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Joan Claybrook, President

July 24, 2003

Honorable Orrin G. Hatch
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Protection of Lawful Commerce in Arms Act, S. 659

Dear Mr. Chairman:

We are writing to point out several constitutional problems with S. 659, currently pending before the Judiciary Committee. This bill would eliminate civil damages actions against manufacturers, distributors, dealers, or importers of firearms and ammunition based on criminal or unlawful "misuse" of their products. The prohibition on such suits would include cases already filed, even those in which a jury has found in favor of the plaintiff but the judgment is not yet final. In the haste with which an identical bill passed the House, scant attention was paid to the several constitutional issues presented by this legislation. We urge the Committee to hold hearings on these issues before proceeding with a vote on the bill, and we would be pleased to testify at the hearings.

First, Congress's presumed authority to enact such legislation is the Interstate Commerce Clause. However, the nexus between these common-law suits and interstate commerce is not self-evident, and the Senate thus far has neither heard any evidence nor made any findings with respect to the effect of the state-law lawsuits against members of the gun industry on interstate commerce. Although the answer to the question whether a particular matter has a sufficient effect on interstate commerce to come under the constitutional power of Congress to regulate is ultimately a judicial rather than a legislative question, congressional findings on this question, based on evidence presented to it, can be important to the Courts. *United States v. Morrison*, 529 U.S. 598, 614 (2000). In considering its authority to legislate under the Commerce Clause, the Judiciary Committee should be careful to keep in mind that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* at 618; *see id.* (there is "no better example of the police power, which the Founders of the Constitution denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). Given the States' traditional role in this regard, it is particularly important that this Committee hold hearings to determine whether there is any basis for Congress to legislate with regard to lawsuits against the firearm industry and their effect on interstate commerce.

We strongly doubt that sufficient evidence exists to show a connection between the broad prohibitions in S. 659 and interstate commerce. Last year the House addressed the connection between lawsuits against gun manufacturers and interstate commerce in its report on H.R. 2037, a bill substantially the same as S. 659. The House Report (No. 107-727), however, fails to justify this bill. Although the report identified some lawsuits that seek overly broad, and possibly unconstitutional, remedies against gun manufacturers, S. 659 goes well beyond protecting the manufacturers from such suits. Instead, it provides protection from a wide array of suits, stating a wide array of causes of action, whether brought by governments or individuals. Indeed, the bill would eliminate damages claims, similar to those brought against the tobacco industry, brought by state attorneys general or local district or county attorneys. And the theory of interstate commerce underlying the bill would allow Congress to prohibit nuisance actions by government officials of the kind specifically envisioned by United States District Judge Jack Weinstein in his recent decision dismissing a complaint by private parties. *See NAACP v. Acusport, Inc.*, No. 99CV3999, Memorandum, Order and Judgment at 19 (E.D.N.Y. July 21, 2003).

Second, the bill would not only immunize the gun industry from future damages actions, but would also require dismissal of any pending actions. Such retroactivity presents a substantive due process question, as it eliminates state common-law and statutory rights and remedies of citizens whose causes of action have already accrued. The authority of Congress to eliminate state-law remedies without providing anything in return has never been adjudicated. However, in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1979), the Court strongly hinted that eliminating state law without any *quid pro quo* would violate due process. In that case, the Court upheld the Price Anderson Act, which provided federal law benefits to individuals injured by accidents at nuclear power plants. Now, however, the Committee is presented with a bill that offers no federal benefits, either in the form of a compensation scheme or even via new regulatory measures to protect the public. This bill, if enacted, would thus squarely present the issue left open in *Duke Power*.

Moreover, the bill's retroactive effect on injuries already sustained, lawsuits already filed, and jury verdicts already rendered in cases still on appeal raises additional constitutional difficulties. *See Landgraf v. USI Film Products*, 511 U.S. 244, 268 n.21 (1994) ("In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application. For if a challenged statute is to be given retroactive effect, the regulatory interest that supports prospective application will not necessarily also sustain its application to past events."). As the Supreme Court has noted, retroactive legislation is disfavored, in part because it poses a risk of "arbitrary or potentially vindictive legislation" and may offer "special opportunities for the powerful to obtain special and improper legislative benefits." *Id.* at 267 & n.20 (citation omitted) (citing cases and describing views of James Madison).

Third, S. 659 threatens to run afoul of the Tenth Amendment, a provision at the heart of our federal system of government. Regardless of the extent of Congress's power under the Commerce Clause, the States's power to develop and continue in effect common-law rights and remedies is

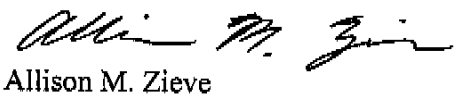
protected by the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 156-57 (1992) ("Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress . . . ."). Before voting on S. 659, the Committee should consider the Tenth Amendment implications of the bill, for the Constitution does not give Congress free reign to determine whether state common-law remedies should be eliminated for a particular category of products.

Supporters of S. 659 will likely point to the federal government's power to preempt state law. We are aware of no instance, however, in which the federal government has made, let alone prevailed in making, a preemption argument in circumstances in which no federal action provided the theoretical justification for preemption. Thus, if Congress could preempt state common law in this instance, it would seem to have no impediment to eliminating any aspect of state tort law, with regard to any category of products, services, or duties, without providing a federal program or remedy to replace it. Congress would merely have to identify some connection, however attenuated, to interstate commerce. If a State finds it appropriate and in the best interests of its citizens to eliminate all common-law remedies for gun "misuse," no matter the degree of the industry's knowledge of the dangers of its products, marketing, sales, or other practices, that decision would be within the State's power. Indeed, that decision properly belongs to each State. For the federal government to step in and tell the States how they must structure and limit their own common law, however, offends the principle of federalism on which our government is based.

These constitutional issues are as complicated as they are important. Given the significant constitutional issues implicated by S. 659, the Committee should, at a minimum, invite the advice of legal experts before further consideration of the bill.

Sincerely,

Alan B. Morrison
Director, Public Citizen Litigation Group



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cc: Honorable Patrick Leahy