEL. Senator, that is just not in the bill. Your bill makes the—

Senator SCHUMER. The part you are referring to relates to mental health programs. The part about ordering it into NICS is the part I read back here on page 7. Anyway—

Mr. KOPEL. Senator, very quickly. Page—

Senator SCHUMER. Go ahead. We will let you get the last—

Mr. KOPEL. Page 9, go down to line 17, subsection 5, "Every federally funded university, a procedure for making involuntary referrals for such students to State or local mental health authorities for mental evaluation, which shall include reporting such referrals to a State agency responsible for identifying persons described in Section 922(g)(4) of Title 18 U.S. Code," which is the section that imposes the gun prohibition for mental conditions.

Senator SCHUMER. But you still need the State agency to approve it.

Mr. KOPEL. No, it—there is nothing—well, not in the bill as drafted. Perhaps you might want to revise it.

Senator SCHUMER. Section 5 deals with—well, okay. We will get—I do not want to—we will go back to Senator Grassley, and we will have a series of questions.

Senator GRASSLEY. He answered all of my questions, and one question I answered—or that I asked, so I will end by just suggesting to us—and I will put this in the record. I want a statement that Burr and Webb put in about their bill to helping veterans get back their Second Amendment protection rights in the—I would like to have that put in the record, and then maybe that will focus people's attention on something we can do right now to correct a sweeping judgment that was made 2 years ago that probably none of us thought about.

[The information appears as a submission for the record.]

Senator GRASSLEY. Thank you all very much.

Senator SCHUMER. I am just going to give you one minute here because I want to clarify this. The part you are referring to says when a university makes such a determination, they have to refer it to the State. It does not relate to whether they are on the NICS database. That is what I am saying. If then the State by its own actions after the referral says that there can be involuntary—you know, orders involuntary counseling or whatever, then it would be referred. That is the point. This is just—page 9 is simply the university refers it to the State so the State is aware.

Mr. KOPEL. I understand your purpose, Senator, but you might want to have the language revised if that is what you want to accomplish, because—

Senator SCHUMER. I am happy to look at it.

Mr. KOPEL. Thank you.

Senator SCHUMER. All right. As I said—I did not quite keep my promise that the only thing else I would say would be, “Hearing adjourned,” but, again, I want to thank so many who came here. We understand your anguish. And, actually, we got good answers to the questions from everybody, and the fact that both Senator Grassley and Senator Sessions, and particularly in Senator Sessions' comments, shows we might be able to reach some common ground here in terms of at least moving parts of our legislation. So I want to thank you for being here and thank all the witnesses for their excellent testimony, and now I will say the hearing is adjourned.

[Applause.]

[Whereupon, at 4:10 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Crime and Terrorism

On

“The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement”

Tuesday, November 15, 2011
Dirksen Senate Office Building, Room 226
2:30 p.m.

David Cuthbertson
Assistant Director
Criminal Justice Information Services Division
Federal Bureau of Investigation
Washington, DC

John Feinblatt
Chief Advisor to Mayor Michael R. Bloomberg for Policy and Strategic Planning
New York, NY

Heather Anderson
Section Manager
Washington State Patrol
Olympia, WA

Patricia Maisch
Tucson, AZ

Professor David Kopel
Adjunct Professor of Advanced Constitutional Law
Denver University, Sturm College of Law
Denver, CO

PREPARED STATEMENT OF HEATHER A. ANDERSON

Washington State Patrol Testimony for the Senate Judiciary Subcommittee on Crime and Terrorism

November 15, 2011

Washington's Historical Progress With the National Instant Criminal Background Check System (NICS) Submissions

In 1998, a written agreement was signed between the Federal Bureau of Investigation (FBI) Director and the Washington Governor to become a Brady State and conduct background checks on handgun purchases. Concealed pistol licenses were grandfathered if issued prior to November 30, 1998.

In 2001, the FBI conducted the first NICS audit in Washington with the Department of Licensing Firearms Unit. At the time, WSP's only involvement was providing the technical capability to allow NICS checks through the State switch, because the gun transfers and concealed pistol licenses (CPLs) were conducted at the local level. The Washington State Patrol (WSP) then took over the management, training, and audits for NICS after this first audit. It was a confusing time for our law enforcement community in trying to understand what was expected of them. WSP continues, today, to work with the FBI, providing decentralized training and support for our law enforcement agencies that conduct these checks.

In 2003, WSP and NICS conducted meetings with the Washington State Department of Social and Health Services (DSHS) to encourage entry of mental health records into the NICS Index. In 2004, DSHS agreed to provide a data transfer of mental health records into the NICS Index, Denied Persons file. The initial transfer was 30,000-plus records. That transfer was then followed up with more current data transfers, provided monthly via CD through the mail. Records were not transferred to the Mental Defectives file within NICS because we knew that each record would need to be researched in the future should it become the subject of a denial. Through this process we learned the following:

- Not all data provided to NICS was cause for a denial. There were false positives and still individuals who were never entered but should have been. Records were not consistently sent in by local mental health facilities.
- DSHS lacked some records for commitments that had their own personal insurance.
- Timeliness of the NICS submissions was compromised by the sources of data and the lack of real-time transmission.
- In 2009, WSP staff began entry and clearing of false positives and false negatives. These requests originate from public requests to DSHS who challenge the denial decision. DSHS has to research each one, and if determined to be an inaccurate entry, they now advise WSP for removal.
- WSP also receives record information from local law enforcement entities that are entered as needed.

In July of 2009 a change in state legislation required the courts to directly enter records into the NICS Index. The Administrative Office of the Courts (AOC) began providing day-forward mental commitment records to NICS in an electronic format. These records are provided to both state databases and NICS in nightly batched transmissions.

Washington's Successes

NICS is now receiving a high percentage of mental health records into the Index from the right sources (DSHS and AOC). The records are made available through an electronic process that is much timelier.

Ongoing training by NICS staff over the years has educated our decentralized state, but the need for ongoing training remains a priority due to turnover in personnel at the local law enforcement agencies. The commitment of NICS to partner with WSP is providing the best possible service despite the obstacles and continued issues we face.

WSP has reached out to various state and local entities to work as a united force to ensure compliance with state and federal laws and to work together to improve challenges. Washington is hosting NICS and five other states on December 7, 2011, for an NIAA discussion.

Lastly, there is continued improvement during Washington's NICS triennial audits.

Washington's Continued Efforts

Misdemeanor crimes of domestic violence are not all entered into our state criminal history repository. The courts have reported many of these charges are not followed up with fingerprints, so the information is not available from the repository.

WSP is not connected to the AOC database to pull data. AOC information is name-based and WSP data results from fingerprint cards.

State misdemeanor and felony warrants are not all forwarded to the National Crime Information Center (NCIC). There is much stakeholder work to accomplish this move of, on average, 165,000 misdemeanor warrants and 19,000 felony warrants. We are currently working on the felony state warrants.

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has determined that Washington State does not meet the requirements of the NIAA for firearm restoration of rights and a relief program. ATF considers Washington's relief law too permissive in some areas and too restrictive in others. This does not allow Washington to participate in NIAA requests for grant funding. The legislature has not updated state law to match federal requirements. There is continued effort by multiple agencies to accomplish this in the future.

Existing records provided by DSHS are not well documented within their databases to separate those that qualify for the NICS Index. Some records are not available and DSHS has to review billing records to obtain names and facilities.

Due to current state law, local law enforcement agencies are still required to complete separate requests for mental health information to DSHS. DSHS staffing and resources are extremely limited. DSHS is unable to keep up with the volume of requests because of a five day processing limitation for conducting the background checks. Requests are averaging more than 1,000 per week and Washington is a "shall issue" state.

The NICS Alternative State permit status was granted to Washington by the ATF in August 2011 and allows a handgun transfer by a federal firearms licensee without a NICS check so long as the purchaser has a valid CPL. State law, however, still requires the dealer to check with NICS and various state agencies, regardless of whether the transferee has a valid CPL.

Final Thoughts

Continued federal funding of the NIAA for years to come will enable states to improve technology for more accurate and faster reporting to the NICS Index. The funding will allow states to bridge legacy data systems and ensure information can be made available. The power of more information can be measured in lessened risk and the prevention of such devastating events as the Virginia Tech shootings.

PREPARED STATEMENT OF HON. MICHAEL R. BLOOMBERG

MAYOR MICHAEL R. BLOOMBERG
TESTIMONY ON FIX GUN CHECKS ACT
US CAPITOL BUILDING
SENATE SUBCOMMITTEE ON CRIME & TERRORISM
11/15/11 2:30 P.M.

Good morning, Chairman Schumer, and members of the Subcommittee. Thank you for the opportunity to testify today.

Ten months ago, the nation turned its attention to Tucson, Arizona and watched in horror as 6 people were gunned down and 13 others were seriously injured, including Congresswoman Gabrielle Giffords. Since that day, more than 10,500 Americans have been shot to death in senseless crimes – 34 Americans every day. That means on a daily basis we experience a tragedy larger than the one we had at Virginia Tech.

Even more tragic is that we could have prevented many of these deaths.

Over the past five and half years, I've worked with Mayor Tom Menino of Boston to help build a bi-partisan coalition of more than 600 mayors dedicated to fighting gun crime by strengthening enforcement of existing laws and closing loopholes that are a criminal's best friend.

Our mayors represent every region of the country, and all different political stripes – but we agree on one thing: this issue isn't an ideological battle. It's possible to respect the Second Amendment right of law-abiding citizens while strengthening and enforcing the laws that keep guns out of the hands of dangerous people.

The tragic fact is that often background checks just don't happen or they don't work, because the information that should be in the background check system isn't.

In the case of the Virginia Tech, where 32 people were murdered in 2007, the shooter passed a background check even though he shouldn't have. His history of mental illness should have disqualified him from legally buying a gun – but those records were never reported to the FBI.

After the Virginia Tech massacre, both Houses of Congress unanimously passed a law designed to ensure that federal agencies and states submit the necessary mental health, domestic violence, and drug abuse records to the background check system. As a result, the number of health records in the background check database has risen from 300,000 before Virginia Tech to some 1.3 million today.

Still, according to new analysis released today by Mayors Against Illegal Guns, 23 states have contributed fewer than 100 mental health records. Seventeen of those states have submitted fewer than ten records, and four haven't shared any at all.

Federal agencies are not doing any better. 52 out of 61 federal agencies have reported zero mental health records. 58 federal agencies have reported zero records of drug abusers, including the Drug Enforcement Administration, the Department of Defense and the U.S. Immigration and Customs Enforcement.

To understand why some states are succeeding and others are failing to act, our coalition conducted extensive interviews with more than 60 officials in 49 different states.

We found that states face a complex set of challenges. But we also learned that a few common themes united the states that are successfully sharing records.

First, it's clear that leadership matters. 9 out of the 10 states with the highest submission rates have taken active steps to overcome legal and logistical barriers by passing record-reporting laws.

Second, funding matters. States with access to federal grant funds are reporting on average nearly twice as many records as states that don't. And yet, Congress has appropriated less than 5 percent of the funds it's authorized for this vital grant program.

Third, it's clear that Congress needs to impose penalties with real teeth for states that are failing to submit records. Today, states stand to lose a combined \$12.7 million in federal funding if they don't meet their reporting requirements. We need to put more at stake if this is going to be the national priority it must be.

Finally, we learned that many states don't know what mental health and drug abuse records should be sent to NICS. The Justice Department should issue clear guidance and make it easily accessible to state officials.

In addition, the President should issue an executive order requiring all federal agency heads to certify to the Attorney General, in writing, that their agency has submitted all the necessary records to the national background check system.

This is about enforcing the law – plain and simple. Both Congress and the President have a responsibility to do that. Each can – and must – take action, if our laws are to be upheld, and the public protected.

These four steps are all necessary and urgent. But unfortunately, they're not enough. Because if you buy a gun from a so-called "occasional seller" at a gun show or online, for example, federal law does not require a background check, no matter if you buy one gun or twenty. This loophole feeds the voracious market for illegal guns. An estimated 40 percent of all U.S. gun sales are not subject to a federal background check.

Passing the Fix Gun Checks Act Senator Schumer introduced earlier this year would increase the incentives for states to ensure that all of the records on prohibited gun purchasers that should be in the NICS system are, in fact, in the system. It would also close the private sale loophole once and for all. A bi-partisan poll commissioned this year by our mayors' coalition showed that 86 percent of the public, and 81 percent of gun owners, want every gun purchase to go through a background check.

Last spring our coalition launched the National Drive to Fix Gun Checks. More than 385,000 Americans have signed our petition in support of that effort. I would like to present these names to the members of the Committee and request they be entered into the record.

A few of those who signed are with me today. All of them have lost loved ones to gun violence, and I hope that this Committee listens to their stories and acts swiftly to pass the Fix Gun Checks Act to prevent future tragedies. Thank you.

PREPARED STATEMENT OF DAVID CUTHBERTSON



Department of Justice

STATEMENT

OF

DAVID CUTHBERTSON
ASSISTANT DIRECTOR
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BEFORE THE

SUBCOMMITTEE ON CRIME AND TERRORISM
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

“THE FIX GUN CHECKS ACT: BETTER STATE AND FEDERAL
COMPLIANCE, SMARTER ENFORCEMENT”

PRESENTED

NOVEMBER 15, 2011

**Statement for the Record of
David Cuthbertson
Assistant Director
Criminal Justice Information Services Division
Federal Bureau of Investigation**

**Before the
Subcommittee on Crime and Terrorism
Committee on the Judiciary
United States Senate**

**“The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement”
November 15, 2011**

Good afternoon, Chairman Schumer, Ranking Member Kyl, and Members of the Committee. It is my privilege and pleasure to address you today regarding the role that record availability and completeness play in the operation of the National Instant Criminal Background Check System (NICS), and the continuing efforts of the FBI to increase the quality and quantity of information available to the NICS. I would like to also take this opportunity to share with you the number of accomplishments we have achieved with the resources we have available. We have meaningful efforts underway to ensure that the current system works as efficiently as possible to keep people as safe as possible.

The Firearms Background Check Process

The Brady Handgun Violence Prevention Act of 1993 (Brady Act) required the Attorney General to establish the National Instant Criminal Background Check System (NICS), which began operating on November 30, 1998. Through NICS background checks, Federal Firearms Licensees (FFLs) receive information regarding whether a prospective firearm transfer may proceed, or if it must be denied because the transfer would violate state or federal law. NICS checks are conducted over the telephone or via the internet, and a response is typically available within minutes.

When a NICS check is conducted, an individual’s name and descriptive information is searched against information maintained in three national databases managed by the FBI’s Criminal Justice Information Services (CJIS) Division: the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Index. In addition, in any transaction where the potential transferee claims non-U.S. citizenship, the NICS works with its partners at the Department of Homeland Security’s U.S. Immigration and Customs Enforcement to determine whether the transfer can proceed.

The III is the chief repository within the CJIS Division for the maintenance of criminal history records, currently housing over 60 million criminal histories. The III relies on submissions from state, local, tribal, and federal agencies across the United States.

The NCIC maintains a database of 19 different files, many of which contain information that may be relevant to the background check process. For example, the NCIC includes approximately 5 million records related to wanted persons and those against whom protection orders have been filed.

The NICS Index, on the other hand, is a database created specifically for the NICS. It contains records relating to the ten specific federal prohibitions on firearms receipt and

possession contained in the Gun Control Act that are not or cannot be housed in III or NCIC. Those categories include, e.g., persons who have been dishonorably discharged, persons who have renounced their U.S. citizenship, persons who are unlawful users of or addicted to controlled substances, and persons who have been committed to a mental institution. The NICS Index currently maintains over 7 million records, and starting next year it will be expanded to include records of persons who are prohibited from acquiring or possessing firearms by state law. In some cases state prohibitions mirror or overlap with federal prohibitions. In other cases, however, state law may be more restrictive, and may rely on records held at the state level that are not eligible to be included in III or NCIC. Having ready access to those records in the NICS Index will increase the likelihood that a NICS background check will identify those persons prohibited by state law from possessing or receiving firearms. Records contained in the NICS Index are voluntarily contributed by local, state, and federal agencies, and every record is prevalidated as demonstrating a prohibition before it is entered into the database. As a result, when a NICS background check matches with a record in the NICS Index it allows the transaction to be immediately denied.

Since it began operating in 1998 the FBI, along with the point-of-contact (POC) state partners that conduct firearms background checks, have processed more than 137 million background checks. In the vast majority of cases these checks have facilitated the timely and efficient transfer of firearms to law-abiding individuals. On more than 882,000 occasions, however, the background checks processed by the FBI have prevented a prohibited person from acquiring a gun. Some state POC partners do not report final transaction statuses to the NICS; therefore, it is undeterminable how many NICS background checks processed by state partners have resulted in denying prohibited persons the ability to obtain firearms.

As should be obvious, the NICS is critically dependent upon having access to reliable and complete records. When records are missing or incomplete the NICS has, by law, just three business days to fill in the gaps before the FFL is allowed – but not required – to transfer the firearm. In some cases, the FBI fails to uncover an existing, applicable prohibitor during that time frame, or never uncovers it at all, because the records needed to establish the prohibitor are beyond its reach. When that happens, firearms can and do end up in the hands of persons who are not allowed to possess them. Our goal at the Department is to use every tool available to us to minimize that risk.

The NICS Improvement Amendments Act of 2007 (NIAA)

The fact that NICS in some cases lacks ready access to relevant prohibiting records was brought home following the tragic shootings on April 16, 2007, at Virginia Tech University in Blacksburg, Virginia. The Virginia Tech shooter was able to acquire firearms from an FFL despite a disqualifying mental adjudication because the records of his adjudication were never transmitted to the NICS Index. In response, Congress passed the NICS Improvement Amendments Act (NIAA). The NIAA, signed by the President on January 8, 2008, reinforced and enhanced the Attorney General's ability to acquire for the NICS information from federal agencies and departments demonstrating that a person falls within one of the ten categories of federal firearms prohibitions contained in the Gun Control Act. The NIAA also focused on non-federal records by authorizing incentives for states, tribes, and associated court systems to provide additional records to the NICS, and to ensure that state supported records in both NCIC and III are complete, accurate, and up to date. The NIAA required that the Attorney General provide annual reports to Congress concerning implementation of the NIAA.

Implementation of the NIAA

Shortly after the NIAA was enacted both the FBI and the Department of Justice began to invest the time and resources necessary to achieve its goals. Those initial efforts included:

- Sending correspondence to the Governors, Attorneys General, Chief Justices, and State Court Administrators in the states and territories to announce passage of the Act and summarize the provisions affecting these entities. The same correspondence was also sent to: the National Council of State Legislatures; the Council of State Governments; the American Legislative Exchange Council; the legislative leadership of each state; the National Center for State Courts; the National Association of State Mental Health Program Directors; the Justice Research and Statistics Association; the membership of SEARCH, the national consortium for justice information and statistics; NICS points of contact; and the membership of NIets, the International Justice and Public Safety Network.
- Sending correspondence to the states and federal departments and agencies regarding the minimum criteria required to establish a qualifying relief from disability program under the Act, as is required of federal agencies that make qualifying mental health adjudications or commitments, and is a prerequisite to grant eligibility for states.
- Sending correspondence from the Deputy Attorney General to the Administrative Office of the United States Courts, Social Security Administration, and the Departments of Defense, Homeland Security, and Interior requesting that each organization identify a point-of-contact to work with the NICS Section to ensure that information on individuals prohibited from purchasing or possessing a firearm is available to the NICS.
- Sending correspondence from the FBI Director (or other FBI official) to all other federal agencies requesting that each organization identify a point-of-contact to work with the NICS Section to ensure that information on individuals prohibited from purchasing a firearm is available to the NICS.
- Conducting outreach to, and dialogue with, state and local law enforcement as well as the mental health community regarding regulations and protocols for protecting the privacy of information provided to the NICS Index concerning a person prohibited from shipping, transporting, receiving or possessing a firearm pursuant to 18 U.S.C. 922(g)(4).
- Publishing “questions and answers” regarding the NICS Improvement Amendments Act of 2007 on the Bureau of Justice Statistics website (<http://www.ojp.usdoj.gov/bjs/niaa.htm>).
- Coordinating and conducting meetings with affected federal agencies and departments.
- Making numerous presentations at association meetings and conferences involving affected parties including, among others, the FBI’s NICS User Conference, the SEARCH Membership meeting, National Crime Prevention and Privacy Compact Council meetings, American Psychological Association meeting and FBI Criminal Justice Information Services Advisory Policy Board meetings.

We have increased efforts recently, and the FBI and the Department have achieved the following:

- Held three regional NIAA meetings in fiscal year 2011 at which more than 10 states participated in meetings designed to provide them with a better understanding of NIAA grant requirements and other resources designed to maximize their record availability.
- Attended individual state meetings (Oregon and Oklahoma) to provide information intended to assist and enhance the development of their plans regarding the NIAA.
- Surveyed more than 90 federal departments and agencies regarding potentially relevant information in their possession. The results of those survey responses are now being used to further identify the universe of information held by federal agencies and enable the FBI to assist them in complying with the information sharing mandate of the NIAA.
- Awarded grants to 3 states in 2009, 8 states in 2010, and 14 states in 2011 to support NIAA activities, totaling nearly \$40 million.

Results

While significant implementation challenges remain, our reinvigorated efforts have achieved some notable successes in a variety of areas since enactment of the NIAA. To start, the sheer number of records available in the NICS Index is much larger than just a few years ago. Prior to the passage of the NIAA, approximately 5.1 million records (state and federal combined) were maintained in the NICS Index. Of these, approximately 500,000 were specific to the mental health category. As of October 31, 2011, the number of records maintained in the NICS Index had increased by 41 percent to over 7.2 million, and the number of mental health records had increased by 153 percent to over 1.3 million. But these macro numbers do not tell the whole story.

Criminal history dispositions

Largely as a result of aggressive outreach, over 766,000 criminal dispositions have been obtained by the FBI for use in updating to national criminal history records. In addition, over 142,000 dispositions were forwarded to state repositories to update corresponding state records. Having ready access to these dispositions will not only make the background check process more effective and efficient, it will also ensure that other users of III and the state databases have access to more complete and accurate records.

Enhanced electronic submissions

Through the combined efforts of the FBI and NIAA-partnering agencies, certain federal agencies have begun submitting records electronically to the NICS. Electronic submissions are more efficient and accurate than submissions on paper or disk, as was the prior practice. For example, the FBI is currently working with the Department of State to accomplish the submission of their information on an electronic basis. In addition, within the Department of Justice the Office of the Deputy Attorney General is spearheading an effort to develop a streamlined, department-wide approach to ensuring that all federal indictment, conviction, and arrest warrant information is promptly transmitted to NICS. By January 2012, all U.S. Attorney's Offices and the litigating components of Main Justice will be required to complete

and submit electronically to NICS a one-page summary of relevant information pertaining to all federal charges and convictions. A similar procedure is being developed for federal law enforcement to submit information regarding federal arrest warrants.

The FBI has also made the states aware of alternative means of accomplishing electronic submissions, including electronic mail, compact disk, and/or through the use of a NICS-only Originating Agency Identifier (ORI). These interim options are available to the states (and federal agencies) as they continue to work toward an optimal electronic submission process.

Additional developments in enhancing the submission of electronic records include:

- In March 2011, the Federal Court Services and Offenders Supervision Agency began electronically submitting federal drug-related prohibiting information to the NICS Index.
- In February 2011, the U.S. Coast Guard identified an additional category of federal prohibition held by their agency and, since the passage of the NIAA, has begun electronic submission of these records to the NICS Index.
- On January 20, 2011, the Drug Enforcement Administration (DEA) became the first federal agency to submit real-time online dispositions via the III. In addition, the DEA has submitted approximately 500,000 legacy dispositions to the FBI for update to III records.
- In July 2011, the Department of Agriculture began electronically submitting information pertaining to the federal prohibiting category of 'persons under indictments for a crime punishable by imprisonment for a term exceeding one year' to the NICS Index.
- In 2010, the FBI created and implemented a process to provide certain noncriminal justice agencies, such as mental health agencies, not eligible for NCIC Originating Agency Identifier (ORI) assignment with a NICS-only ORI. A NICS-only ORI provides such agencies with the ability to submit federal prohibiting information electronically to the NICS Index. The FBI provided this as an alternate means for agencies to electronically submit records to the NICS Index other than through the NCIC front-end.

Controlled substances

In July 2010, in response to the NIAA, the U.S. Army enacted a policy change that provides for the submission of fingerprints to the III on persons subject to the federal firearms prohibitor for illegal use of controlled substances.

Domestic violence

On December 14, 2009, the FBI implemented a process to post victim relationship information to III records. The relationship information is essential for the effective processing of records regarding the prohibiting misdemeanor crime of domestic violence.

State prohibitors

Effective April 2012, the NICS Index will be expanded to collect and maintain records of persons who are prohibited from the possession of firearms based on state law. The expanded NICS Index capability will enhance the level of firearm-prohibiting information made available

to NICS users during the NICS background check process. Participation by the states will be voluntary, as is state submission of information to any of the databases accessed by NICS.

Mental health records

In the wake of the tragic shootings at Virginia Tech, the Attorney General issued correspondence to federal agencies requesting they identify and contribute any information that would immediately identify individuals prohibited by federal law, particularly those persons with a prohibiting mental health history, from possessing or receiving firearms or explosives. The Attorney General also referred agency inquiries or concerns pertaining to relevant firearm-prohibiting information to the FBI. Corresponding guidance was provided to numerous federal agencies about the NICS program, determining if agency-held information is relevant to NICS' purposes, and accurately interpreting federal firearm-prohibiting criteria. Both the FBI and the ATF wrote letters to the state Attorneys General on these issues as well.

Since 2002, each successive year of operations has reported an increase in the number of prohibiting mental health submissions to the NICS Index, with the most notable increase, approximately 74 percent, occurring after the Virginia Tech tragedy in 2007. As of October 30, 2011, the number of records maintained in the NICS Index Mental Defective File totaled 1.3 million. A significant percentage of these records, however, are from a small number of states.

Continuing Challenges

The Department continues to educate our federal, state, and tribal partners about the NICS and the records relevant to the federal laws prohibiting the receipt or possession of a firearm. During the course of this outreach, several continuing challenges and obstacles have been reported. Among these challenges are limitations including the manpower to accomplish the added duties and responsibilities associated with the management and maintenance of information submitted to the NICS. Other issues identified include outdated information technology and the inability to submit records electronically. In certain instances, the requirement to implement a relief from mental health disabilities program that is a prerequisite to grant funding also presents obstacles, thereby hindering progress.

At the state level, a variety of legal and policy barriers appear to hinder the submission of robust mental health information to the NICS. For example, some states report that state privacy laws bar them from providing information to the NICS that would demonstrate a mental health prohibitor for one of its citizens. The FBI has compiled and disseminated a catalogue of state legislation that has been enacted by certain states to allow for the sharing of mental health information with the NICS. Whether such legislation is pursued, however, is up to the state.

Moreover, submission by the states to any of the databases accessed by NICS is voluntary. While the availability of grant funds under the umbrella of the NIAA is helping some states develop capabilities that will permit them to effectively and efficiently submit much-needed information to the NICS, the requirement that states create and operate a qualified relief from disabilities program in order to compete for a grant may act as a disincentive for some states from seeking those funds. Finally, the manpower to assume the duties and responsibilities associated with the management and maintenance of information and to assist with the auditing of such records has also been identified as a significant issue faced by states.

Conclusion

During the last three years, a great deal of progress has been made toward fully implementing the NIAA. Much work through intense outreach, training, and information sharing has enhanced state and federal awareness of the importance of making relevant information available to the NICS. The overall number of records submitted to the NICS Index since the passage of the NIAA has improved; however, the improvements are not spread equally across the board. Although deficits in funding may continue to be an issue across many state, local, tribal, and federal agencies, it is anticipated that through our Department's continued outreach and with the support from the federal government and the NIAA partnering agencies will help the local, state, tribal, and federal agencies move closer to the NIAA's goal of closing the gaps in the information available to the NICS.

I appreciate the opportunity to review some of the Department's recent work to improve the completeness and accuracy of the information made available to the NICS by local, state, tribal, and federal agencies. Through these efforts, we continue to ensure that persons prohibited from possessing firearms pursuant to state or federal law do not acquire them from an FFL, and that law abiding citizens are able to acquire them without undue delay. I would be happy to answer any questions that you may have.

PREPARED STATEMENT OF JOHN FEINBLATT

JOHN FEINBLATT
CHIEF ADVISOR FOR POLICY AND STRATEGIC PLANNING
CITY OF NEW YORK
TESTIMONY ON FIX GUN CHECKS ACT
SENATE SUBCOMMITTEE ON CRIME & TERRORISM
11/15/11 2:30 P.M.

Good morning, Chairman Schumer, and members of the Subcommittee. Thank you for the opportunity to testify today. I'm John Feinblatt, and I serve as Chief Advisor for Policy and Strategic Planning for New York City Mayor Michael Bloomberg.

Ten months ago, the nation turned its attention to Tucson, Arizona and watched in horror as 6 people were gunned down and 13 others were seriously injured, including Congresswoman Gabrielle Giffords. Since that day, more than 10,500 Americans have been shot to death in senseless crimes – 34 Americans every day. That means on a daily basis we experience a tragedy larger than the one we had at Virginia Tech.

Even more tragic is that we could have prevented many of these deaths.

Over the past five and half years, Mayor Bloomberg and Mayor Tom Menino of Boston have worked to help build a bi-partisan coalition of more than 600 mayors dedicated to fighting gun crime by strengthening enforcement of existing laws and closing loopholes that are a criminal's best friend.

Our mayors represent every region of the country, and all different political stripes – but we agree on one thing: this issue isn't an ideological battle. It's possible to respect the Second Amendment right of law-abiding citizens while strengthening and enforcing the laws that keep guns out of the hands of dangerous people.

The tragic fact is that often background checks just don't happen or they don't work, because the information that should be in the background check system isn't.

In the case of the Virginia Tech, where 32 people were murdered in 2007, the shooter passed a background check even though he shouldn't have. His history of mental illness should have disqualified him from legally buying a gun – but those records were never reported to the FBI.

After the Virginia Tech massacre, both Houses of Congress unanimously passed a law designed to ensure that federal agencies and states submit the necessary mental health, domestic violence, and drug abuse records to the background check system. As a result, the number of health records in the background check database has risen from 300,000 before Virginia Tech to some 1.3 million today.

Still, according to new analysis released today by Mayors Against Illegal Guns, 23 states have contributed fewer than 100 mental health records. Seventeen of those states have submitted fewer than ten records, and four haven't shared any at all.

Federal agencies are not doing any better. 52 out of 61 federal agencies have reported zero mental health records. 58 federal agencies have reported zero records of drug abusers, including the Drug Enforcement Administration, the Department of Defense and the U.S. Immigration and Customs Enforcement.

To understand why some states are succeeding and others are failing to act, our coalition conducted extensive interviews with more than 60 officials in 49 different states.

We found that states face a complex set of challenges. But we also learned that a few common themes united the states that are successfully sharing records.

First, it's clear that leadership matters. 9 out of the 10 states with the highest submission rates have taken active steps to overcome legal and logistical barriers by passing record-reporting laws.

Second, funding matters. States with access to federal grant funds are reporting on average nearly twice as many records as states that don't. And yet, Congress has appropriated less than 5 percent of the funds it's authorized for this vital grant program.

Third, it's clear that Congress needs to impose penalties with real teeth for states that are failing to submit records. Today, states stand to lose a combined \$12.7 million in federal funding if they don't meet their reporting requirements. We need to put more at stake if this is going to be the national priority it must be.

Finally, we learned that many states don't know what mental health and drug abuse records should be sent to NICS. The Justice Department should issue clear guidance and make it easily accessible to state officials.

In addition, the President should issue an executive order requiring all federal agency heads to certify to the Attorney General, in writing, that their agency has submitted all the necessary records to the national background check system.

This is about enforcing the law – plain and simple. Both Congress and the President have a responsibility to do that. Each can – and must – take action, if our laws are to be upheld, and the public protected.

These four steps are all necessary and urgent. But unfortunately, they're not enough. Because if you buy a gun from a so-called "occasional seller" at a gun show or online, for example, federal law does not require a background check, no matter if you buy one gun or twenty. This loophole feeds the voracious market for illegal guns. An estimated 40 percent of all U.S. gun sales are not subject to a federal background check.

Passing the Fix Gun Checks Act Senator Schumer introduced earlier this year would increase the incentives for states to ensure that all of the records on prohibited gun purchasers that should be in the NICS system are, in fact, in the system. It would also close the private sale loophole once and for all. A bi-partisan poll commissioned this year by our mayors' coalition showed that 86 percent of the public, and 81 percent of gun owners, want every gun purchase to go through a background check.

Last spring our coalition launched the National Drive to Fix Gun Checks. Today, the number of Americans who have signed our petition in support of that effort passed 400,000. I would like to present these names to the members of the Committee and request they be entered into the record.

A few of those who signed are with us today. All of them have lost loved ones to gun violence, and I hope that this Committee listens to their stories and acts swiftly to pass the Fix Gun Checks Act to prevent future tragedies. Thank you.

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PREPARED STATEMENT OF PROF. DAVID B. KOPEL

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

Regarding S. 436

112th Congress, Second Session

November 15, 2011

Presented by David B. Kopel

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 rid 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 in the 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.)

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

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

Overbreadth¹ 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

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 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, a 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 determines 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 person’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.

¹⁹ 18 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.

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 or 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

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 aviophobia (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 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;

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

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

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.

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

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.

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/>.

PREPARED STATEMENT OF PATRICIA MAISCH

**United States Senate
Committee on the Judiciary
Testimony before the Subcommittee on Crime and Terrorism
The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement**

November 15th, 2011

Statement of Patricia Maisch

Good morning Chairman Schumer, Senator Hatch and distinguished members of the Crime and Terrorism Subcommittee of the Judiciary Committee. Thank you for inviting me to testify today.

It is an honor, and humbling, to speak about what has become a very personal issue for me – fixing our great country's firearms background check system and keeping illegal guns away from dangerous persons.

January 8 of this year - a beautiful, crystal clear Saturday morning in Tucson - my life and the lives of so many people changed forever. Words cannot describe the horrific acts I witnessed that morning, or the sorrow we all suffered. Luck was with me that day – I survived, physically uninjured.

Six other innocents were not as fortunate that day -- their lives ended violently in a matter of 30 seconds. I want you to know who they were.

Dorothy Morris

Wife of George Morris, he was shot and survived the day;
High school sweethearts married more than half a century;
Mother of two daughters.

Dorwin Stoddard

Died shielding his wife Mavy;
Mavy and Dorwin, friends in high school also, found each other again after both their spouses had passed away.
Mavy tells me that the last 15 years have been a wonderful journey and that she misses Dorwin every waking minute.
Mavy, who was wounded that day, is here today with one of her daughters.

Phyllis Schneck

Widow with three adult children, grandchildren and one great-grandchild;
Tucson snowbird from New Jersey; avid crafter;
Cherished winter member of North Minster Presbyterian Church.

Judge John Roll

Husband, father, grandfather;
Attended mass daily;
Served the great State of Arizona for over thirty years;

Friend of Congresswoman Giffords.

Gabe Zimmerman

Loved Tucson, hiking, and social concerns;
 Fiancé to Kelly O'Brien,
 Son of Emily Nottingham and Ross Zimmerman,
 Brother to Ben,
 Friend to everyone he met, I am told.
 I am so sorry I didn't get an opportunity to be his friend.

Christina-Taylor Green

And, of course, beautiful little Christina-Taylor Green.
 Only 9 years old, born on the day of our National tragedy - 9/11 2001.
 Newly elected to the Mesa Verde Elementary School student council – potential for future
 political service – gone!
 Loved butterflies;
 Budding artist;
 Loved playing baseball with the boys in Little League;
 Doting sister of Dallas;
 Cherished daughter of Roxanna and John.

Thirteen more were physically injured that morning, and untold numbers emotionally hurt.
 Colonel Bill Badger, Ken Dorushka, Randy Gardner and Mavy Stoddard were among those
 physically wounded, and they are here with us today.

Faith and Roger Salzgerber are also here today. They stopped by that morning to talk to Gabby.
 Roger volunteered many hours to help re-elect Gabby. It's incredible that they escaped physical
 injury that day. Faith covered Christina-Taylor to keep her warm and comfort her while waiting
 for medical assistance to arrive.

That morning, January 8, Roger had the courage to chase in behind the shooter, joined by Bill
 Badger, who suffered a bullet graze wound to the head. Together they took the shooter down.
 Their courage and heroism gave me the opportunity to take an ammunition magazine from the
 shooter.

Nurse Nancy Bowman is here today, too. She and her husband, David Bowman, a doctor, were
 buying Brussels sprouts at Safeway that morning. They provided triage service and immediate
 life-saving care to the wounded. I shudder at the thought of what might have happened had they
 been absent that day.

Tucson, unfortunately, is not the only tragedy represented here today. Joining us are more than
 50 other survivors from across our great land, whose lives are forever altered by gun violence.
 Mass murders with guns garner the most headlines, but each gun murder holds its own horrific
 details. Different places, different names, different circumstances: each somewhat different, but
 each all too similar – all tragic, all so unnecessary.

Chairman Schumer, I am definitely here to remember the names of those we lost, as well as to honor each survivor. But my primary mission today is to remind all of you that Tucson is yet another extremely tragic example of what is at stake each and every time a gun falls -- or is placed -- in the wrong hands.

Changing the past is impossible, no matter how desperately we want it to change, but it would be a pitiful shame if no action were taken to change the future.

You can take action to improve our broken gun background check system, and I truly believe, with all my soul, that your actions can save lives.

If I can make this as personal to you as it is to me, I feel that together we can make progress. So forgive me if you find this offensive, but I want you to take a moment to do something. Imagine the headlines you've seen, but now with the name of a loved one instead of the names of Dorothy Morris, Dorwin Stoddard, Phyllis Schneck, John Roll, Gibe Zimmerman or Christina-Taylor Green.

So, that's why I am here today -- to ask that you pass the Fix Gun Checks bill, which will save lives, maybe the life of someone you love.

Your support for this important legislation would help families and communities across our great country be more hopeful that they will be spared the pain, the sorrow, the tragedy that our community, Tucson, has suffered.

Since the day of the shooting, I have been sincerely touched by the outpouring of prayers and good wishes that Americans from across the county have shared with the victims' families as well as with my fellow survivors, our community and myself. These offerings continue to comfort and sustain me during this emotionally difficult time.

Their outpouring of support reminds me of our fundamental unity as a country. We all know that polarized debates that stifle policy-making prevent us from solving real-life problems. And when it comes to guns, the majority of Americans, the majority of Tucsonans, want common-sense laws that protect Second Amendment rights, and that protect us by helping stop the supply of illegal guns to dangerous people.

This law will do that.

Hopefully the debate we have today will be different. I am here -- we are here -- to ask you to recognize the common ground we share, and to take two common sense steps.

First -- make sure that the records of all persons who should not be allowed to buy guns are in the background check system.

Second -- require every gun buyer to pass a background check, no matter where he or she buys the gun, or whom he or she buys it from. Background checks are simple, quick and inexpensive.

The American people support these proposals. According to a recent poll, 90 percent of all Americans and 90 percent of gun owners support fixing gaps in the background system. 86 percent of all Americans and 81 percent of gun owners support universal background checks.

Please, take these two steps by enacting the Fix Gun Checks bill. This bill could help prevent the murders of some of the 34 Americans killed with guns each day.

34 Americans killed every day with guns! Five times the number of people murdered in Tucson! I will not sit idly by while that happens each day, and I know that you won't either.

The shooting in Tucson brought Americans together. Please honor that unity by putting politics aside and working together to fix our broken background check system.

Please take action.

Please help prevent the next mass shooting.

Please pass the Fix Gun Checks Act.

I want to thank you, again, all members of the committee for giving me the opportunity to appear before you today, and I just have one last question to ask you:

How much more pain, how much more sorrow, how many more deaths by guns must we endure before we do something?

PREPARED STATEMENT OF SENATOR DICK DURBIN

Statement of Senator Richard J. Durbin
Subcommittee on Crime and Terrorism
Hearing on “The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement”

I want to thank Subcommittee Chairman Whitehouse and Senator Schumer for holding this important hearing on the need to ensure that the NICS gun background check database has all available records about those prohibited by law from possessing guns.

The tragic shooting at Virginia Tech in 2007 brought the nation’s attention to the failure of many state and federal agencies to populate the NICS database with complete records. The Virginia Tech shooter, Cho Seung-hui, was able to pass a NICS check and buy guns despite the fact that he had been adjudicated by a court to be mentally ill and thus qualified as a prohibited purchaser under federal law. Had this deranged individual been blocked from buying guns, 32 deaths and 25 injuries could have been prevented on that devastating day in Blacksburg, Virginia. Other shooting crimes, such as the fatal shooting of five Illinoisans at Northern Illinois University on February 14, 2008, could also potentially have been prevented had the NICS database contained complete records.

While Congress acted after Virginia Tech to pass the NICS Improvement Amendments Act of 2007, it is clear that there is still much work to do to ensure the full submission of documents to NICS. I have worked with state and local agencies in Illinois to help improve their sharing of criminal, mental health and drug abuse records with the NICS system. But in an era of tight agency budgets, coordination of records between agencies can often be crowded out by other priorities. Today’s hearing serves as an important reminder that lives are at risk when these records are neglected, and we must continue at all levels of government to make the accuracy of the NICS database a priority. Improved submission of prohibited purchaser information is a necessary step to make the gun laws on the books more effective in preventing crimes and saving lives.

I received a letter from an impressive young Chicagoan named Garrett Evans about this issue, and at Garrett’s request I would like to share this letter with the Subcommittee. Garrett is a native of the South Side of Chicago, and was a student at Virginia Tech on the day of the 2007 tragedy. He was shot three times that day. Not only did Garrett survive his wounds, but he has made it a mission in his life to speak to young men and women in the Chicago area to help guide them away from the path of violence. I commend Garrett for the work he has done to improve his community and our nation since his wounding at Virginia Tech. But I wish he had never been shot that day. Complete submission of records to the NICS database could have prevented Garrett’s shooting, and Garrett’s letter drives home the need to pursue that goal. It is a goal I will continue to pursue, for Garrett’s sake and for the sake of the millions of Americans whose lives have been or will be touched by preventable gun violence.

**Letter from Garrett Evans of Chicago, Illinois
Survivor of the April 16, 2007 Shooting at Virginia Tech
To the Senate Subcommittee on Crime and Terrorism**

We live in a society where people want quick fixes as solutions. This holds true to resolutions to conflicts when guns are involved. We are seeing more cases where people are killing over the smallest of things, such as how to run a household and CDs. One should be alarmed by the fact that there are guns on campus because there are people over 21, shootings are happening in all types of locations, and guns are too easy to obtain. You can go to places where the seller feels it is optional to check IDs as well as the buyer's background.

It is really critical that we have background checks for all gun transactions. I am living proof of this, having survived Virginia Tech and carrying a hollow point bullet even today. Looking at three gunshot wounds every morning lets me know not only how much God has blessed me but reminds me of how serious this issue really is. Lives would have been saved had the shooter had a background check, instead of having a gun to shoot. That day at Virginia Tech could have been prevented just with a simple background check. The same holds true for Northern Illinois University, which is not very far from me. In fact, the one online dealer sold guns to both shooters, who had a history of mental illness. We also have these problems in Chicago as well. Many children are dying, some as young as 1 year old. Babies. Many of them have to endure gun violence every day and either have scars from the bullet, are carrying a bullet(s), or have been a witness. It has been a challenge for me to have lived with the truth that I saw and smelled all of the dead bodies as I was being carried out, but just imagine children having to live with it. Also remember that they are losing their friends and family to this. I was able to see in many of their eyes as well as feel their spirits when I spoke to them at a lot of these schools that it is no walk in the park. Background checks would have prevented a lot of these guns from ending up in the wrong hands. I am thinking it is true for Arizona as well.

People of all races, religions, and locations are being shot. 32 killed every day is quite alarming, and it just so happens that that was the same number that the shooter killed at Virginia Tech. With the society we live in now, we need to do as much as we can to preserve as many lives as we can, preventing as much gun violence as we can. I truly believe that background checks are a positive way of going about this. The last thing anyone needs is someone with a history of mental illness, a criminal history, or a drug history being allowed to have access to a weapon. Also, remember that no one is immune to this and at the rate we are going, gun violence is coming to your neighborhood if it hasn't already. When/If it does happen to you or someone you love, do you feel you are prepared as well as ready to live with something like that? I doubt it. Who is? As God is my witness, I would never want that for you.

Garrett Evans

"You have the power to prevent tragedies."

QUESTIONS SUBMITTED TO DAVID CUTHBERTSON BY SENATOR GRASSLEY

1. National Instant Criminal Background Check System (NICS)

In briefings, my staff has been informed that if an individual purchasing a firearm has a felony arrest on their record, there is supposed to be a delay on gun purchases while FBI officials do research on the individual to determine whether or not the individual has been indicted, which would prevent the sale from being lawfully made.

Court records show that an arrest warrant for Jacob Wayne Chambers was issued on May 22, 2009 for felonies committed on November 7, 2008. Chambers bought 54 firearms from October 2, 2009 to November 24, 2009. He was arrested on December 18, 2009.

Questions:

- (a) News reports have suggested that FBI officials in the NICS Section and ATF in Phoenix communicated whenever suspects in Operation Fast and Furious tried to buy a gun, since an arrest would have triggered a delay.¹ Is this accurate? If so, please indicate the number of times such communications occurred and describe the communications in detail.
- (b) Are felony arrest warrants entered into the NICS? Please describe the differences in length of purchasing delay for individuals with felony warrants and those with felony arrests on their records.
- (c) Was there a delay for Chambers each time he tried to purchase a gun in October and November 2009? If so, please describe in detail the length of delay and the actions that FBI took to research the firearm prohibition in each instance.

Sean Christopher Steward purchased 281 firearms between December 7, 2009 and June 23, 2010. According to Arizona court documents, a state injunction against harassment was obtained against Steward on April 8, 2010, prohibiting him from possessing firearms or ammunition. However, Chambers purchased 42 firearms in June 2010.

- (d) Is there a delay in the NICS system for court-ordered prohibited firearms possessors? How does it differ from those arrested for felonies?
- (e) Was there a delay for Steward each time he tried to purchase a gun in June 2010? If so, please describe in detail the length of delay and the actions that FBI took to research the firearm prohibition in each instance.
- (f) Of the 42 firearms Steward purchased after his harassment injunction, how many did the FBI know about before the purchase?

¹ William La Jeunesse and Laura Prabucki, *Feds Silent on How Convicted Felons Bought Guns in 'Operation Fast and Furious'*, FOX NEWS, Jul. 25, 2011, <http://www.foxnews.com/politics/2011/07/25/feds-refuse-to-explain-why-proper-background-checks-werent-conducted-on-fast>.

- (g) Did the ATF arrange or seek to arrange for Chambers, Steward, or any other Operation Fast and Furious suspect's instant background check to be processed any differently in order to assist with its investigation? If so, please explain in detail.

QUESTIONS SUBMITTED TO PROF. DAVID B. KOPEL BY SENATOR HATCH

Senator Hatch - Follow Up Questions for Dr. Kopel

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)?

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?

QUESTIONS SUBMITTED TO DAVID CUTHBERTSON BY SENATOR KLOBUCHAR

QUESTIONS FOR THE RECORD
Senate Judiciary Committee
Subcommittee on Crime and Terrorism

“The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement”
November 15, 2011

Senator Amy Klobuchar

For David Cuthbertson (*Assistant Director, FBI*)

1. Does the FBI's Criminal Justice Information Services Division work with states in connection with their NICS reporting requirements?
2. Do you have any measure of how much it costs states to report the required NICS data to the FBI?

RESPONSES OF DAVID CUTHBERTSON TO QUESTIONS SUBMITTED
BY SENATORS GRASSLEY AND KLOBUCHAR

**Questions for the Record
Federal Bureau of Investigation**

**Subcommittee on Crime and Terrorism
Committee on the Judiciary
United States Senate**

**“The Fix Gun Checks Act:
Better State and Federal Compliance, Smarter Enforcement”
November 15, 2011**

Questions Posed by Senator Grassley

National Instant Criminal Background Check System (NICS)

1. In briefings, my staff has been informed that if an individual purchasing a firearm has a felony arrest on their record, there is supposed to be a delay on gun purchases while FBI officials do research on the individual to determine whether or not the individual has been indicted, which would prevent the sale from being lawfully made.

Court records show that an arrest warrant for Jacob Wayne Chambers was issued on May 22, 2009 for felonies committed on November 7, 2008. Chambers bought 54 firearms from October 2, 2009 to November 24, 2009. He was arrested on December 18, 2009.

a. News reports have suggested that FBI officials in the NICS Section and ATF in Phoenix communicated whenever suspects in Operation Fast and Furious tried to buy a gun, since an arrest would have triggered a delay.¹ Is this accurate? If so, please indicate the number of times such communications occurred and describe the communications in detail.

Response:

Information responsive to this inquiry is provided separately.

NCIC records do not reflect that an arrest warrant was entered for Jacob Wayne Chambers, on May 22, 2009, in connection with alleged felonies committed on November 7, 2008 in Maricopa County, Arizona. We understand that a court summons was issued for Chambers by the Maricopa County Superior Court on December 18, 2009.

¹ William La Jeunesse and Laura Prabucki, *Feds Silent on How Convicted Felons Bought Guns in 'Operation Fast and Furious'*, FOX NEWS, Jul. 25, 2011, <http://www.foxnews.com/politics/2011/07/25/feds-refuse-to-explain-why-proper-background-checks-were-not-conducted-on-fast>.

b. Are felony arrest warrants entered into the NICS? Please describe the differences in length of purchasing delay for individuals with felony warrants and those with felony arrests on their records.

Response:

The National Crime Information Center (NCIC), National Instant Criminal Background Check System (NICS), and Interstate Identification Index (III) are all searched during a NICS background check. While felony warrants are typically entered into NCIC, some are, instead, entered in NICS. Regardless of where they reside, if a criminal arrest warrant matching to the subject is validated as active, the purchase may be denied at that point, which is usually within three days of the inquiry.

Felony arrests, which reside in III, are not, by themselves, prohibiting. If a NICS check reveals a felony arrest without a corresponding disposition, further research is required before the NICS Section can determine whether a transaction is prohibited. If the arrest resulted in pending felony charges, the purchaser is prohibited from receiving the firearm by 18 U.S.C. § 922(n). If the arrest resulted in a felony conviction, the purchaser is typically prohibited from receiving the firearm by 18 U.S.C. § 922(g)(1) (not every felony conviction is prohibiting). The response times of the agencies from which the FBI seeks record-completing information vary widely. The Brady Handgun Violence Prevention Act of 1993 allows three business days to obtain this information before a Federal Firearms Licensee (FFL) may transfer a firearm.

c. Was there a delay for Chambers each time he tried to purchase a gun in October and November 2009? If so, please describe in detail the length of delay and the actions that FBI took to research the firearm prohibition in each instance.

Response:

The FBI has no record of purchases made by Chambers in October and November 2009. By law, the FBI may not retain the records of any such purchases, or of the NICS checks preceding such purchases, if the NICS checks resulted in anything other than a denial. In the case of a "proceeded" transaction, the FBI is required by 28 C.F.R. § 25.9(b)(1) to destroy all transaction information containing personally identifiable information regarding the transferee within 24 hours of informing the FFL that the transaction may proceed.

2. Sean Christopher Steward purchased 281 firearms between December 7, 2009 and June 23, 2010. According to Arizona court documents, a state injunction against harassment was obtained against Steward on April 8, 2010, prohibiting him from possessing firearms or ammunition. However, Chambers purchased 42 firearms in June 2010.

a. Is there a delay in the NICS system for court-ordered prohibited firearms possessors? How does it differ from those arrested for felonies?

b. Was there a delay for Steward each time he tried to purchase a gun in June 2010? If so, please describe in detail the length of delay and the actions that FBI took to research the firearm prohibition in each instance.

c. Of the 42 firearms Steward purchased after his harassment injunction, how many did the FBI know about before the purchase?

Response to subparts a through c:

It is the FBI's understanding that others in the Department of Justice have reviewed court records and have found that, based upon a petition alleging harassment, a temporary order was issued by a court on April 9, 2010, and was later followed by a restraining order. Neither order contained any restriction on Steward's possession of firearms.

When the databases accessible during a NICS check include information about an order of protection that disqualifies the individual from receiving a firearm under 18 U.S.C. § 922(g)(8), there is no attendant delay in denying that transaction. However, because information about disqualifying protection orders is normally housed in the NCIC, and that information is uploaded by the issuing jurisdiction, there can be a lapse of time between the issuance of the order and its availability in NICS during a background check. If the databases available to NICS indicate that a purchaser is subject to an outstanding order of protection, but not whether that order of protection qualifies as prohibiting under section 922(g)(8), the FBI must attempt to obtain record-completing information from the issuing jurisdiction. As discussed in response to Question 1b, above, the law allows three business days to obtain this information before an FFL may transfer a firearm.

The FBI has no record of purchases made by Steward between April and June of 2010. As noted above, the FBI is not permitted to retain the records of any such purchases, or of the NICS checks preceding such purchases, if the NICS checks resulted in anything other than a denial.

Additional information responsive to this inquiry is provided separately.

d. Did the ATF arrange or seek to arrange for Chambers, Steward, or any other Operation Fast and Furious suspect's instant background check to be processed any differently in order to assist with its investigation? If so, please explain in detail.

Response:

Information responsive to this inquiry is provided separately.

Questions Posed by Senator Klobuchar**3. Does the FBI's Criminal Justice Information Services Division work with states in connection with their NICS reporting requirements?****Response:**

As noted in response to Question 1b, above, the NICS searches three national databases managed by the FBI: the III, NCIC, and NICS Index. The FBI's Criminal Justice Information Services (CJIS) Division works with the states relative to their reporting to these databases in order to maximize the accuracy and completeness of the FBI's criminal history records. In addition, following passage of the NICS Improvement Amendments Act (NIAA) of 2007 (Pub. L. No. 110-180 (January 8, 2008)), the FBI established an internal NIAA Task Force and conducted an impact analysis to determine the needs, resources, and potential obstacles associated with compliance by federal, state, and tribal authorities. As a result of this analysis, the FBI is intensifying its outreach efforts with states, tribes, and federal agencies to help them make NIAA improvements. Among these outreach efforts, the FBI:

- Created and disseminated to federal, state, and tribal agencies notifications, training materials, and other resources related to NICS improvements and coordinated teleconferences to provide updates and address outstanding needs;
- Met with state NIAA task forces and regional groups of state agencies (including elements of the mental health community) to help them obtain grant funding through the NICS Act Record Improvement Program;
- Participated in mental health conferences at the state and national levels;
- Assisted states' efforts to submit information to the NICS electronically and provided referrals to help states address technology challenges, legal issues, and audit methodologies related to the NIAA;
- Met with state CJIS Systems Officers and state points of contact to provide NIAA information and updates and responded to over 2,000 requests for guidance on a variety of NIAA issues; and
- Provided easy Internet access to resource information and prepared federal, state, and tribal contact lists to ensure the consistent sharing of information.

4. Do you have any measure of how much it costs states to report the required NICS data to the FBI?

Response:

The FBI does not have access to this information.

RESPONSES SUPPLEMENT—REDACTED OF DAVID CUTHBERTSON
TO QUESTIONS SUBMITTED BY SENATORS GRASSLEY AND KLOBUCHAR

FOUO//Law Enforcement Sensitive//Pending Case

**Questions for the Record
Federal Bureau of Investigation**

**Subcommittee on Crime and Terrorism
Committee on the Judiciary
United States Senate**

**“The Fix Gun Checks Act:
Better State and Federal Compliance, Smarter Enforcement”
November 15, 2011**

Questions Posed by Senator Grassley

National Instant Criminal Background Check System (NICS)

1. In briefings, my staff has been informed that if an individual purchasing a firearm has a felony arrest on their record, there is supposed to be a delay on gun purchases while FBI officials do research on the individual to determine whether or not the individual has been indicted, which would prevent the sale from being lawfully made.

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a. News reports have suggested that FBI officials in the NICS Section and ATF in Phoenix communicated whenever suspects in Operation Fast and Furious tried to buy a gun, since an arrest would have triggered a delay.¹ Is this accurate? If so, please indicate the number of times such communications occurred and describe the communications in detail.

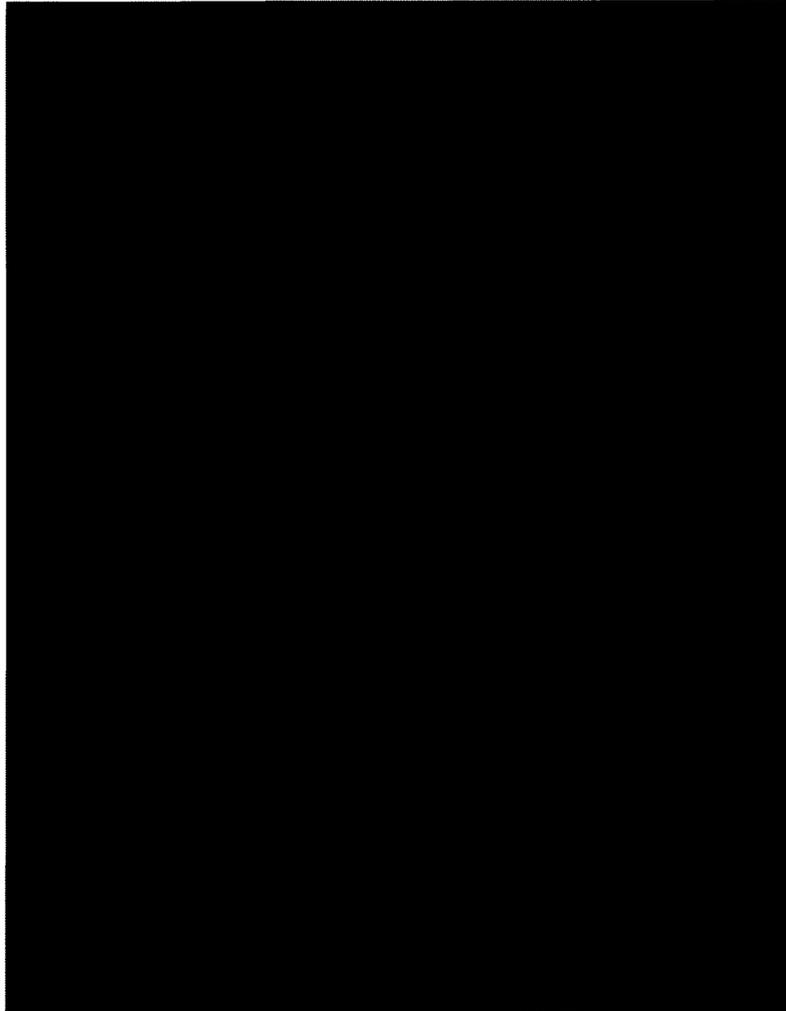
Response:

(U) The following response is supplementary law enforcement information.

¹ William La Jeunesse and Laura Prabucki, *Feds Silent on How Convicted Felons Bought Guns in 'Operation Fast and Furious'*, FOX NEWS, Jul. 25, 2011, <http://www.foxnews.com/politics/2011/07/25/feds-refuse-to-explain-why-proper-background-checks-were-not-conducted-on-fast>.

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c. Of the 42 firearms Steward purchased after his harassment injunction, how many did the FBI know about before the purchase?

Response:

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Response:



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RESPONSES OF PROF. DAVID B. KOPEL TO QUESTIONS SUBMITTED
BY SENATOR HATCH

Nov. 30, 2011

Independence Institute
13952 Denver West Parkway
Suite 400
Golden, Colorado 80401

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 are 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

SUBMISSION FOR THE RECORD

9/5/12 Richard Burr, United States Senator of North Carolina: Press Releases

Press Office**Press Releases**

October 13, 2011 - 4:14 PM

Burr, Webb Introduce Veterans Second Amendment Protection Act**Legislation would end arbitrary process that strips veterans of rights**[\[Share This\]](#)

WASHINGTON, D.C. – Today, U.S. Senators Richard Burr (R-NC) and Jim Webb (D-VA), along with 10 other cosponsors, introduced legislation that would end the arbitrary process through which the government strips veterans and other Department of Veterans Affairs (VA) beneficiaries of their Second Amendment rights. Currently, veterans who have a fiduciary appointed to act on their behalf are deemed "mentally defective" and are reported to the FBI's National Instant Criminal Background Check System (NICS), a system which prevents them from being able to purchase firearms in the United States. The *Veterans Second Amendment Protection Act* would require a judicial authority to determine that VA beneficiaries pose a danger to themselves or others before they can be added to the FBI's NICS.

"Taking away a Constitutional right is a serious action, and veterans should be afforded the same due process under the law as all other American citizens," Burr said. "This legislation would protect the rights of veterans and their families by ensuring that only a proper judicial authority is able to determine who is referred to NICS. Our veterans took an oath to uphold the Constitution and they deserve to enjoy the rights they fought so hard to protect."

"As a matter of fairness, a veteran should be permitted to purchase a firearm under the same conditions as every other American," said Senator Webb. "This bipartisan bill ensures consistent guidelines are used for reporting citizens to the FBI, and that no veteran is needlessly stripped of their Second Amendment rights."

The Federal Gun Control Act prohibits certain individuals who have been deemed a "mental defective" from purchasing a firearm. Currently, around 114,000 people who are receiving VA benefits have been reported to NICS, stripping them of their constitutional rights simply because VA appointed a fiduciary to act on their behalf. A fiduciary is assigned to handle disability compensation, pensions, survivors' compensation, and other VA payments on behalf of a veteran, surviving spouse, dependent child, or dependent parent. VA's review process for assigning a fiduciary is meant to determine one's ability to manage VA-provided cash assistance. The process does not determine whether they are a danger to themselves or others.

October 2011 Press Releases

- 10/03/11 [Senator Burr Statement on EPA Decision and Its Impact on Veterans and Civilians Exposed to Toxic Water at Camp Lejeune](#)
- 10/13/11 [Burr, Klobuchar, Bennet Introduce Legislation to Boost Medical Device Innovation](#)
- 10/13/11 [Burr, Webb Introduce Veterans Second Amendment Protection Act](#)
- 10/20/11 [Burr Joins Bipartisan Effort to Make Medicare Secondary Payer Program More Efficient, Save Taxpayer Dollars](#)
- 10/24/11 [U.S. Senator Richard Burr Delivers Weekly Republican Address](#)
- 10/25/11 [Senator Burr Announces Events for October 24 – 28, 2011](#)
- 10/31/11 [Senator Burr Announces Event for November 1, 2011](#)

11-01-11
 Success,
 Anna Wang

SUBMISSION FOR THE RECORD

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 FACSIMILE: 202.228.2064

United States Senate

SENATE CAUCUS ON
 INTERNATIONAL NARCOTICS CONTROL
 HART SENATE OFFICE BUILDING, ROOM 818-C
 WASHINGTON, DC 20510

November 15, 2011

Via Electronic Transmission

The Honorable Hillary R. Clinton
 Secretary of State
 U.S. Department of State
 2201 C Street NW
 Washington, DC 20520

Dear Secretary Clinton:

I write today to request copies of diplomatic cables to and from the Department of State and U.S. embassies in Mexico and nations in Central America and South America that discuss instances of, and the overall extent of, trafficking in weapons from, to, and within those regions. I am aware from news reports of the existence of such cables. I believe that the information contained in them is crucial to Congress's understanding of the threat posed by transnational drug trafficking organizations (DTOs) and other organized criminal groups, such as Mara Salvatrucha (MS-13).

As the Senate Caucus on International Narcotics Control detailed in a report we issued in September of this year, DTOs and other criminal groups in Mexico and Central America pose a national security threat both to the people of the United States and to the people of the countries where they operate.¹ As our report stated, "Violence in Central America...has grown out of control."² Murder rates in the Central American countries are so high that "Central America has become one of the most violent areas of the world."³ The Administration has recognized this threat in its *National Drug Control Strategy* and its *Strategy to Combat Transnational Crime*, as well as in its support to regional governments through, among other activities, the Merida Initiative and the Central American Security Strategy.

As you know, among the grave concerns regarding the threat posed by these criminals is that they are increasingly armed with sophisticated weapons. According to a press report, DTOs are "obtaining rockets and other heavy armament that make them more than a match for Central

¹ United States Senate Caucus on International Narcotics Control, "Responding to Violence in Central America," 112th Congress, First Session (September 2011), available at:

http://www.feinstein.senate.gov/public/index.cfm/files/serve?file_id=a67575d5-66dd-4e36-a4ac-6a4f70de500a&SK=689B2D014C1464F4CFD26561AASFEDC4F (visited Nov. 9, 2011).

² *Id.* at p. 3.

³ *Id.* at p. 13.

America's weak militaries."⁴ For example, according to another press report, a raid on a drug trafficking organization's warehouse in Guatemala City recovered 11 machine guns, a light antitank weapon, 563 rocket-propelled grenades, 32 hand grenades, 8 landmines, and a large amount of ammunition.⁵

According to these media reports, diplomatic cables from U.S. Embassies in Central America and Mexico provide significant information about these matters, including U.S. government assessments of the role of regional militaries in the proliferation of weapons to DTOs. I believe it is crucial that Congress review those cables and avail itself of the information contained therein as part of its duty to examine the threat to the United States posed by DTOs and other criminals. Furthermore, I believe that it is likely that there is relevant information on these matters in cables that has not been released or otherwise publicly referenced.

Accordingly, as Co-Chairman of the Senate Caucus on International Narcotics Control, I request that you provide (1) the four cables specifically referenced in the reports by Tim Johnson of McClatchy Newspapers, entitled, "Drug gangs move into new territory: Central America," (April 21, 2011) and "Drug Gangs Help Themselves to Central American Military Arsenals," (April 21, 2011); (2) all classified and unclassified cables from U.S. Embassies in Central America, South America, and Mexico that address weapons trafficking—including, but not limited to, trafficking of military weapons in host countries, security of military weapons stockpiles, and U.S. assistance to host countries in preventing illicit transfer of firearms from military bases; and (3) all classified and unclassified cables discussing the July 2, 2010 cable from the U.S. Embassy in Mexico entitled, "Mexico Weapons Trafficking – The Blame Game."

I appreciate your prompt assistance in responding to this request. Given the serious nature of the subject matter and the urgent need for these documents, I expect your response to my request no later than November 30, 2011. If any of these documents are classified, please transmit them to the Office of Senate Security, located at the Senate Visitors' Center, Room 217, and mark the documents "to the attention of Senator Grassley Co-Chairman, Senate Caucus on International Narcotics Control."

Sincerely,



Charles E. Grassley
Co-Chairman

Cc: The Honorable Diane Feinstein
Chairman, Senate Caucus on
International Narcotics Control

⁴ Johnson, Tim, "Drug gangs move into new territory: Central America," (April 21, 2011) available at: <http://www.mcclatchydc.com/2011/04/21/112617/drug-gangs-muscle-into-new-territory.html> (visited Nov. 9, 2011)

⁵ *Id.*

United States Senate

WASHINGTON, DC 20510

June 16, 2011

Via Electronic Transmission

Kenneth Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, & Explosives
U.S. Department of Justice
99 New York Avenue, NE
Washington, DC 20226

Dear Acting Director Melson:

I write today in response to a June 10, 2011, article in *The Wall Street Journal* titled, "Mexican Guns Tied to U.S.", which cites a letter you sent to Senator Diane Feinstein, the Chairman of the Senate Caucus on International Narcotics Control ("Caucus"). As the Co-Chairman of the Caucus, and Ranking Member of the Senate Committee on the Judiciary ("Committee"), I have been investigating serious allegations raised by whistleblowers within the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that agents knowingly allowed weapons to be sold to straw purchasers who then transferred those weapons to Mexican Drug Trafficking Organizations ("DTOs"). These allegations were the subject of two Congressional hearings this week and the timing of the release of this information raises questions about why the ATF would choose to release this information publicly now. Further, after reviewing the data presented in the article, I have questions about why ATF provided some select information, but not a more detailed analysis that would help Congress, and the American people, better understand the causes and sources of illegal firearms in Mexico.

Federal law prohibits the ATF from releasing firearm trace data or multiple handgun sales reports, but it does not prohibit the release of aggregate statistical data on illegal gun trafficking. However, I am concerned that the selective release of certain statistical data without further clarification and categorization may inaccurately reflect the scope and source of the problem of firearms in Mexico and the DTO violence. For example, the article states that ATF traced firearms in Mexico that were submitted for tracing by the Government of Mexico ("GOM") 21,313 firearms in 2009 and 7,971 firearms in 2010. The article further adds that of the firearms traced, 14,213 in 2009 were manufactured in the U.S. or imported to the U.S. from other countries. The article adds that 6,291 firearms in 2010 were either manufactured in the U.S. or imported from other countries. Taken together, these numbers provided the basis for the general estimate that 70% of firearms provided to the ATF from the GOM were traced back to the U.S.

The implication the article makes is that these firearms must come directly from U.S. manufacturers or U.S. Federal Firearms Licensees ("FFLs") selling guns to DTO members who smuggle the guns over the Southwest border. Unfortunately, this information paints a grossly inaccurate picture of the situation.

First and foremost, it is worth noting that the firearms data discussed in the article is based upon only the firearms that were submitted by the GOM to ATF for tracing. According to a May 6, 2009, article written by the Associated Press, over 305,424 confiscated weapons are locked in vaults in Mexico.¹ The weapons submitted for tracing represent only a small percentage of the number of weapons found to be part of the DTO related crime in Mexico. Further, there has been significant evidence in the media recently regarding the proliferation of weapons in Mexico smuggled out of Central America. For example, at a recent hearing before the Caucus on Central American security cooperation we heard testimony from witnesses that corrupt officers with access to unsecured arsenals in Guatemala and Honduras were an important source of weapons. In one recent media report, they discussed how over 1,100 fragmentation grenades, M-60 machine guns, and over a dozen grenade launchers were recovered in Guatemala at an alleged safe house of the Zetas DTO. That same article added that the Zetas had stolen over 500 weapons from a Guatemalan military base between 2007 and 2008.

Additional evidence regarding the source of weapons in Mexico is contained in an unclassified cable from the U.S. Department of State ("DOS") dated July 2, 2010, obtained by my office and attached to this letter. The cable, titled, "Mexico Weapons Trafficking – The Blame Game" seeks to dispel rumors about the source of weapons trafficked to Mexico. The unclassified cable includes sections such as: "Myth: An Iron Highway of Weapons Flows from the U.S.," "Myth: The DTOs Are Mostly Responsible," "Myth: Mexico Aggressively Investigating Weapons Confiscated," "Myth: Mexico Methodically Registers and Tracks Weapons," and "Myth: The GOM Justice System is Tough on Violators of Gun Laws." While this cable is very candid about the true problem of weapons smuggling inside Mexico, the cover emails forwarding this cable suggest that the ATF and officials associated with the ATF disagreed.

In fact, one email written by Special Agent in Charge William Newell states, "I could go on and on but once our 'Fast and Furious' case breaks it will change this." Unfortunately, it now appears that Special Agent in Charge Newell's prediction was correct, but instead of an "Iron Highway" operating on its own, it was ATF who fueled the flow of weapons through its "Fast and Furious" investigation which knowingly sanctioned the sale of nearly 2,000 firearms to straw purchasers.

I understand that agents working on tracing weapons in Mexico back to the U.S. routinely instruct GOM authorities to only submit weapons for tracing that have a likelihood of tracing back to the U.S. The purpose of this policy is to direct resources to tracing firearms that may have a U.S. nexus, instead of simply wasting resources on tracing firearms that will not trigger a U.S. source. So, based upon this background information, it is not surprising that reviewing a sample of weapons that is purposefully directed to increase the likelihood of U.S. generated weapons would in fact skew toward the direction of making it look like U.S. gun dealers provide more weapons than they actually do.. However, further discussion of the data that is presented in the article is warranted.

¹ E. Eduardo Castillo, *AP Impact: Mexico's Weapons Cache Symbies Tracing*, May 6, 2009, available at <http://www.brownsvilleherald.com/common/printer/view.php?db=brownsville&id=97742> (last visited June 13, 2011).

Looking specifically at the information provided by the ATF to Senator Feinstein and the *The Wall Street Journal* raises some questions when compared more detailed data provided to my office. ATF actually traced 26,813 firearms in 2009 and 9,443 in 2010. Further, that data indicates that of those firearms actually submitted for tracing, a vast majority of those firearms did not come from FFLs (either U.S. based or Mexican based). In fact, of the 26,813 weapons traced in 2009, only 5,800 actually traced back to U.S. or Mexican FFLs. Table 1 illustrates a more detailed breakdown of the firearms data for both 2009 and 2010. The most noteworthy portion of the information is that nearly 78% of firearms traced in 2009 and 66% of firearms traced in 2010 were assigned to a catchall category “No Final Sale Dealer” which means the firearms did not trace back to a United States FFL. This category of firearms includes firearms that have no nexus with U.S. commerce. It also includes firearms where the only nexus to U.S. commerce is that they were manufactured by U.S. companies. This means they are not sold by FFLs in the United States. Instead, they may be sold to foreign countries or militaries requiring approval of the State Department and Homeland Security. Additionally, this category includes firearms in the ATF’s Suspect Gun Database—a category which would include nearly 2,000 firearms as part of ATF’s Fast and Furious Investigation where the ATF knowingly authorized firearm sales to straw purchasers before the weapons were trafficked to Mexican DTOs.

Table 1: Firearms Tracing Information for 2009 and 2010

Year	Number of Firearms Submitted for Tracing by Government of Mexico	Number of Firearms Traced to Federal Firearm Licensees (FFLs)	Number of Firearms Assigned to “No Final Sale Dealer”
2009	26,813	5,800 (22%)	21,013 (78%)
2010	9,443	3,176 (34%)	6,267 (66%)

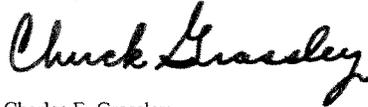
Because the numbers provided to my office indicate that the data provided to Senator Feinstein and *The Wall Street Journal* may not be entirely accurate and because further questions and breakdowns of that data are necessary for Congress to make an informed decision about the sources of weapons that are fueling the DTO related violence in Mexico, I ask that you provide responses to the following questions:

- (1) Of the 21,013 firearms in the “No Final Sale Dealer” category for 2009, how many of those firearms can be traced back to military sales to the GOM? How many can be traced to the military of Guatemala? How many can be traced to the military of Honduras? How many can be traced to the military of El Salvador? How many can be traced to other Central American and South American militaries? How many can be traced to other foreign militaries? How many are in that category because they were in the Suspect Gun Database?
- (2) Of the 6,267 firearms in the “No Final Sale Dealer” category for 2010, how many of those firearms can be traced back to military sale to the GOM? How many can be traced to the military of Guatemala? How many can be traced to the military of Honduras? How many can be traced to the military of El Salvador? How many can

- be traced to other Central American and South American militaries? How many can be traced to other foreign militaries? How many are in that category because they were in the Suspect Gun Database?
- (3) How many of those weapons in the "No Final Sale Dealer" category for 2009 and 2010 were previously reported lost or stolen?
 - (4) Has the ATF requested access to the 305,424 firearms held by the GOM military vault? How many of those firearms have been traced? How many of those firearms would trace back to the GOM and the Mexican military?
 - (5) Data indicates that the top source dealer for illegal firearms traced in Mexico for 2009 was "Direccion General De Industria Milita" or the Directorate General of Military Industry in Mexico. They provided 120 firearms that were later traced back, likely after a crime. Why does this entity have a U.S. Federal Firearms License? Are sales to this and other foreign entities with U.S. FFL's included in the numbers the ATF provided as being a gun from a "U.S. Source". If so, why?
 - (6) Why did the number of trace requests drop significantly from 2009 to 2010, but the percentage trace to U.S. FFLs go up? What is behind this trend?

Accordingly, as Co-Chairman of the Caucus and Ranking Member of the Committee, I request your prompt response to these important questions no later than June 23, 2011.

Sincerely,



Charles E. Grassley
Co-Chairman, Senate Caucus on International Narcotics Control
Ranking Member, Senate Committee on the Judiciary

Attachment

From: Newell, William D.
Sent: Wednesday, July 07, 2010 8:46 PM
To: [REDACTED]
Subject: Re: Mexico Weapons Trafficking - The Blame Game

"ends" up Typing and eating dinner. shame on me.
Bill Newell
Special Agent in Charge
ATF Phoenix Field Division (AZ and NM)
Cell: 602 [REDACTED]

...
NOTICE: This electronic transmission is confidential and intended only for the person(s) to whom it is addressed. If you have received this transmission in error, please notify the sender by return e-mail and destroy this message in its entirety (including all attachments)

From: Newell, William D.
To: [REDACTED]
Sent: Wed Jul 07 23:44:18 2010
Subject: Re: Mexico Weapons Trafficking - The Blame Game

As for "large seizures" and "DTO related" what about the recent 147 guns in Laredo specifically intended for the Zeras? I could go on and on but once our "Fast and Furious" case breaks it will change this. [REDACTED] and crew know better and we (ATF) needs to be careful about feeding Dept of State with opinion instead of fact. It appears to me that this cable, "authored" by the Ambassador, was based largely on opinion and not fact. It may be the easy road but unfortunately always up being a dead end.
Bill Newell
Special Agent in Charge
ATF Phoenix Field Division (AZ and NM)
Cell: 602 [REDACTED]

...
NOTICE: This electronic transmission is confidential and intended only for the person(s) to whom it is addressed. If you have received this transmission in error, please notify the sender by return e-mail and destroy this message in its entirety (including all attachments)

From: [REDACTED]
To: Newell, William D.
Sent: Wed Jul 07 20:21:43 2010
Subject: Fw: Mexico Weapons Trafficking - The Blame Game

...
NOTICE: This electronic transmission is confidential and intended only for the person(s) to whom it is addressed. If you have received this transmission in error, please notify the sender by return e-mail and destroy this message in its entirety (including all attachments)

From: [REDACTED]
To: [REDACTED]
Sent: Wed Jul 07 20:19:05 2010
Subject: FW: Mexico Weapons Trafficking - The Blame Game

From: Gil, Darren D.
Sent: Tuesday, July 06, 2010 10:56 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Mexico Weapons Trafficking - The Blame Game
Importance: High

All,

This is the cable that went to Main State. Quite extraordinary in its honest language of the situation here in Mexico.

Although not classified, this cable is sensitive and should not be distributed outside of our offices here in Mexico.

[REDACTED] Leadership should be advised, as I sent an earlier version up already.

Please note the Ambassador's comments which refer to your hard work and commitment here in Mexico, you all are to be commended.

dl

Darren D. Gil
OTF, DACH-Mexico

(NO) 32 [REDACTED]
(NO) 32 [REDACTED]
[REDACTED]

From: Gil, Darren D (Mexico City) [REDACTED]
Sent: Tuesday, July 06, 2010 9:51 AM
To: Gil, Darren D.
Subject: FW: Mexico Weapons Trafficking - The Blame Game

SBU
This email is UNCLASSIFIED.

From: [REDACTED]
Sent: Friday, July 02, 2010 10:32:43

To: [REDACTED]

[REDACTED]

Cc:

Subject: Mexico Weapons Trafficking - The Blame Game

UNCLASSIFIED



Action Office: LEGAT, POL, ORA
Info Office: RSO, DAO, ATF, DOJ, USSS, ODC

MRN: 10 MEXICO 365
Date/DTG: Jul 02, 2010 / 021531Z JUL 10
From: AMEMBASSY MEXICO
Action: WASHDC, SECSTATE ROUTINE
E.O.: [REDACTED]
TAGS: PGOV, PINR, MX, PREL
Captions: SENSITIVE, SIPDIS
Reference: [REDACTED]
Pass Line: WHA
Subject: Mexico Weapons Trafficking - The Blame Game

- 1 (SBU) Summary. The Mexican Government (GOM) has consistently focused the blame for weapons trafficking into Mexico squarely on the United States. Recent articles in Mexico City daily, El Universal, however, have called into question whether all the responsibility rests with the United States, or whether there is also more Mexico can do to combat this problem. It appears that Mexico may be just starting to realize that the answer to the arms trafficking problem requires confronting the challenge on both sides of the border. Nevertheless, the GOM still has substantial work to do and institutional barriers to overcome in order to effectively play its role in stopping the violence associated with the illicit weapons trade. End Summary

Myth: An Iron Highway of Weapons Flows from the U.S.

- 2 (SBU) The Mexican Attorney General's office (PGR) is quick to report that since the start of the Calderon administration in December 2006, Mexico security forces have seized 83,566 weapons. The sheer magnitude of weapons, as well as the general acceptance that most come from U.S sources,

suggests that there is an "Iron Highway" of weapons streaming across the border in identifiable patterns that make interdiction easy. Rather, it appears there maybe thousands of small streams. To date, despite U.S. Customs and Border Protection's (CBP) use of the latest detection equipment and agents trained in a wide range of interdiction techniques, our best efforts have not produced massive seizures of weapons on the U.S. side of the border, although some important seizures have been effected and are being investigated. Most illicit weapons confiscated in Mexico are from various crime scenes, checkpoints, or DTO camps inside of Mexico - not at the border. CBP reports that since 2009, it and Mexican Customs has conducted coordinated operations at border crossings. Mexican Customs, however, is in the nascent stages of transitioning from a tariff collection entity to a law enforcement agency and lacks full statutory authority to perform at an equivalent level to its CBP counterparts. At present, Mexican Customs relies on other Mexican law enforcement agencies (SSP, PGR or SEDENA) to effect detentions and arrests of smugglers. Additionally, the scarcity of interdiction technology at many of the Mexican ports of entry result in significant inconsistencies along the border. This, as well as the dispersed and small nature of the seizures, suggest that interdiction is not as simple as plugging the suspected holes on the U.S. side of the border. But perhaps the biggest gap is a strong disincentive. In the United States the average sentence for arms trafficking is only 12 to 30 months for straight weapons trafficking crimes. For U.S. prosecutors, there is a bigger pay off from focusing on other crimes. For traffickers and straw purchasers, the combination of cost and risk still is not too high to bear.

3. (SBU) In order to address this issue, the GOM has worked through the Merida Initiative to identify the need for significant investment in non-intrusive inspection equipment at the border. NAS and CBP are working with their Mexican partners and identifying exchanges and training opportunities under the 21st century border pillar in order to strengthen interdiction coordination.

Myth: The DTOs Are Mostly Responsible

4. (SBU) While DTOs are the largest consumer of illegal fire arms in Mexico, they are not the primary trafficking agents of weapons going south from the United States. ATF officials assess that, instead, straw purchasers buy small quantities of weapons at pawn shops, gun shows, and fully licensed firearm dealers (FFL) in the United States, illegally transport one to five weapons across the border, and sell them independently to the DTOs. They do not work directly for the organized criminal groups. For example, ATF officers cite as an emblematic case the 54 firearms recovered at a Mexican Customs check point on March 22, 2009. Using e-Trace, ATF traced all firearms recovered to a licensed dealer in St. Madera, CA. Further investigation by ATF agents identified twelve Mexican citizens, legally residing in the United States, who trafficked these weapons and as many as 442 additional firearms to Mexico between 2005 and 2009. Separate individuals with links to organized crime in Oaxaca State had requested the weapons. The case demonstrates general trends in arms trafficking, including: 1) the lack of a single large seizure, but rather multiple small shipments over a long period of time; 2) weapons were bought legally in the United States; 3) the purchasers were Mexicans living legally in the United States; and 4) the individuals who made the purchases were not directly linked to the organized criminal group requesting the transfers.
5. (SBU) The Mexican Attorney General's Office (PGR) agrees that individuals or small groups, not the DTOs, are primarily responsible for most trafficking. This represents a shift from its earlier position. In April 2008, PGR officially stated in their Monthly Arms Trafficking Report that the DTOs had specific members in their organization dedicated to procuring and transporting weapons into Mexico. In the same report for April 2009, PGR assessed that DTOs did not control the arms trafficking networks, but relied on semi-autonomous individuals or small, independent organizations to buy weapons and sell them to the cartels. This allowed the DTOs a more flexible distribution network where they were not directly involved in the transactions.

Myth: Mexico Aggressively Investigating Weapons Confiscated

6. (SBU) According to PGR records, ten of the 15 commercial brands of weapons regularly confiscated in Mexico are manufactured and sold by U.S. companies. To date, however, the GOM has done little to investigate the origin of these weapons. As a result, the United States has largely been unable to open investigations domestically on un reputable dealers or smuggling organizations on the U.S. side of the border. To assist in these efforts, ATF has made several attempts to implement e-Trace weapons trafficking software in Mexico. In September 2009, PGR's Center for Information, Analysis, and Planning to Fight Crime (CENAPI) requested ten accounts and ten computers to access to e-Trace. The request followed a presentation at the Bilateral Weapons Trafficking Conference in Phoenix, AZ by ATF (Reffel) that discussed the benefits of e-Trace as a tool in developing investigations for weapons smuggling. In October 2009, ATF provided CENAPI with ten computers and five accounts, corresponding to the number of specific individuals identified as E-trace users.
7. (SBU) To date, PGR has restricted the rollout of additional accounts to other agencies in the GOM reducing its effectiveness as an investigative tool. The Mexican Attorney General told the Ambassador in a March 2010 meeting that he wants all Mexican federal and state law enforcement agencies to have e-Trace access, but the process nevertheless has been mired in an administrative tug-of-war for control and access to the tool. The Mexican Federal Police (SSP) has requested 70 accounts, and three state governments have requested a total of 300 accounts, but PGR has only given ATF permission to train - not provide - other institutions on e-Trace. PGR/CENAPI insists that it must maintain control of the tool and that they are capable of tracing all weapons confiscated in Mexico without distributing it more broadly.
8. (SBU) ATF, meanwhile, assesses that CENAPI does not have the personnel, nor the infrastructure to accommodate the volume of traces of confiscated weapons in Mexico. The Secretariat of National Defense (SEDENA) claims to have seized over 5,000 firearms since January 1, 2010. As of April 23, 2010, CENAPI has traced 513 firearms - only 10%. U.S. law enforcement officials state that in order for e-Trace to be effective, weapons data seized at crime scenes must be immediately entered into e-Trace so that the U.S. sellers are investigated and held accountable. ATF touts the May 2010 seizure of a weapons cache from a Zeta training camp as an example of how the system can be used successfully. As ATF was granted immediate access to the firearms, it was able to quickly trace the semi-automatic weapons to a purchase in Las Vegas only 39 days prior to being confiscated in Mexico. ATF opened an investigation and is tracking down the smugglers based on the information received from the FFL. ATF's ability to quickly perform the traces, rather than having to wait to go through CENAPI, contributed to its launching an immediate investigation in the case. The same can be said for granting vetted state and deployed local forces e-Trace access, which would allow for the kind of swift turnaround on traces that would be virtually impossible through a centralized CENAPI system. Recent negotiations for a memorandum of understanding between PGR and ATF on e-Trace usage may open the door, but ATF remains skeptical that PGR will allow universal access. [Note: PGR and SRE finally completed their review of the MOU on 25 June and we expect for it to be signed shortly. End Note]

Myth: Mexico Methodically Registers and Tracks Weapons

9. (SBU) While Mexico has a system in place for registering and tracking firearms, no central database exists and the GOM lacks an automated ability to track ownership. SEDENA is solely responsible for the import and distribution of legal firearms in Mexico. Moreover, U.S. law enforcement officers say that an individual can register a legal weapon with SEDENA without having to submit to a background investigation or having to provide information on how it was purchased. To remedy this, the GOM plans to eventually register all weapons in Mexico in Plataforma Mexico, SSP's comprehensive crime database, accessible to vetted federal and state law enforcement officers. Plataforma Mexico has yet to receive data from e-Trace due to institutional rivalries (the Federal Police controls Plataforma Mexico but does not have e-Trace access)

Myth: The GOM Justice System is Tough on Violators of Gun Laws

10. (SBU) Mexican gun ownership laws as written are quite strict compared to U.S. laws. They prohibit personal ownership of rifles or shot guns greater than .22 caliber and pistols greater than .38 caliber. Additional restrictions apply to automatic weapons, various classes of revolvers, and semi-automatic pistols. Furthermore, owning more than two hand-guns and ten long guns is prohibited. U.S. law enforcement experts indicate that the stricter gun control laws should allow for more prosecutions and stiffer penalties for criminals involved in weapons trafficking. Little data is available, however, on the prosecution and sentencing of individuals involved with illegally possessing or trafficking a firearm. The case of Gregorio Salgado Lopez is a key example of how the Mexican justice system struggles to detain and prosecute egregious cases of firearms possession or trafficking. In March 2009 Salgado was arrested at a checkpoint in San Emeterio for possessing 55 disassembled firearms. ATF discovered the case through local press. Through its own investigation, ATF determined that Salgado was part of larger ring of smugglers. Although the magnitude of weapons alone should have been enough to bring him to trial and obtain a conviction, by the time ATF presented the additional information to the PGR, Salgado had already been released without a trial.
11. (SBU) Comment: Mexico understands that stopping the flow of illegal weapons into the country is paramount to achieving long-term success in the counternarcotics fight. Calderon made this a central theme of his address to the U.S. Congress. The responsibility does not lie solely on the northern side of the border. Just as demand fuels the flow of drugs north, it also drives the flow weapons south. With a combined operational effort, shared information, sustained investigations, and more prosecutions with serious sentences in the U.S. our relationship will be strengthened as we work together to cease the flow of weapons south. The first step will be to implement e-Trace across the board in Mexico and to train operators in its use as an investigative tool. This common platform will provide the springboard from which further investigative and judicial collaboration can occur. But if we cannot prosecute straw purchasers and traffickers in the United States, and put them in jail with serious sentences, then the trafficking will continue. There is too much money to be made, and it will not stop until there is a tough price to be paid in U.S. jails. End comment.

Signature: [REDACTED]

Drafted By: MEXICO [REDACTED]
 Cleared By: EXEC [REDACTED]
 POL [REDACTED]
 ATF Gil, Darren
 CBP [REDACTED]
 ICE [REDACTED]

Approved By: [REDACTED]
 Released By: MEXICO [REDACTED]

Info: MEXICO, AMEMBASSY ROUTINE; NATIONAL SECURITY COUNCIL WASHINGTON DC ROUTINE; DEPT OF HOMELAND SECURITY WASHINGTON DC ROUTINE; DEPT OF JUSTICE WASHINGTON DC ROUTINE; CDR USNORTHCOM PETERSON AFB CO ROUTINE; CDR USSOUTHCOM MIAMI FL ROUTINE; ALL US CONSULATES IN MEXICO COLLECTIVE ROUTINE

Action Post:
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SHOOTING SPORTS)	
FOUNDATION, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:11-cv-01401-RMC
)	(consolidated with 11-cv-1402)
B. TODD JONES, Acting Director)	
Bureau of Alcohol, Tobacco, Firearms)	
& Explosives, in his official capacity,)	
)	
Defendant.)	
_____)	

DECLARATION OF STUART L. LOWREY

I, Stuart L. Lowrey, pursuant to 28 U.S.C. § 1746(2), do hereby declare and state as follows:

I. I am the Chief, Firearms Operations Division, Office of Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). In that capacity, I serve as an advisor to the Director, Deputy Director, Executive Staff, the Office of Field Operations, and other ATF directorates on matters related to ATF's firearms criminal investigative programs and training. I am responsible for the development, oversight, and evaluation of criminal enforcement and training policy, programs and initiatives related to firearms trafficking, interdiction and deterrence. My duties also include the compilation and review of statistical data related to ATF's firearms related initiatives. This declaration is based on my personal knowledge as well as knowledge made available to me in the course of my duties as the Chief of the Firearms Operations Division.

2. Between fiscal year 2004 and fiscal year 2008, an estimated 20,060 firearms were recovered in Mexico and traced back to the United States, either as firearms manufactured in the United States or imported into the United States.¹

3. According to data reported in April 2011, 29,284 firearms were recovered in Mexico and submitted to ATF for tracing in 2009-2010. Of these, 20,504 were United States-sourced firearms: 15,131 were manufactured in the United States and 5,373 were imported into the United States.

4. The statistics in paragraphs 2 and 3 above are derived from ATF's eTrace data, the only systematic trace data available to the agency. It is important to note, however, that ATF's eTrace data is based only on gun trace requests actually submitted to ATF by law enforcement officials in Mexico, and not on all of the guns seized in Mexico. Administrative Record ("A.R.") at 51 (U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges* 3 (June 2009) ("GAO Report")). By way of example, in 2008, of the approximately 30,000 firearms that the Mexican Attorney General's Office informed ATF that it had seized, only 7,200, or one quarter of those firearms, were submitted to ATF for tracing. *Id.* Given the under-inclusive nature of the data available to ATF, the total number of guns trafficked to Mexico from the United States may be far greater than the data in paragraphs 1 and 2 above indicates. Relying on similar statistics, the Justice Department's Inspector General recommended that ATF and the Department of Justice "explore options for seeking a requirement for reporting multiple sales of long guns." A.R. at 288, 289 (U.S. Department of Justice, Office of the Inspector General, *Review of ATF's Project Gunrunner* (Nov. 2010)). The Government Accountability Office also noted that "limitations on

¹ ATF tracks traces by the year the firearm is recovered, not the year the trace is initiated.

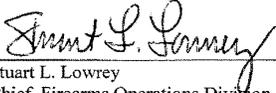
reporting requirements for multiple sales” were a “significant challenge” for ATF in combating the trafficking of arms across the Southwest Border, and recommended that this issue be “address[ed] by the agency.” A.R. at 39-40, 42 (GAO Report).

5. Operation Fast and Furious was formally opened as an investigation in November 2009. As previously reported to Congress, as of May 26, 2011, ATF had identified:

- a. 602 firearms purchased by Operation Fast and Furious suspects before they had been identified in the investigation; and
- b. 1418 firearms purchased by Operation Fast and Furious suspects after they had been identified in the investigation.

Of the 1418 firearms noted in Paragraph 5.b., 274 firearms were recovered in the United States, 96 were recovered in Mexico, and 1048 have not yet been recovered. ATF is in the process of updating these May 2011 numbers.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of November, 2011.



Stuart L. Lowrey
Chief, Firearms Operations Division
Office of Field Operations